TOWARDS A DEMOCRATIC CONCEPTION
OF SOVEREIGNTY

by

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Submitted in satisfaction of the requirements
for the degree of Ph.D.
in the University of Edinburgh

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Abstract

State sovereignty is being challenged by a variety of factors, ranging from globalisation, to the increasing importance of non-state actors, to the new modalities of force at the international level. But perhaps the most important challenge to sovereignty is that posed by democracy. Democracy dominates international society to such an extent that it has provoked arguments that democratic processes and content are necessary in such areas as self-determination, recognition of states, and more generally, through a right to democratic governance under international law.

This work develops the implications of the challenge of democracy to sovereignty in three arguments. The first, rejecting the trend of much current scholarship, is simply that sovereignty is a valuable legal construct, one that can, and should, be preserved. The second argument is that sovereignty can overcome its present challenges because by its very nature it is a flexible, dynamic, and evolving concept. Sovereignty, both in practice and theory, has represented different things at different times, and continues to react and adapt to new developments. The third argument is that sovereignty is developing in ways that make it more compatible with democracy. This latter argument is particularly contentious, and requires detailed examination of the nature of the three concepts at the heart of this work, namely, statehood, democracy and sovereignty.

Several chapters engage in this detailed analysis. After a brief definitional chapter, the concept of statehood and the challenges facing the modern state are examined. Democracy is the focus of the following two chapters, one of which defines it and sets out its substance, and the other examines its theoretical and practical justifications. Five chapters concentrating on sovereignty follow. The first looks at absolutist, the second at contractarian (social contract), and the third at more modern theories of sovereignty. Then the three concepts of statehood, democracy and sovereignty are distinguished and re-assessed, before a democratic conception of sovereignty is set forth.

The remaining chapters re-examine and apply the notions of statehood, sovereignty and democracy in the light of our deeper understanding of these concepts. Several areas of international law are scrutinised in this light, including the international law related to self-determination, the new standards for recognition of states, and the potential right of democratic governance. Each of these areas may assist in bringing democracy into the international sphere, but not one matches the enormous potential of firmly tying democracy to sovereignty. The conclusion briefly examines the challenge posed by non-democratic societies, before arguing that a democratic conception of sovereignty, although not capable of resolving all of these difficulties, nevertheless presents the best mechanism to combine the two goods of democracy and sovereignty at both the national and international levels.
ACKNOWLEDGEMENTS

This thesis was written at four primary locations, namely, the University of Edinburgh, the University of the West Indies, the University of Toronto and the University of Victoria. I owe debts of gratitude to each institution. Over the years I have been assisted and encouraged by too many individuals to list here. For those not mentioned below, let me express my gratitude for your many acts of kindness and support. Needless to say, responsibility for any errors in the present work rests with the author.

I would like to thank my peers at the University of Edinburgh for their support and encouragement, particularly Henriette Piene, Neil Olley, Murray Earle, Juliette Casey, Brad Miller and Linda Bauld. My supervisors, Stephen Neff and Bill Gilmore assisted, encouraged and challenged me over the years in so many ways that it will be difficult for me to repay their kindness. I must also thank Neil MacCormick, Zenon Bankowski and Emiliios Christodoulidis for encouraging my interest in legal theory, and Elizabeth Kingdom for enabling me to pursue my interests in feminist theory.

Thanks to all of my colleagues at the Faculty of Law of the University of the West Indies, in particular Andrew Burgess for helping me gain my footing at the start of an academic career and Tracy Robinson for encouraging me to be a better and more caring teacher. Thanks to the Faculty of Law of the University of Toronto for accommodating several research visits. I am especially grateful to Karen Knop for helping to arrange a summer research visit in 1994, and to David Schneiderman and Patrick Macklem for their ongoing support and encouragement. I am indebted to the Faculty of Law of the University of Victoria for providing me with academic accommodation, intellectual stimulus and collegial support during the Fall of 2000 and the Summer of 2001. I must thank in particular Jamie Cassels, John McLaren and Ted McDorman for encouraging me and helping me to test out my ideas, and Warren Magnusson for assisting me with the complexities of democratic theory.

I gratefully acknowledge the financial support of Canadian Department of Foreign Affairs and International Trade for two Barton Awards in International Peace and Security, the Canadian Women's Club (UK) for a Canadian Centennial Scholarship, the International Council for Canadian Studies and British Association for Canadian Studies for an ICCS Graduate Student Thesis/Dissertation Scholarship, the University of Edinburgh Faculty of Law for a Faculty of Law Research Scholarship, and the Academic Council on the United Nations System/American Society of International Law for inviting me to attend the 1999 ACUNS Summer Workshop on International Organization Studies.

Finally, I would like to thank my sister, Michelle, for inspiring me to write, and my parents, Margaret and Edward, for inspiring me to finish.
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INTRODUCTION

Sovereignty is being challenged and changed as a result of several recent developments at the international level, from the strengthening processes of globalisation to increases in the prominence of such things as democracy, the environmental movement, and non-state entities. Such developments challenge sovereignty by making it seem less relevant for two of its essential roles, namely, its role of allowing societies to participate in international affairs and its role of protecting those same societies from international or transnational forms of intrusion or interference. Sovereignty seems less relevant as an international participatory mechanism once alternatives such as non-governmental organisations, emerging forms of civil society or even global versions of democracy become available. It is less relevant as a mechanism for protecting societies from external interference if international developments remove from the sphere of state competence the abilities to monopolise use of force, to regulate economies and to control the environment.

Of these challenges, the most important may be the increasing role of democracy in the international sphere. The factors leading to this new prominence of democracy are apparent. The end of the Cold War and the collapse of the Soviet Union in the early 1990s moved us from a bipolar to unipolar or multipolar world. These developments also shifted the political debate from one between the virtues of communism as a political ideology and the virtues of democracy (as capitalism's political ideology), to a debate within the parameters of democracy itself, a debate about the best form of democratic system. The shift in favour of liberal democracy has been profound, and is amply reflected in the literature.\(^1\) Some have, perhaps prematurely, heralded the triumph of liberal democracy—arguing that it has superseded all other forms of political association and brought about the "end of history."\(^2\) More cautious writers suggest that democracy should triumph, for such reasons as that it has a

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\(^1\) Dahl, in Democracy and Its Critics, at p. 2, explains:

Today, the idea of democracy is universally popular. Most regimes stake out some sort of claim to the title of "democracy"; and those that do not often insist that their particular instance of nondemocratic rule is a necessary stage along the road to ultimate "democracy." In our times, even dictators appear to believe that an indispensable ingredient for their legitimacy is a dash or two of the language of democracy.

superior conception of the good or can promote a kind of Kantian perpetual peace (the 'democratic peace' thesis).³

The dominance of democracy as a political concept is evident. The importance of its challenge to sovereignty lies in the way that democracy has the potential to break down one of the fundamental distinctions upon which sovereignty depends, namely, the boundary between the national and the international. Sovereignty demarcates the border between national and international activity by creating the discrete unit (the state, the national sphere), without which there could not exist inter-unit relations (the international sphere). Democracy, in contrast, simultaneously provides a mechanism for national and international political and legal organisation. It transcends the national/international boundary, making such distinctions unimportant. Also, as seen later in the context of the 'democratic peace thesis,' democracy challenges sovereignty's ability to identify discrete, uniform units by showing us that democratic units are different from the rest. Not all sovereign states are the same, and this has important implications for the concept of sovereign equality. Sovereigns, of course, have never been equal as a matter of political, military or economic reality. But the notion of sovereign equality is important at the international level as it helps to provide the theoretical foundation that allows weak and powerful states to coexist. Democracy challenges this equality by showing that even its theoretical basis is illusory. The idea of sovereign equality relies upon the premise that sovereign units possess some indistinguishable core that will allow us to treat them as equivalent in international relations. This assumption underpins the 'billiard ball' models of interaction of sovereign states, where actions and reactions are calculable without reference to the internal political makeup of states, in the same way that movement of billiard balls may be predicted without reference to their colouring or other features.⁴ Democracy spoils the simplicity of 'billiard ball' models because recent studies show that one type of unit is fundamentally different. Democratic states change the dynamic of international relations. They behave differently from non-democratic states. The democratic billiard ball rolls differently. International analysis (at least in the post-Cold War period), cannot succeed if it does not take into account this domestic, democratic variable. The difference between types of national political systems has become an important determinant of international relations.

³ See, e.g., Doyle, "Kant, Liberal Legacies and Foreign Affairs."

⁴ This 'billiard ball' type of model has been favoured by international relations scholars of the realist school. For a critique of the adequacy of such a view from a democratic perspective, see generally the opposing essays in Brown, Lynn-Jones and Miller, eds., Debating the Democratic Peace. Roughly half of these essays argue that realist notions of international order cannot explain the 'democratic peace', and the other half either deny the existence of a 'democratic peace' or attempt to explain it in realist terms.
In order to reflect these new realities, a large part of this work is dedicated to bringing the democratic variable into discussions of sovereignty and statehood. The latter two concepts have not been unaffected by such developments. Numerous critiques of sovereignty and statehood have emerged in international legal, political, and philosophical scholarship. According to some writers, if democracy’s sphere is ascendant, sovereignty’s must be descendant. Sovereignty, we are told, is problematic because it is fragmented, perforated, contending, a social construct, or a form of organised hypocrisy. In fact, it is argued to be nearing its demise. Similarly, statehood is said to be less relevant today because it is retreating, declining, disintegrating, partial, extinct, or in the process of being transcended. Democracy, in contrast, is becoming more powerful. It is no longer limited to the state, but is now regional, international and cosmopolitan. In fact many see democracy as an engine for international peace, a form of international legal governance, a moral force and an engendered concept. However, a few sceptics have met this wave of enthusiasm by arguing that democracy is imaginary, a paradox or a riddle, and that it is potentially intolerant.

This extensive scholarship is fascinating, but ultimately limited. This is because nearly all of the writers who examine the three concepts of democracy, sovereignty and statehood, do so either by looking at one concept in isolation, or by merely juxtaposing two of the three. No author attempts to trace the linkages that exist between all three concepts in any sustained manner. At most we see two of the concepts juxtaposed in a state of zero-sum tension or conflict. Democracy at the international level is seen to be expanding at the expense of state sovereignty, or state sovereignty is seen to be maintaining its tenacious grip on the international imagination at the expense of democracy. Such oppositional viewpoints

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6 E.g., Camilleri and Falk, The End of Sovereignty?


are useful for highlighting certain issues, but they tend to ignore vital questions, such as whether these three concepts necessarily conflict.

Clearly sovereignty and democracy can and do sometimes conflict. In fact the two concepts have been traditionally conceived of as being mutually exclusive. Democracy has been viewed as a participatory principle, allowing sub-state political groupings and individuals to influence the workings of the state. Sovereignty, in contrast, frequently appears to be an authoritarian principle, one that serves as both the highest source of legal validity within the state, and the basis for independence and equality internationally. Starkly put, democracy is as an ascending principle, with power being exercised from below, whereas sovereignty may be a descending one, with power being exercised from above. This traditional juxtaposition makes it clear that although sovereignty and democracy may meet at some point along the power continuum, their compatibility is far from self-evident. They may best be described as existing in a state of dialectical tension.

But there is a clear difference between a dialectical relation, and no relation at all (due to incompatibility). Which description is accurate? If, as some argue, democracy is to replace sovereignty as the ordering mechanism of international society, then we need not concern ourselves with such questions. If sovereignty and democracy are to continue to play simultaneous and sometimes conflicting roles in international relations, then it is essential to examine their relations more closely. If, as argued here, democracy and sovereignty are dynamic rather than static concepts, ones that are capable of changing and altering over time, then a close study of the ways in which they relate may help us discover further possibilities for making their coexistence more harmonious.

In any event, it is important to examine the potential for compatibility between sovereignty and democracy for two further reasons. Firstly, no international legal or political scholarship has yet to suggest a practical and viable alternative to the sovereign state. In fact much of the most innovative scholarship—such as the 'cosmopolitan democracy' writings pioneered by David Held, Daniel Archibugi and Martin Köhler12—depends upon and acknowledges the need for the continued existence of the sovereign state. Secondly, sovereignty continues to fulfil certain vital human needs that democracy alone may not satisfy. This is a controversial proposition and later arguments will attempt to support it. For

11 Although few today would use the term "sovereign" to describe the source of validity for our laws, most jurisprudential theories still trace the formal validity of laws to such a unitary source of authority, regardless of the differences in terminology. See, e.g., Austin, The Province of Jurisprudence Determined, pp. 165, 172, 188-91 (the "sovereign"); Hart, The Concept of Law, pp. 92-3 and 97-107 (the "secondary" or "ultimate rule of recognition"); and Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," pp. 61-3 (the "basic norm" or "grundnorm").

12 See the works by these authors listed in footnote 8, above.
present purposes, let me highlight two of the basic functions of sovereignty that continue to make it relevant. Internally, sovereignty provides the philosophical and legal framework for the ultimate authority within any legal system. There must be some final authority to determine legality, and the juristic notion of the sovereign plays this role in domestic legal systems. Externally, or in the realm of international relations, sovereignty guarantees the legal independence necessary for the state to develop its core features—its social, cultural, political and economic values and relations. Sovereignty in this sense may be seen as the earliest, albeit limited, form of self-determination. At present sovereignty is also limited by a variety of other factors, as will be demonstrated later. However, to the extent that sovereignty allows retention of some control over the basic parameters of a society, it serves the invaluable role of creating and sustaining the legally autonomous unit within which that society may regulate itself. Sovereignty fulfils the formal role of protecting the sovereign unit from external intervention and it is supported by the international legal principles of non-interference and non-intervention (which principles presuppose the sovereign unit).

Democracy, in contrast, does not require any particular form of fixed unit. It operates equally well at neighbourhood, provincial, federal, and even supranational levels. Although democracy must presuppose a bounded and defined unit of some form, this unit can be of any size. Importantly, the democratic unit may be subject to external democratic interference. This possibility raises complicated philosophical and political issues. For the present, the important distinction is that whereas sovereignty requires respect for any sovereign unit, democracy may only require respect for democratically-governed ones. In other words, sovereignty protects all sovereign states from non-intervention, but democracy per se does not provide a ground for respecting non-democratic forms of government. This is because these latter forms of government invariably violate the fundamental notions of equality and participation that form the basis for democracy. To the extent that they do so, democratic theory alone cannot offer a justification to support their continued existence. Sovereignty or some similar principle is needed to protect non-democratic governments from democracy.

Some might argue that such forms of non-democratic governance should not be protected—that intervention to promote democracy need not, or in fact should not, be a concern. But such a position could not be maintained unless two preconditions were satisfied. Firstly, there would have to be near-universal agreement on suitable definitions and descriptions of democracy. After several thousand years humankind is still struggling with this task, and this work will show it is far from complete. Secondly, even if such a description could be achieved, it must be capable of practical implementation. In other words, a universal and functional definition of democracy is needed, one that can adequately implement democratic norms and values. No such model exists at present. Until these two
democratic preconditions are satisfied, it remains crucially important to preserve an environment of freedom and experimentation at the international level, one that may allow a superior democratic model to emerge. Such freedom can only exist if the particular and limited existent models of democracy are not heteronomously imposed upon the weak by the strong. The dominant position of the United States after the Cold War, with its two long-established traditions of democracy and foreign intervention, heightens these concerns.

For both practical and theoretical reasons democracy alone will not be able to replace sovereignty. State sovereignty, even in its present weakened form, is the only existing concept that has the potential to limit external coercion and preserve the space for societies to experiment with different forms of political organisation. The present work therefore attempts to balance the need for certain vital aspects of sovereignty with the long-term goal of increasing the democratic, participatory aspects of international society. In examining sovereignty I suggest ways in which this concept may be made more democratic and responsive to the needs of societies, as well as ways in which sovereignty may be formulated in a less rigid, non-absolutist manner. In critically examining the challenges facing sovereignty today I argue that democracy offers the greatest challenge to sovereignty, and yet paradoxically remains its best hope. If the two concepts can be harmonised, or at least yoked together in a dialectical relation, then some of the most important needs of humanity will be best served at the international level. By undertaking such a study of sovereignty and democracy, at the very minimum this work hopes to encourage its readership to re-examine some of the more fundamental premises of modern public international law. At the more ambitious level it hopes to reveal potential avenues for change and development.

The structure of this work is divided into two parts. The first part engages in an in-depth, critical analysis of the meanings of statehood, democracy and sovereignty. Chapter 1 sets out basic definitions of the terms and Chapters 2 and 3 further explore the specific meanings of statehood and democracy, respectively. Chapter 4 pauses to explore some of the justifications for democracy, justifications that are of vital importance because they reveal both the strengths and weaknesses of the concept. The limitations of democracy are especially important to a critical analysis of its potential in the international sphere, a point missed by many of its more enthusiastic adherents. Chapter 5 examines two of the more traditional conceptions of sovereignty, the absolutist and contractarian (social contract) models. Both models are argued to be problematic, although the latter less so. Chapter 6 sets out a modern formulation of sovereignty, examining its roles and current characteristics. Chapter 7 refines our understanding of all three terms—democracy, statehood and sovereignty—by attempting to distinguish each from the other two. Chapter 8 rounds out the first part by setting out a democratic conception of sovereignty.
The second part of the work focuses upon parallel international legal developments or alternative methods of implementing democracy at the international level. Chapter 9 examines the possibility of using the right of self-determination for implementing democracy, but suggests that despite the flurry of self-determination during the decolonisation period, the right is of more limited value today. At present, it is too doctrinally restricted to bridge the theoretical distance between sovereignty and democracy, and the right of self-determination has generally become weak and uncontentious. Chapter 10 examines recent developments in the international law of recognition, particularly the new requirements that were suggested for state recognition in the context of the dissolution of the USSR and the Socialist Federal Republic of Yugoslavia. These requirements included those of respect for human rights, the rule of law and, importantly, democracy. By conditioning state recognition upon prior satisfaction of democratic criteria these developments would aid in joining sovereignty, statehood and democracy in international law. However upon closer analysis, especially after examining the events surrounding the break up of the former Yugoslavia, Chapter 10 suggests that even if recognition theory may be moving towards such a union of sovereignty and democracy, it is far from it at present. In a similar manner, Chapter 11 critically examines the so-called 'right to democratic governance,' a right asserted by some international legal scholars to already exist and by others as about to come into existence (a right de lege ferenda). Such a right to democratic governance would be particularly interesting because, unlike democratic requirements for state recognition, which would be imposed only at the moment of the creation of states, the right to democratic governance could impose democratic requirements throughout the life of a state. Nevertheless, the analysis of Chapter 11 suggests that the right to democratic governance remains a distant possibility. Because it does not exist at present (neither having a treaty or customary international legal basis), the majority of this chapter is dedicated to postulating what such a right might look like if it comes into being. Several potential difficulties become apparent, ones that suggest that we must be cautious when in framing and developing a right to democratic governance, especially if such a right is to actually promote democratic values. The concluding chapter briefly examines the implications for a democratic conception of sovereignty of non-democratic forms of governance, such as those suggested in some of the self-government claims of indigenous peoples.

Taken as a whole, this work suggests that democratic norms are profoundly affecting the structures and process of the international sphere. New and robust understandings of

13 See generally, Franck, "Democratic Governance," Crawford, Democracy, and Fox and Roth, eds., Democratic Governance and International Law.
democracy are changing our views of sovereignty, statehood and international law. If these democratic norms and values are wisely incorporated into both national and international processes, decision-making and governance structures will take on a deep sense of legitimacy, and humanity will benefit from increased autonomy and responsibility. Let us examine the possibility of a democratic conception of sovereignty.
PART ONE: STATEHOOD,
DEMOCRACY AND SOVEREIGNTY
CHAPTER 1: BASIC CONCEPTS AND DEFINITIONS

The terms “democracy”, “statehood” and “sovereignty” are the subject of an immense body of literature in disciplines as diverse as political science, history, law and philosophy. In these disciplines both the meaning and content of these terms have changed and developed over time. Such changes have not been superficial. Instead, the essence of what it means to be a state, a sovereign, or a democracy has changed. This chapter will briefly outline the current meaning of each these terms in order to establish parameters for the work as a whole, a historical analysis being for the most part outside of its scope. The following chapters will develop these concepts at greater depth, focusing especially on the two terms “democracy” and “sovereignty,” each of which remains highly contested.

I. STATEHOOD

A. LEGAL CRITERIA

The term “state” has been briefly defined as “an organized political community under one government; a commonwealth; a nation.” More abstractly, the state has been defined as


2 For historical analyses of statehood, sovereignty and democracy, respectively, see van Creveld, The Rise and Decline of the State, Spruyt, The Sovereign State and Its Competitors, Hinsley, Sovereignty, Krasner, Sovereignty: Organised Hypocrisy, and Dunn, Democracy.

a centralised legal system, one which "establishes certain organs—whose respective functions reflect a division of labour—for creating and applying the norms formulating the legal system."4 Seen in this manner, the state cannot be an object of legal regulation (as can, for example, a person), because it "is the legal regulation itself, a specific legal order."5 Pithy, less theoretical and slightly more comprehensive legal definitions of the state include:

The State in international law is an entity having exclusive jurisdiction with regard to its territory and personal jurisdiction in view of its nationals.6

The state whose essential elements are population, territory, and power is defined as a relatively centralized legal order, limited in its spatial and temporal sphere of validity, sovereign or subordinated only to international law, and by and large effective.7

A lengthier international legal definition would analyse the state in terms of its pre-requisite components. These components are best described in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States [hereafter the "Montevideo Convention"]:

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4 Kelsen, Introduction to the Problems of Legal Theory, at p. 99 (§48(a)). The entire passage reads:

Cognition that is free from ideology, and thus free of all metaphysics and mysticism, can grasp the essence of the state only by comprehending this social structure as a system of human behaviour. A closer look shows it to be a coercive social system, which must be identical with the legal system since the very same coercive acts distinguish both systems, and since one and the same social community cannot be constituted by two different systems. The state, then, is a legal system. Not every legal system, however, is characterized as a state; this characterization is used only where the legal system establishes certain organs—whose respective functions reflect a division of labour—for creating and applying the norms formulating the legal system. When the legal system has achieved a certain degree of centralization, it is characterized as a state.

Kelsen goes on to argue, in ibid., at p. 101 (§48(b)), that any concrete or 'real' understanding of the existence of the state is a fiction: "Like these [other legal persons], the legal person of the state—one expression of the unity of a legal system—is a point of imputation, which the cognizing theorist, his intellect strived after imagery, is all too inclined to hypothesize, to posit as real, concrete, in order to imagine behind the legal system something essentially different from it, namely, the state" (references omitted). See generally, ibid., pp. 97-106 (§46-48) [disproving the theory of the duality of law and the state]. See also, Kelsen, General Theory of Law and State, p. xvi [contrasting positivists who distinguish between the state and the law, from the approach of his own 'pure theory' which "shows that the State as a social order must necessarily be identical with the law," and thereby "establishes a theory of the State as an intrinsic part of the theory of law and postulates a unity of national and international law within a legal system comprising all the positive legal orders."]

5 Kelsen, General Theory of Law and State, p. 377 (arguing in the context of his theory of the unity of national and international legal orders). Kelsen continues: "The State is believed to be an object of regulation only because the anthropomorphic personification of this order leads us first to liken it to a human individual and then to mistake it for a superhuman individual."


7 Kelsen, Pure Theory of Law (2nd ed.), p. 290. A slightly different version of his definition is found in ibid., at p. 339, when Kelsen explains that "the state is a relatively centralized partial legal order, subject only to international law—the territorial, temporal and material sphere of validity of this partial legal order being limited only by international law." Note that Kelsen's definition is slippery in that his central assumption is that the state is simply a legal order. See footnote 4, above, and the surrounding text. Thus in Kelsen's view, for example, "[t]he so-called state territory can only be defined as the spatial sphere of validity of a national legal order." Ibid., p. 288 (citation omitted).
The State as a person of international law should possess the following qualifications:

(a) a permanent population;
(b) a defined territory;
(c) government; and
(d) capacity to enter into relations with other states.8

Although only a few states are parties to this Convention, Article 1 is generally accepted as setting out the customary international legal position.9 Some international lawyers have imposed additional requirements to the four stipulated in the Montevideo Convention. These include such things as: (1) that the government must be able to exert effective control over its territory and population, (2) that international recognition must be accorded the new entity before it can claim the status of statehood, (3) that the entity must achieve a certain degree of independence, and (4) that the entity must respect the principle of self-determination.10 The first and third of these ‘additional’ requirements may easily be ‘read into’ the government and capacity criteria of the Montevideo test, respectively. The requirement of respect for the principle of self-determination, alongside such related conditions as that prohibiting the emergence of a new state based upon an apartheid system, merely confirm that states are creatures of international law and are therefore

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8 Convention on the Rights and Duties of States [Montevideo Convention] (1933). Some writers would refer to the Peace of Westphalia treaties [Treaty of Peace Between France and the Empire (Münster, October 24, 1648), Treaty of Peace Between Spain and the Netherlands (Münster, January 30, 1648), Treaty of Peace Between Sweden and the Empire (Osnabrück, October 24, 1648)], as providing the important definition of statehood. But in doing so they provide almost exactly the same definition as that in the Montevideo Convention. For a quick summary of the legal aspects of the Westphalia approach see, e.g., Farley, Plebiscites and Sovereignty, pp. 7-8. In political science, however, the ‘Westphalian’ model of sovereign power has taken on a different meaning. David Held, in “Democracy and the New International Order,” at pp. 103-4 provides a brief summary:

[The ‘Westphalian’ model of sovereign power] depicts the development of a world community consisting of sovereign states which settle their differences privately and often by force; which engage in diplomatic relations but otherwise demonstrate minimal cooperation; which seek to place their own national interest above all others; and which accept the logic of the principle of effectiveness, that is, the principle that might eventually makes right in the international world—appropriation becomes legitimisation. [Citation omitted.]

9 Higgins, Development of International Law, p. 13, Williams, Secession by Québec, p. 3, n. 7 and surrounding text. For a quick summary of the meaning attributed to the Montevideo Convention, see: Williams, ibid., pp. 3-6; Williams and de Mestral, Introduction to International Law, pp. 44-45; Brownlie, Principles of Public International Law, 5th ed., pp. 70-75 [note, however, that Brownlie’s conception of “dependent states,” also discussed at the previously noted pages, is subject to substantial criticism in Chapter 7, below]. For an early analysis of the UN practice in applying the Convention see, e.g., Higgins, Development of International Law, p. 20 ff.

10 E.g., Williams and de Mestral, Introduction to International Law, pp. 44-45; Brownlie, Principles of Public International Law, 5th ed., pp. 70-75. Brownlie, in ibid., at pp. 75-6, also discusses such factors as “a degree of permanence” and “willingness to observe international law.” ‘Independence’ can mean both complete independence from other sovereign entities, and the more limited form of “constitutional independence” that would encompass closely related states: Hannum, Autonomy, Sovereignty, and Self-Determination, p. 15. Hannum, ibid., at p. 16 also adds the requirements “that a certain degree of civilization [sic] necessary to maintain international relations be allowed, or that a state’s government be established consistently with the principle of self-determination.” For an examination of the role of self-determination in the criteria of statehood see, e.g., Shaw, International Law, 4th ed., pp. 144-46.
subject to its most important rules. The second, middle requirement of ‘recognition’ by other states is a more complex one and so will be briefly examined now.11

B. RECOGNITION OF STATES

Recognition theory is divided into two categories, namely, recognition of governments and recognition of states. Recognition under both categories serves two distinct legal roles, namely, (1) it determines the existence of a legal fact (the state or government), and (2) allows bilateral relations between the recognising state and the object of recognition.12 The question of recognition of governments normally arises only when there has been an unconstitutional or abnormal change of government. In such a case, states deciding whether to have relations with the new regime tend to judge its suitability using the Montevideo criterion of effectiveness. If the new government has effective control over the population and territory of the state, then it may be accorded recognition.13 However, since the use of other, more overtly political criteria is within the discretion of states, many states that do not wish to suggest that they use these criteria no longer accord formal recognition of governments. This policy against according formal recognition is known as the Estrada Doctrine, after the position endorsed by the Mexican Secretary of Foreign Relations of the same name in 1930.14 Under the Estrada Doctrine states refrain from issuing a declaration or expressing any formal recognition of the new regime, but may continue to engage in relations with it. These relations may give rise to implied recognition (with legal consequences in

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11 See further: Crawford, Creation of States, ch. 1, Roth, Governmental Illegitimacy in International Law, ch. 5, Malanczuk, Akehurst’s Modern Introduction to International Law, 7th ed., pp. 75-90, Brownlie, Principles of Public International Law, 5th ed., pp. 85-104, Shaw, International Law, 4th ed., ch. 8. See also the discussion of recent EC recognition practice in Chapter 10, below. Note that imposing a recognition requirement would seem to be prohibited by Art. 2 of the Montevideo Convention, which states that the “political existence of the State is independent of recognition by the other States.” However the better view is that Art. 2 did not reflect customary international law in 1933 and in any event does not represent customary international law today. Rather, the current position appears to be that some form of recognition is required in order to create a fully functional state (i.e., one capable of relating to other states).

12 Cf. Brownlie, ibid., p. 89 (applying this kind of distinction to recognition of states).

13 Examples of application of the criteria of effectiveness include the cases of the Tinoco Arbitration (Great Britain v. Costa Rica), (1923) 1 R.I.A.A. 369, and Republic of Somalia v. Woodhouse Drake & Carey (Suisse) SA [1993] Q.B. 54.


Withholding diplomatic relations from these [unsavory] regimes, after they have obtained effective control, penalizes us. It means that we forsake much of the chance to influence the attitudes and conduct of the new regime. [...] Isolation may well bring out the worst in the new government.
national courts), but avoid the problems associated with being seen to politically approve or disapprove of new governments.\(^\text{15}\)

The international legal doctrine regarding recognition of states can be subdivided into two general positions: declaratory and constitutive.\(^\text{16}\) Those espousing ‘declaratory’ theories view recognition as serving the formal role of acknowledging pre-existing entities as states.\(^\text{17}\) In contrast, those espousing ‘constitutive’ theories view recognition as serving a more substantive role, with the act of recognition itself ‘creating’ the state under international law.\(^\text{18}\) The Montevideo Convention criteria are relevant for both positions. Under the declaratory view the Convention criteria are used to help determine the existence of the state; but under the constitutive view such criteria do not, themselves, lead to the creation of the state, since the act of recognition itself serves this role. Constitutive theories therefore prioritise the importance of recognition, and declaratory perspectives decrease its importance, as an element in determining the existence of statehood.\(^\text{19}\) Both theories are problematic. The declaratory theory downplays the real importance which international relations with other

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\(^\text{15}\) British courts have gone to great lengths either to imply recognition of a foreign state or to circumvent the problem of non-recognition through such legal fictions as that of agency. See, e.g., Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2) [1967] A.C. 853, and Gur Corporation v. Trust Bank of Africa Ltd. [1986] 3 All E.R. 449. In the first case the House of Lords allowed a company of the German Democratic Republic to have legal standing in the UK courts even though the UK had not recognised the G.D.R. This was accomplished with the fiction of legal agency, as the G.D.R. was said to be the agent of a real (recognised) sovereign, the U.S.S.R. The UK subsequently recognised the G.D.R. in 1973 (after the 1972 General Relations Treaty between both Germanies): Jennings and Watts, eds., Oppenheim’s International Law, 9th ed., p. 137. The second case involved a public body of the unrecognised Republic of Ciskei. A similar agency argument was upheld here, with Ciskei being allowed to exercise legal rights in the UK courts as a subordinate body set up by South Africa, the latter having been recognised by the UK. The English Court of Appeal went further in the Gur Corporation case, however, as it allowed a part of the unrecognised government itself to assert rights in UK courts, not simply private corporations or citizens.

\(^\text{16}\) A third, middle position, sometimes called the ‘modified constitutive’ one, is endorsed by Jennings and Watts, in Oppenheim’s International Law, 9th ed., at p. 130:

The overwhelming practice of states does not accept that the mere claim of a community to be an independent state automatically gives it a right to be so regarded, or that an existing state is justified in recognising or refusing to recognise a new community as a state in disregard of whether it fulfils the factual requirements of statehood. While the grant of recognition is within the discretion of states, it is not a matter of arbitrary will or political concession, but is given or refused in accordance with legal principle. That principle, which applies alike to recognition of states, governments, belligerents, or insurgents, is that, when certain conditions of fact (not themselves contrary to international law) are shown to exist, recognition is permissible and is consistent with international law in that it cannot (as may recognition accorded before those facts are clearly established) be considered to constitute intervention; and that, while recognition is accordingly declaratory of those facts, it is also constitutive of the rights and duties of the recognised community in its relations with the recognising state.

\(^\text{17}\) E.g., Brownlie, in Principles of Public International Law, 5th ed., at pp. 86-87, summarises: “According to the declaratory view, the legal effects of recognition are limited, since recognition is a mere declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law” (citations omitted).

\(^\text{18}\) E.g., Brownlie, in ibid., at p. 88, states: “According to the [constitutive view], the political act of recognition is a precondition of the existence of legal rights: in its extreme form this is to say that the very personality of a state depends on the political decision of other states” (citations omitted).

\(^\text{19}\) See, e.g., ibid., pp. 86-7.
states must have for statehood. Such relations cannot occur without recognition, and thus a strict application of the declaratory theory would allow non-functional states to come into being. The constitutive theory, on the other hand, both gives too much power to existing states (which can be abused for political reasons), and suffers from the theoretical inconsistencies involved in simultaneously recognising and creating the same thing. To put it simply, it is difficult to recognise something that does not yet exist.\(^{20}\)

As a result, I suggest a median role for recognition in the theory of statehood. States, in the technical sense, may exist without recognition if they satisfy the Montevideo Convention criteria. As illustrated below, these latter criteria are relatively easy to satisfy. However, if we wish to define statehood in a functional sense, then we must add a requirement for at least minimal recognition (i.e., by enough states to allow the new state to have some meaningful international relations). Thus, at this point we can tentatively define the fully-functional state as a recognised entity with a permanent population, defined territory, effective government and capacity to enter into international relations.

C. APPLICATION OF THE MONTEVIDEO CONVENTION CRITERIA

Before we leave these basic requirements of statehood it may be useful to see how flexible the Montevideo Convention test is in practice.\(^{21}\) There are more states in existence today than ever before. One source estimates that there are 191 independent states.\(^{22}\) The United Nations has a membership of 189 Member States.\(^{23}\) The existence of such a large number of states, possessing a wide variety of different characteristics, means that the Convention now may be applied to numerous, unique entities. Thus a ‘permanent population’

\(^{20}\) Constitutive theories are problematic because their assumption that the entity does not have international legal existence before recognition begs the question as to what legal entity will receive that recognition once it is awarded (the pre-state entity having no legal existence before recognition, it remains forever unable to receive that which would give it legal existence). In other words, recognition under the constitutive theory becomes analogous to a kind of bilateral contract to create the second party to the contract: Knop, “The ‘Righting’ of Recognition,” pp. 40-41. The weakness of a declaratory theory lies in the fact that it cannot get around the ‘rights-within-a-community’ component of recognition—the idea that regardless of whether something can be said to be a state, that entity still must function in a community of nations and needs recognition to gain those rights and duties that only a community can provide. Karen Knop has made the further point that both constitutive and declaratory theories leave unanswered the question of whether the requirements for statehood and recognition are identical or separable: ibid., p. 36. Hillgruber, in “The Admission of New States to the International Community,” attempts to avoid this difficulty by arguing that the single important criterion for both recognition and statehood is the new entity’s ability and willingness to act in accordance with international law.

\(^{21}\) See e.g., Jennings and Watts, Oppenheim’s International Law, 9th ed., ch. 2; Brownlie, Principles of Public International Law, 5th ed., chs. 3 and 4; Harris, International Law, 5th ed., pp. 103-4 and 109-12; Malančuk, Akehurst’s Modern Introduction to International Law, 7th ed., p. 76; Shaw, International Law, pp. 140-44.


may be nomadic—even wandering outside the state’s borders at times—and can be as small as Nauru’s roughly 10,000 inhabitants, as long as a significant number of permanent inhabitants can be shown to exist. 24 ‘Defined territory’, alludes to “geographical areas separated by borderlines from other areas and united under a common legal system.” 25 Such ‘territory’ need not be united in one area and can be spread out across the globe (e.g., France and Martinique). Although states must possess territory, it need not be of any minimum size. 26 Nineteen independent states exist with a territory of less than one thousand square kilometres. 27 With respect to the ‘defined’ nature of the territory, many currently-accepted states possess undefined or strongly disputed boundaries. Thus, the more accurate position is that merely a “sufficiently identifiable core of territory” must be consistently controlled. 28

24 Twenty-five independent states with a population under 500,000 include: Andorra, pop. 66,824; Antigua and Barbuda, pop. 66,422; The Bahamas, pop. 294,982; Barbados, pop. 274,540; Dominica, pop. 71,540; Grenada, pop. 89,018; Kiribati, pop. 91,985; Liechtenstein, pop. 32,207; Luxembourg, pop. 437,389; Maldives, pop. 301,475; Malta, pop. 391,670; Federated States of Micronesia, pop. 133,144; Monaco, pop. 31,693; Nauru, pop. 11,845; St. Kitts and Nevis, pop. 38,819; Saint Lucia, pop. 156,260; Saint Vincent and the Grenadines, pop. 115,461; Samoa, pop. 179,466; San Marino, pop. 26,937; Sao Tome and Principe, pop. 159,883; Seychelles, pop. 79,526; Solomon Islands, pop. 466,194; Tonga, pop. 102,321; Tuvalu, pop. 10,838; Vanuatu, pop. 193,618. All population statistics are specified as being July 2000 estimates and are taken from the Central Intelligence Agency (US), World Factbook 2000. Note, however, that Shaw, in International Law, 4th ed., at p. 140, n. 13, comments that nomadic populations might not count for the purposes of territorial sovereignty, even though they may have certain rights over the land (citing: Western Sahara Case, 1975 I.C.J. Rep. 12, at pp. 63-5). Jennings and Watts, in Oppenheim’s International Law, 9th ed., at pp. 563-4, would seem to allow a wandering tribe with a government and which has settled down in a territory of its own to be a state. It is submitted that nomadic peoples could form a state if they stayed for the most part within one defined territorial area.

25 Malanczuk, Akehurst’s Modern Introduction to International Law, 7th ed., p. 76.

26 Jennings and Watts, in Oppenheim’s International Law, 9th ed., at p. 563, state: “A state without a territory is not possible, although the necessary territory may be very small, as with the Vatican City, the Principality of Monaco, the Republic of San Marino, the Principality of Liechtenstein or Nauru” (citations omitted). Brownlie, in Principles of Public International Law, 5th ed., at p. 83, argues that “however small geographically or modest in resources, an entity is a ‘state’ for general purposes of international law provided the criteria of statehood are satisfied.” For an analysis of the particular difficulties confronting very small states, particularly small island ones, see Crawford, “Islands as Sovereign Nations.”

27 McGee, in “A Third Liberal Theory of Secession,” at p. 62, makes the same point more graphically by describing a similar number of states as being smaller in area than New York City. The nineteen independent states with territory under 1,000 sq. km include: Andorra, 468 sq. km; Antigua and Barbuda, 442 sq. km; Barbados, 430 sq. km; Dominica, 754 sq. km; Grenada, 340 sq. km; Kiribati, 717 sq. km; Liechtenstein, 160 sq. km; Maldives, 300 sq. km; Malta, 316 sq. km; Federated States of Micronesia, 702 sq. km; Monaco, 1.95 sq. km; Nauru, 21 sq. km; St. Kitts and Nevis, 261 sq. km; St. Lucia, 620 sq. km; St. Vincent and the Grenadines, 389 sq. km; San Marino, 60.5 sq. km; Seychelles, 455 sq. km; Tonga, 748 sq. km; Tuvalu, 26 sq. km. Sao Tome and Principe is just above the limit as it has 1001 sq. km of territory. One entity not counted for these purposes, Vatican City, is considered to have a special kind of statehood status, even though its size is minuscule (0.44 sq. km), and its inhabitants amount to no more than 880 living persons. All statistics from: Central Intelligence Agency (US), World Factbook 2000.

28 Malanczuk, Akehurst’s Modern Introduction to International Law, 7th ed., p. 76. Israel, for example, was recognised early as a state even though its borders remain unsettled. The Court in the North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), 1969 I.C.J. Rep. 3, at p. 32, states: “There is ... no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations (Monastery of Saint Naum, Advisory Opinion, 1924 P.C.I.J. Rep., Series B, No. 9, at p. 10).” Territory also may be abandoned by a state. For an analysis of an historical example of abandonment, see Geoffrey Marston, “Note: The British Acquisition of the Nicobar Islands, 1869: A Possible Example of the Abandonment of Territorial Sovereignty” (1998) 69 Brit. Yrbk. Int’l L 244-65.
‘Government’ must be effective, meaning that it must be able to exert control over both the population and territory, as well as remain independent of other states, at least to the extent of preventing them from directly interfering in the affairs of the state. With the exception of the clear prohibitions against *apartheid*, the form or type of government a state possesses is irrelevant to its qualification for statehood. The ‘effectiveness’ of the government also has an elastic quality, as there are some cases in which this requirement will not be strictly applied. These include periods of civil war or similar upheavals, as recently witnessed in Lebanon and Somalia, which will not preclude the continuity of statehood. Occupation by a victorious power will not challenge the status of the occupied state in most cases. In each of these instances even though the state’s government is temporarily ineffective, the *state itself* does not lose its status. As emphatically stated by Rosalyn Higgins: “What is absolutely clear is that a loss of ‘stable and effective government’ does not remove the attribute of statehood, once acknowledged.” Statehood can be altered, however, through such international legal actions as entering into a real union with another state, or through significant loss of independence (i.e., joining a federation), and it can be extinguished by such actions as merger, dissolution into two or more new states, dissolution and absorption by surrounding states, and in earlier periods, by conquest.

The final requirement of ‘capacity to enter into relations with other states’ is more challenging. ‘Independence’ would appear to be part of this ‘capacity’ requirement, since in order to conduct international relations with other states as a state, one must be at least a legally independent entity. ‘Independence’ for the purposes of statehood requires the entity not to either (1) need the assistance of foreign troops to assert control over its territory, or (2) have given up its sole right of decision or subordinated its sovereign will to another state.

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33 Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th ed., at p. 79, goes so far as to suggest that the ‘capacity’ test may not be a real requirement for statehood. He points to Guinea-Bissau as an example of a state that was recognised even though it did not possess this capacity. Bosnia-Herzegovina, as will be seen in Chapter 10, below, may represent an even more recent example.

34 Point (1) is illustrated by the case involving the Åland Islands, in which Finland sought to establish its independence after the demise of the Russian Empire. The International Committee of Jurists appointed by the League of Nations to look into the question of sovereignty over the Åland Islands refused to recognise the independence of the Finnish Republic until it possessed a “stable political organisation ... and ... the public authorities had become strong enough to assert themselves throughout the territories of the State without the
Independence is not affected by obligations imposed by international law, no matter how extensive they may be.\textsuperscript{35} Some argue that it even may be unaffected by forms of factual dependence.\textsuperscript{36} The more difficult cases regarding ‘independence’ mostly revolve around the prohibitive rules regarding apartheid and use of force, and the permissive rules regarding self-determination of peoples.\textsuperscript{37} In any event, the importance of ‘independence’ as a requirement for statehood may be exaggerated. As summarised by Brownlie, even a state that is subject to extreme forms of dependence will nonetheless remain a state—albeit a “dependent state”—as long as the dependence is permissible under international law.\textsuperscript{38}

\textsuperscript{35} Judge Anzilotti’s opinion in the case of the Customs Régime Between Germany and Austria, ibid., reveals that the restrictions placed upon a state by international law do not affect its independence. This can be argued in more positive manner, namely, that restrictions upon a state’s powers by means of international law reveal the strength of its sovereignty, since a state’s sovereignty is the thing that allows it to impose such restrictions upon itself.\textsuperscript{36}

But consider the difficult case of micro-states. Liechtenstein’s early application for admission to the League of Nations, for example, was denied on lack of capacity to fulfil League duties. Liechtenstein was legally independent, but revealed such factual dependence that it was not recognised as having the capacity to fulfil the international legal obligations of League Membership. Liechtenstein had delegated almost all of its sovereign powers to other countries (including control of its customs, telecommunication, and diplomatic services), allowed final appeals in its courts to other states and had no army. See, e.g., Juliane Kokott, “Micro-States,” in Encyclopedia of Public International Law, vol. 10, ed. R. Bernhardt, 297-99 (Amsterdam: Elsevier, 1987). See also, Crawford, Creation of States, pp. 139-41, Robert H. Jackson, Quasi-States: Sovereignty, International Relations, and the Third World (Cambridge: Cambridge University Press, 1990).\textsuperscript{37}

\textsuperscript{37} Situations where independence has been doubtful or non-existent include the puppet state of Manchukuo (created by the Japanese in China), the South African homeland of Transkei, Southern Rhodesia, Guinea-Bissau, Bangladesh and Cyprus. Of these problem cases, Transkei and Southern Rhodesia were not recognised as independent states because their status was a violation of the right of self-determination. Guinea-Bissau and Bangladesh were more easily recognised as independent (even though they could not factually have been so described), because they came about through exercises of the right of self-determination. Cyprus and Manchukuo involved aggression and occupation and thus posed problems of independence (being occupied and subservient to the aggressor state), as well as problems regarding the illegality of their origin. See, e.g., Harris, International Law, 5th ed., pp. 109-12. See generally, Crawford, Creation of States, pp. 48-71 (examining the criterion of independence).\textsuperscript{38}

\textsuperscript{38} Brownlie, Principles of Public International Law, 5th ed., p. 74. Note, however, my critique of Brownlie’s analysis of “dependent states,” in Chapter 7, below.
II. DEMOCRACY

“Democracy” has a long and interesting historical pedigree, being traceable to the ancient Greek city-states of Sparta and Athens, starting around 600 B.C.39 In earlier periods it was deeply criticised as revolutionary, and even today retains a disruptive potential.40 Although difficult to define, and arguably non-existent in any full sense today,41 “democracy” has been briefly described by three authors as:

[A] political system in which the citizens themselves have an equal effective input into the making of binding collective decisions. A non-democratic system is a system in which some individual or sub-group possesses superior power to make binding collective decisions without any formal accountability to citizens.42

[A] mode of decision-making about collectively binding rules and policies over which people exercise control ... the most democratic arrangement [being] that where all members of the collectivity enjoy effective equal rights to take part in such decision-making directly—one, that is to say, which realizes to the greatest conceivable degree the principles of popular control and equality in its exercise. Democracy should properly be conceptualized as lying at one end of a spectrum, the other end of which is a system of rule where the people are totally excluded from the decision-making process and any control over it.43

The central principle of contemporary democracy is that governments must subject themselves to periodic recall: there must be enough freedom of association and information to promote the organization of a variety of

39 Young Sparta developed some basic democratic institutions before Athens (an assembly and a kind of probouleutic council, where ideas were hammered out before being put to general discussion), and even the earlier civilisation of the Phoenicians had a kind of self-regulating city-state: Hornblower, “Creation and Development of Democratic Institutions in Ancient Greece,” pp. 1-2. In later Athens democracy was developed into the sophisticated system we associate with the term today: ibid., p. 2. For historical essays on democracy see generally Dunn, Democracy.

40 E.g., Massimo La Torre, in Democracy and Tensions: Representation, Majority Principle, Fundamental Rights, EUI Working Paper, Law No. 95/5 (Florence: European University Institute, 1994), at p. 45, comments on the revolutionary potential of democracy:

Democracy also means “turbulence”, that is, a political system not closed in on itself but instead open to demands coming from society, aware of the risk of instability that may involve: a social structure ready to call in question its own criteria of justice and of redistribution of wealth. [Citations omitted.]

41 Dahl, in Democracy and Its Critics, argues that the modern Western liberal democratic state cannot be described as a “democracy” due to changes in scale and the consequences of those changes. Hence he formulates the new term “polyarchy.” See ibid., chs. 15 and 16. “Polyarchy” is defined in the Oxford English Dictionary Online as: “1. The government of a state or city by many; contrasted with monarchy.”

42 Saward, The Terms of Democracy, p. 15 (emphasis omitted). In ibid., at p. 51, he goes on to suggest that democracy entails a “necessary correspondence between acts of governance and the equally weighted felt interests of citizens with respect to those acts.” [Emphasis omitted.]

political parties and there must be regular elections in which all adults are permitted to vote.\textsuperscript{44}

The first two descriptions reveal that democracy is a system designed to enable effective equality and participation by citizens in binding decision-making. The third highlights the most popular form of democratic participation—periodic elections—as well as two of the substantive rights that must be possessed by the participants, namely, those of freedom of association and freedom of information. In one of its country reports the Inter-American Commission on Human Rights adds the requirement of adherence to the rule of law as a component of democracy, as does the Supreme Court of Canada in its \textit{Reference re: Secession of Quebec}.\textsuperscript{45} Others have added several additional rights as either being pre-requisites for, or complements to, democracy.\textsuperscript{46}

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1. Government by the people; that form of government in which the sovereign power resides in the people as a whole, and is exercised either directly by them (as in the small republics of antiquity) or by officers elected by them. In mod. use often more vaguely denoting a social state in which all have equal rights, without hereditary or arbitrary differences of rank or privilege.

b. A state or community in which the government is vested in the people as a whole.


The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution.

\textsuperscript{46} David Held, in "Democracy and the New International Order," at p. 98, describes the cluster of rules, procedures and institutions present in modern representative democracy as including: "elected government; free and fair elections; universal suffrage; freedom of conscience, information and expression; the right of all adults to oppose their government and stand for office; and the right to form independent associations." [citations omitted]. Saward, in \textit{The Terms of Democracy}, sets out a list of the requirements (both rules and rights), for the realisation of the ideal of democracy (as in a Weberian ideal-type). These are summarised in \textit{ibid.}, at p. 108 (in Table 6.1), as follows:

1. A set of equal procedural rights common to all citizens:
   - The right to a vote of equal value in elections for candidates to appropriate government offices and in referendums
   - The equal right to run for elective office
The term "democratic governance," as I will use it, describes a broad set of relatively permanent and stable institutional structures and practices that allow a group to regulate and make decisions about their lives using the democratic process. I will define this concept more extensively in Chapter 3, below. For present purposes it should be understood to require a participatory governing body, which if not direct must be chosen by free and fair elections, and which must be subject to certain rule of law and human rights limitations. A "right to democratic governance" means the human right or international legal right to have such democratic structures and practices. Since international legal rights, and human rights generally, are available at all times,\(^{47}\) a practical effect of such a right is that the citizens must be able to continuously assess the democratic legitimacy of their government. As explained in Chapter 11, below, this means that a right to democratic governance may require external intervention to be effective. This is because, as a practical matter, most non-democratic governments that could be challenged under the right would not voluntarily expose themselves to the chance of being displaced after a new election. As will be discussed further in the same chapter, such considerations seriously challenge both the feasibility and desirability of a ‘rights-based’ formulation of democratic governance.

A. AN INTERNATIONAL VARIANT: THE COSMOPOLITAN FORM OF DEMOCRACY

A recently proposed category of democracy, labelled “cosmopolitan democracy” by David Held, must be mentioned at this point, given the international focus of this work.\(^{48}\) Daniele Archibugi and David Held explain their term as follows:

The term cosmopolitan is used to indicate a model of political organization in which citizens, wherever they are located in the world, have a voice, input

\[\begin{itemize}
\item The equal right to an opportunity to be selected for service (as appropriate) in non-elective representative and public-decision bodies
\item The right to equal treatment under the law
\item Equal and regular opportunities for all adult citizens to set the public political agenda
\item Formal provision for notification of citizens concerning options, arguments and relevant previous outcomes with respect to public political issues
\item Formal provision for freedom of information from all government bodies
\item Equal rights to basic freedoms of expression and association
\item Equal social rights to adequate education and adequate health care
\item A basic income
\item That citizens’ votes be decisive
\item That majority rule procedures be employed for the resolution of public political issues
\item That direct democratic mechanisms be given formal and systematic priority over indirect mechanisms
\item Appropriate time limits placed on the realization of the substance of public decisions
\item Adequate appeals and redress mechanisms with respect to public bodies and their functions
\end{itemize}\]

\(^{47}\) In other words, the right is possessed by the entity or individual, even if there are practical problems with procedural access to the right, or its enforcement.

\(^{48}\) E.g., Held, “Democracy: From City States to a Cosmopolitan Order,” Held, “Democracy and the New International Order.” Also, see generally, Archibugi, Held and Köhler, eds., Re-Imagining Political Community.
and political representation in international affairs, in parallel with and independently of their own governments. The conception of democracy deployed here is one that entails a substantive process rather than merely a set of guiding rules. For the distinctive feature of democracy is, in our judgement, not only a particular set of procedures (important though this is), but also the pursuit of democratic values involving the extension of popular participation in the political process.49

What would such a democracy look like and how could it function at the international level? Cosmopolitan democracy envisages a form of participatory governance with individual, group and state involvement in international decision-making. The important distinction between such a model and current international life is that the former assumes that individuals must be able to participate directly in the international sphere.

Despite such bold ambitions, cosmopolitan democracy is formulated pragmatically. Rather than setting as a prerequisite an entirely democratic world, cosmopolitan democracy "aims at parallel development of democracy both within states and among states."50 As a result, cosmopolitan democracy does not require the abolition of statehood, which continues to serve an important administrative role.51 Importantly, Held suggests that this form of democracy may be gradually realised through such changes as: the further enforcement and development of the UN Charter regime, the creation of new regional parliaments, the implementation of transnational referenda, the entrenchment and enforcement of human rights, the creation of an accountable international military, and the creation of a new, democratised and effective UN General Assembly (or in Archibugi’s terminology, ‘Assembly of the Peoples of the United Nations’).52 The changes involved in adopting such a model may


51 Daniele Archibugi and David Held, in “Editor’s Introduction,” at p. 14, state: “But unlike many federalist projects, cosmopolitan democracy seeks neither to abolish existing states nor to replace their powers with an entirely different institutional framework.” Daniele Archibugi, in “From the United Nations to Cosmopolitan Democracy,” at p. 128, is even more explicit: “The perspective of cosmopolitan democracy requires us, in the first instance, to recognize the state as the central figure in international relations. The very notion of thinking and acting politically presupposes the individual’s citizenship of a state there can be no politics without a polis.” But cf., ibid., pp. 129-30 [fundamental purpose of states—security—requires their limitation], and 156 [acknowledgement that cosmopolitan democracy will challenge the current form of statehood].

Archibugi and Held distinguish cosmopolitan democracy from standard definitions of democracy because the former looks beyond a state’s borders. It is also different from the ambiguous term “international democracy.” This latter term could refer to either a system of democratic rules between states (without questioning each state’s internal order), or to a set of democratic institutions that go beyond the border of individual states without bringing democratic values to inter-state relations. Archibugi and Held point to the Congress of Vienna and NATO as examples of such international forms of democracy. The former established wide-ranging consultative mechanisms amongst a primarily non-democratic membership, and the latter, although with a mainly democratic membership, uses extremely undemocratic procedures.

The necessity for some form of international democracy arises from the increasing interdependence of states today. As summarised by Held, “[t]he problem is that national communities by no means make and determine decisions and policies exclusively for themselves, and governments by no means determine what is right or appropriate exclusively for their citizens.” In other words, the choices made by each state affect those available to other states, and these ‘external’ decisions (by other states or non-state organisations) may adversely influence local, democratic decision-making processes. Regional organisations, for example, may make decisions that trump the will of national majorities. The implications of ‘external’ decisions are severe for all states, those affected and those affecting. As

new seats be added to the UN Security Council to help represent global civil society: “The orientation of global civil society would go further, insisting on setting aside a permanent seat for ‘a moral superpower’ (as designated by a panel of Nobel Peace Prize winners), another for a representative of the most economically deprived states (as determined by reference to UNDP indices), a third for a representative of global civil society (as selected by a panel of alternative Nobel Peace Prize winners), and a fourth to represent the world assembly of indigenous peoples.”

Held, for example, when speaking of the possibility of an accountable international military in “Democracy and the New International Order,” argues at p. 110: “If such a settlement [between coercive power and accountability] sounds like a ‘pipe dream’, it should be emphasized that it is a pipe dream to imagine that one can advocate democracy today without engaging with the range of issues elaborated here.”


Ibid., p. 100.

As Luigi Bonanate argues, in “Peace or Democracy?,” in Cosmopolitan Democracy: An Agenda for a New World Order, ed. D. Archibugi and D. Held, 42-67 (Cambridge: Polity Press, 1995), at p. 57, when forms of nondemocratic behaviour are engaged in by states internationally, their own internal democratic capabilities will be adversely impacted upon: when democratic regimes “act undemocratically externally, they also risk lowering the level of their own democratic legitimacy.” In ibid., at p. 63, he also suggests that the converse is true: “it seems to
highlighted in the following Chapter, the magnitude of global interaction, including increases in both the scope and frequency of contact, has created a unique situation in the modern era, one that places severe challenges upon democracy, both within and beyond the state. These developments challenge such fundamental assumptions as the one regarding which constituency is the relevant one for consent in international decision-making.

A final point to make regarding the concept of ‘cosmopolitan democracy’ is to re-emphasise its focus upon bringing individual and group participation directly into the international sphere. Many commentators who advocate a cosmopolitan form of democracy miss this point when they express satisfaction with a situation where a number of relatively democratic states use a democratic process to arrive at a decision. The United Nations General Assembly, with its supra-majority voting rules, provides an example. But this kind of procedure, although more democratic than other forms of international decision-making (i.e., the voting rules of the Security Council), does not allow involvement by the citizens of most of the countries concerned in any significant manner. Not only is the form of democracy barely representative, with only leaders or foreign affairs bureaucrats voting, but the content of international decision-making is opaque. There is no effective day-to-day input from the people of these states for such decisions. Recent feminist critiques have shown that very little input is made by, or on behalf of, women, for example. Further, most countries

me unlikely that a penchant for external democratic conduct can coexist with another for domestic anti-democratic conduct.”

59 Held, “Democracy and the New International Order,” pp. 100-101. At the latter page Held summarises the extent of the changes in our global system:

While in the eighteenth and nineteenth centuries trade routes and empires linked distant populations together through quite simple networks of interaction, the contemporary global order is defined by multiple systems of transaction and coordination which link people, communities and societies in highly complex ways and which, given the nature of modern communications, virtually annihilate territorial boundaries as barriers to socio-economic activity and relations, and create new political uncertainties.

60 Ibid., p. 102 (providing the examples of decisions regarding AIDS, acid rain, the use of non-renewable resources, and the management of economic flows). In ibid., at pp. 102-3, Held comments: “The implications of this [change in the international system] are profound, not only for the categories of consent and legitimacy, but for all the key ideas of democracy: the nature of a constituency, the meaning of representation, the proper form and scope of political participation, and the relevance of the democratic nation-state as the guarantor of the rights, duties and welfare of subjects.”

61 E.g., Luigi Bonanate, in “Peace or Democracy?,” in Cosmopolitan Democracy: An Agenda for a New World Order, ed. D. Archibugi and D. Held, 42-67 (Cambridge: Polity Press, 1995), at p. 53, sets out the following four criteria for a democratic international system: (1) equality among states, (2) a turnover of rulers, (3) tolerance of dissent and the ability to form world public opinion, and (4) the existence of tools to resolve controversies and conflicts. The need for direct participation of citizens is given scant attention (referenda mentioned in passing on page 61), with instead, the “ideal international democracy [being] a system in which each state would speak for itself and would have an equal right to be heard.” Ibid., p. 55.

62 Art. 18 of the Charter of the United Nations (1945) authorises the General Assembly to vote by two-thirds majority for “important questions” and simple majority for “other questions.”

63 There exists significant literature commenting on the fact that states and international bodies reveal disproportionately low percentages of women in positions of authority. See, e.g., Kathleen Mahoney, “Theoretical Perspectives on Women’s Human Rights and Strategies for Their Implementation” (1996) 21 Brook. J. Int’l L.
have no formal mechanism by which to inform the electorate about the positions being advocated on their behalf by their state in the various international fora, and no state regularly puts the international treaties it enters into before its people for approval. In sum, cosmopolitan democracy represents an advanced model of democracy, one conceived of as operable at the international level and allowing the participation of individuals, groups and states.

III. SOVEREIGNTY

One word which recurs frequently in the writings of Vattel's followers is 'sovereignty', and it is doubtful whether any single word has ever caused so much intellectual confusion and international lawlessness.65

The conception of 'sovereignty' in international law is generally admitted to contain many illogical elements, the chief of which is the assumption of a freedom of action which is contracted in numerous respects by the very existence of the law of nations. Moreover, there is no definite objective test by which it can be decided in all cases whether a given State is sovereign or not, so that there exists a group of States whose precise status within the international community it is difficult to determine.66

As intimated above, "sovereignty" is difficult to define with precision.67 Those that attempt to do so rightly preface their discussions by alluding to its many ambiguities, or to its


64 The latter scrutiny would be most appropriate when treaties are being ratified domestically, although few states allow this to happen to any significant extent. In the UK, for example, "the power to make or ratify treaties belongs to the Queen on the advice of the Prime Minister, a Minister of the Crown, an Ambassador or other officials, though by the so-called Ponsonby Rule, as a matter of constitutional convention, the Executive will not normally ratify a treaty until twenty-one parliamentary days after the treaty has been laid before both Houses of Parliament." Malanczuk, Akehurst's Modern Introduction to International Law, 7th ed., p. 65. A better example lies in the referenda that were called by the governments of the various states regarding the desirability of entry into the European Union. See, e.g., Denis Dinan, Ever Closer Union? [in-depth historical account of the development of the European Union].

65 Malanczuk, ibid., p. 17.

66 Fenwick, Wardship in International Law, p. 7.

67 Sovereignty is rarely defined because its meaning is so central that it is (incorrectly) assumed to be obvious. Bartelson, in A Genealogy of Sovereignty, at p. 17, argues:

[Although theorists] have turned sovereignty into an organizing principle or a constitutive rule, they have also simultaneously withdrawn sovereignty itself from study; the more sovereignty is thought to explain, the more it itself is withdrawn from the explanation. The theoretical sovereignty of sovereignty leaves sovereignty itself essentially unquestioned; the more constitutive sovereignty appears to be, the less unconstituted it becomes.
controversial and contested character.68 Such ambiguities and contradictions should not be surprising because of the centrality of sovereignty to political and legal discourse.69 One scholar has even gone so far as to argue that sovereignty by its very nature is beyond the scope of knowledge.70 Leaving aside such ontological questions for the moment, some attempt to narrow the meaning of sovereignty may be useful. For even if sovereignty, like fire, ceases to exist under rigorous scientific scrutiny, its functional relevance remains crucial to the organisation of the modern world.71

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68 Lassa F.L. Oppenheim, in International Law, A Treatise (London: Longmans, Green and Co., 1905-06), at p. 103 states:

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

Louis Henkin, in “The Mythology of Sovereignty” (1992) Proc. Can. Council on Int’l Law 15-23, argues that ambiguities inherent in the term “sovereignty” necessitate its abandonment in favour of other conceptions such as the Lockean social contract. For a brief summary of the controversial nature of the term see also Schrijver, “The Changing Nature of State Sovereignty,” pp. 69-70. Schrijver, in his conclusion to this article, at pp. 95-96, notes that sovereignty has not been pushed to the side, but nevertheless retains a double-edged quality. At the latter page he points out the “ambivalence of the sovereign State: often intolerable but yet indispensable.”

69 Bartelson, in A Genealogy of Sovereignty, at p. 13, concisely explains the relationship between centrality and ambiguity as follows:

In political discourse, centrality and ambiguity usually condition each other over time. A concept becomes central to the extent that other concepts are defined in terms of it, or depend on it for their coherent meaning and use within the discourse. These linkages—whether inferential or rhetorical—saturate the concept in question with multiple meanings that derive from these linkages, which make it ambiguous; an ambiguity that is open to further logical and rhetorical exploitation.

70 Bartelson, in ibid., at p. 239, argues:

Because sovereignty is rigorously interlinked with the foundations of modern political knowledge, it cannot easily be disentangled and analysed; because sovereignty is so profoundly involved in the naturalization and reification of modern political reality, it is a difficult object of political knowledge. Indeed, to the extent that sovereignty constitutes the unthought foundation of political knowledge, it is beyond the scope of that knowledge.

In other words, since the concept of sovereignty is the basis for political knowledge—its alphabet, so to speak—it is impossible to understand it outside of that knowledge.

71 The analogy to fire is Bartelson’s. In A Genealogy of Sovereignty, at p. 3, he points out that since prehistory, fire has been available to human experience as a datum. Still, despite the apparent uniformity of the objective phenomenon of fire, it is close to impossible to discern a corresponding uniformity in the accounts of fire since antiquity. From ancient teachings on the elements, through medieval alchemy to early-modern phlogiston theory, fire is an object of knowledge, yet the accounts of it vary to the point of incommensurability. More puzzling, when the question of fire is raised today, one is likely to discover that fire no longer is a reality for science; there is a theory of combustion, but whenever the original question is posed, answers are likely to repeat the most ancient and fanciful explanations. In modern textbooks in physics, it is as if fire did not exist.
The term “sovereignty” stems originally from the medieval Latin terms “superanitas,” “supremitas” or “suprema potestas,” and came into English usage through the French word, “souveraineté.”\(^{72}\) It has been briefly defined as:

A term used in much political and legal theory, sometimes at the cost of confusion, to characterize both (1) a modern nation-state and (2) a supreme legislature within a state. The sovereignty of a state is that area of conduct in which according to international law it is autonomous and not subject to legal control by other states or to the obligations of international law. On the other hand a legislature within a state is said to be sovereign if there are no legal limits on its legislative competence.\(^{73}\)

In general ‘sovereignty’ characterizes powers and privileges resting on customary law and independent of the particular consent of another state.\(^{74}\)

[Soeverignty denotes] the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law.\(^{75}\)

These three definitions reveal that sovereignty fulfils the multiple functions of describing legal and political regimes both inside, and outside, of the state. This divide is usually identified with a contrast between ‘internal’ and ‘external’ forms of sovereignty. Internal sovereignty refers to the right of each sovereign to control its own territory and interests (political, legal, economic, etc.), whereas external sovereignty refers to the reciprocal duty of all sovereigns not to interfere with one another’s internal affairs.\(^{76}\) Seen another way,

\(^{72}\) Schrijver, “The Changing Nature of State Sovereignty,” p. 70. The author spells the French term as “souveraineté” rather than “souveraineté,” but I believe this to be a typographical error. The word has been spelled as “souveraineté” since the publication of Jean Nicot’s Thesoro de la Langue Françoise in 1606. This work, along with several other historical French dictionaries, is available on-line through the University of Chicago’s “Dictionnaire de l’Académie Française Database Project,” at http://www.lib.uchicago.edu/efts/ARITFL/projects/dicos (accessed 12 July 2001).


\(^{76}\) Brownlie, in Principles of Public International Law, 5th ed., at p. 289, summarises these two aspects and adds a third, a ‘consent-based’ notion of obligation:

The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor. [Citations omitted.]
sovereignty within the state identifies the existence of a political and legal order unified by a point of ultimate competence or authority; sovereignty outwith the state identifies complete legal autonomy from other states. This external role of sovereignty remains a key reason for its continued popularity, as seen in the frequent, strong assertions of sovereignty by developing states. These states tap into and value the liberal, egalitarian notions implicit in sovereignty, with each sovereign being legally ‘equal’ regardless of size or power.77 ‘Sovereign equality,’ referring to the formal equality of sovereign states, remains a fundamental principle of international law.78 Notice as well about these definitions, that the second and third introduce the fundamental idea that sovereignty is limited by law, since it is an international legal construct.79 The last of the three definitions reproduced above also

Brownlie contradicts his last point by stating, in *ibid.*, at pp. 291-2, that sovereign powers themselves are a product of general customary international law: “In general ‘sovereignty’ characterizes powers and privileges resting on customary law and independent of the particular consent of another state.” His first definition assumes that sovereignty can exist outside of the law, his second sees it as a product of the law. The second is preferable.

77 E.g., Hoffman, in *Beyond the State*, at p. 190, refers to the egalitarian norms underlying sovereignty as a weapon against ‘neo-colonialism’:

> It is scarcely surprising that, when old empires break up and national liberation movements succeed, new sovereign states are formed since the sovereign state is itself premised upon egalitarian norms. However abstract these norms, they constitute indispensable ideological weapons with which to resist the new ‘imperialist’ oppressor.

78 Crawford, in “Islands as Sovereign Nations,” at p. 284, comments that “[I]t has long been a basic principle of international law, reflected in the Charter of the United Nations, that States are defined as ‘equal.’” However, he continues, in *ibid.*, at pp. 284-5:

> [T]he principle of equality of States is a doctrine of formal equality. Obviously that principle does not mean that States are actually equal in terms of their powers and resources, or even that they are equal in terms of their actual rights, since the rights and duties of States depend upon their treaty and other commitments. What it does mean is that, unless there is a clear provision to the contrary, rights under international law are equally attributable to all States.

See also, Brownlie, *Principles of Public International Law*, 5th ed., p. 289 (arguing that the “sovereignty and equality of states represent the basic constitutional doctrine of the law of nations”).

79 Hinsley, in *Sovereignty*, at p. 1, reminds us that we are dealing with a concept, not a tangible entity:

> Although we talk of it loosely as something concrete which may be lost or acquired, eroded or increased, sovereignty is not a fact. It is a concept which men in certain circumstances have applied—a quality they have attributed or a claim they have counterposed—to the political power which they or other men were exercising.

Brownlie, in *Principles of Public International Law*, 5th ed., at p. 289, argues that “[i]f international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organisations of states) defined by law.” In *ibid.*, at p. 291-2, he adds: “In general ‘sovereignty’ characterizes powers and privileges resting on customary law and independent of the particular consent of another state.” Note, however, that Hans Kelsen viewed traditional formulations of sovereignty in absolutist terms—as not limited by international law—and thus rejected the concept in his theory. Kelsen describes sovereignty, in his *Pure Theory of Law* (2nd ed.), at p. 334, as follows:

> The sovereignty of the state is the decisive factor for assuming the primacy of the national legal order. Sovereignty is not a sensually perceptible or otherwise objectively cognizable quality of a real object, but a presupposition. It is the presupposition of a normative order as the highest order whose validity is not derivable from any other higher order. The question of whether the state is sovereign cannot be answered by an analysis of natural reality. Sovereignty is not a maximum of real power. States which,
describes what I will argue is the essence of sovereignty, with the single phrase "international legal status."

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In sum, statehood is a status recognised and supported at international law for entities that fulfil certain requirements. Democracy is a decision-making process most frequently exercised domestically, but with a potential for international application. Sovereignty is a legal status, important for both national and international legal systems, and most frequently possessed by states. The three terms do not seem controversial when examined in this way. As revealed in the following chapters, however, when each concept is examined in greater detail various conceptual and practical difficulties arise, especially with respect to the relation of the three terms. This is why it is important to examine democracy, statehood and sovereignty together. If this is done, interesting possibilities arise. Democracy may be seen as a transformative principle for both the national and international spheres. Statehood becomes separable from governance, allowing us to re-evaluate the status of ancient societies as well as opens up possibilities for modern non-state governance. Sovereignty is transformed. No longer conceived as a uniform, transhistorical concept, it may be seen as a historically contingent form of status, one that changes in meaning and content over time.

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in comparison with the so-called great powers, have very little real power are considered as sovereign powers just at the great powers.

See also the further discussion of Kelsen’s view of sovereignty in the section describing its normativity in Chapter 6, below.
CHAPTER 2: STATEHOOD

This Chapter accomplishes two broad tasks: it deepens our definition of the state and assesses some of its more recent challenges. The first section fleshes out our understanding of statehood, moving beyond its simple description in the Montevideo Convention as an entity possessing defined territory, a permanent population, government and the capacity to enter into international relations. Such criteria are necessary, but not sufficient for the purposes of fully comparing statehood with sovereignty and democracy. Statehood possesses other important qualities, qualities that continue to help it dominate the political and legal landscape. Two of these are its ability to assert a monopoly over the legitimate use of force within its territory, and its more general claim to exercise legitimate authority. These two characteristics are important because they allow us to connect statehood directly to sovereignty and democracy. The first, monopolistic characteristic links statehood with legal notions of sovereignty because of their shared focus upon ultimate, coercive, binding norms. The second, more general characteristic links statehood with political conceptions of sovereignty and democracy, since both presuppose and require legitimate authority. The second and third sections of this Chapter examines the limitations placed on the state by the processes of globalisation and the rivals to the state that are emerging at the international level. In critically analysing the effects of globalisation this Chapter suggests that although this process may eventually push international society towards institutional change, it has not yet done so. Not one of the developments associated with globalisation or increases in non-state actors suggests an institutional replacement for statehood. As a result, this Chapter concludes by suggesting that the state will remain central to international society for some time to come, albeit playing some new and different roles.

I. FUNCTIONAL AND THEORETICAL CHARACTERISTICS OF THE STATE

There are two important characteristics of the state not sufficiently highlighted by the criteria established under the Montevideo Convention of 1933. These are, on the one hand, its claim to monopolistic control over territory, including over legitimate uses of force within

1 Convention on the Rights and Duties of States [Montevideo Convention] (1933). See the discussion of the criteria established by this Convention in Chapter 1, above.
that territory, and on the other, its paradoxical, yet intimate relation with such force. In exploring the first characteristic I will focus upon Max Weber’s classic understanding of the state as an entity asserting a continuous monopoly over the legitimate use of force within a territorial area. In exploring the second, I will engage in a more general discussion of the distinction between statehood to governmental authority, as illustrated by their different relations to force. These relations reveal that statehood and government are conceptually distinct. This distinction has important implications for our understanding of legitimate authority in the context of both statehood and sovereignty. Once statehood and government are recognised as separable, non-state forms of government may be more readily accepted. In light of the plurality of actors that play roles in the international system, non-state governance may become particularly important in the future.

A. THE WEBERIAN STATE

Max Weber’s conception of the state has been particularly influential in political and sociological theory because it manages to convincingly isolate some of the core attributes of the state, namely, power, territory and legitimacy. Weber’s definition of the state, which he sets out in the context of the definition of a “political” group, is as follows:

An imperatively coordinated corporate group will be called “political” if and insofar as the enforcement of its order is carried out continually within a given territorial area by the application and threat of physical force on the part of the administrative staff. A compulsory political association with continuous organization (politischer Anstaltsbetrieb) will be called a “state” if and insofar as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order.²

In other words, the state is defined as an entity that claims a continuous monopoly of legitimate force within a territorial area.³ The modern state builds upon and perfects this definition since it possesses administrative and legal orders that are subject to legislative change. It also claims to be able to exert legitimate force over every form of action taking place within its jurisdiction. According to Weber:

³ Weber, in “The Profession and Vocation of Politics,” at pp. 310-11, describes the state as follows: “a state is that human community which (successfully) lays claim to the monopoly of legitimate physical violence within a certain territory, this ‘territory’ being another of the defining characteristics of the state.” In ibid., at p. 316, he rephrases his definition in a more conceptual form:

For the purpose of our deliberations I wish only to establish the purely conceptual ground as follows: the modern state is an institutional association of rule (Herrschaftsverband) which has successfully established the monopoly of physical violence as a means of rule within a territory, for which purpose it unites in the hands of its leaders the material means of operation, having expropriated all those functionaries of ‘estates’ who previously had command over these things in their own right, and has put itself, in the person of its highest embodiment, in their place.
The primary formal characteristics of the modern state are as follows: It possesses an administrative and legal order subject to change by legislation, to which the organized corporate activity of the administrative staff, which is also regulated by legislation, is oriented. This system of order claims binding authority, not only over the members of the state, the citizens, most of whom have obtained membership by birth, but also to a very large extent, over all action taking place in the area of its jurisdiction. It is thus a compulsory association with a territorial basis. Furthermore, to-day, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it. ... The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization.4

By claiming and exerting a continuous monopoly of authority, Weber’s state has the potential to be self-perpetuating. Because of its political neutrality, the state also becomes universal—its form may be used to establish almost any type of political society.5

Weber did not overemphasise the presence of physical force in the state, as it is “neither the sole, nor even the most usual, method of administration of political corporate groups.”6 However, “the threat of force, and in case of need its actual use, is the method which is specific to political associations and is always the last resort when others have failed.”7 As illustrated below, this Weberian conception of the state remains meaningful despite the effects of globalisation. The state retains a monopoly over legitimate force within its territorial borders, even if others may exert illegitimate force (e.g., mercenaries or criminal organisations), or legitimate forms of coercion (e.g., economic actors such as transnational corporations).

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5 This is a fascinating implication of Weber’s theory, which considers the type of political system as irrelevant to the determination of whether an entity may be characterised as a state. Weber consciously excluded the form, as well as the telos, of the political system from his definition of the state because he considered such matters incapable of classification. As summarised by Anthony Giddens, in Politics and Sociology in the Thought of Max Weber (London: The Macmillan Press/British Sociological Association, 1972), at p. 34.

6 Weber, Sociological Writings, p. 25.

7 Weber, ibid., p. 25.
B. **STATEHOOD DISTINGUISHED FROM GOVERNMENT**

Weber’s identification of force as a fundamental requirement of statehood has allowed later theorists, such as political scientist John Hoffman, to distinguish statehood from government by combining structural and functional definitions of the state.8 ‘Statehood’, according to Hoffman, must be defined in a Weberian manner as “an institution claiming to exercise a monopoly of legitimate force within a particular territory.”9 ‘Government,’ in contrast, Hoffman describes as the process that solves disputes through a range of sanctions (including coercion) without use of organised physical force.10 Thus defined, government can exist in non-state or pre-state entities, as well as in international society as a whole.11 The state, on the other hand, must possess or at least claim to possess all four of Weber’s criteria—monopoly, territory, legitimacy and force. The crucial element distinguishing the two is force, since the state, in contrast to the government, depends upon its ability to use legitimate force.12 As a result, a crucial distinction between the state and the various non-state actors identified below, is one of legitimacy; the crucial distinction between statehood and government is one of force. Let us examine Hoffman’s arguments regarding the latter.

1. **Force and Coercion**

Hoffman separates the state from government at two levels. First, he conceptually distinguishes ‘force’ from ‘coercion’.13 ‘Coercion’ is the broader term, and can encompass everything from social pressures to threat of force.14 Force *per se*, remains physical.15

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8 Hoffman, in *Beyond the State*, at pp. 68-71, specifically advocates a definition of the state based upon both its structure and functions.

9 Ibid., p. 3. See generally, *ibid.*, ch. 3. Notice that Hoffman does not specify the requirement of continuity that exists in Weber’s original definition, as outlined in the preceding section. I suspect that this is an implicit assumption of Hoffman’s, rather than an intentional exclusion.


11 See, *ibid.*, pp. 42-6 (non-state entities) and ch. 12 (international society as having government).

12 Kaldor, in “Reconceptualizing Organized Violence,” at p. 93, explains the strong connection between force and the state:

The nation-state, which came into being in the nineteenth century, could be said to be the organized entity through which violence was contained. It was contained geographically in that violence was pushed outwards against other states and it was contained temporally because war became a discrete activity between states when ‘normal’ relations broke down. The implicit contract through which a rule of law and civil society was established legitimized the state as the embodiment of an emergent national identity in exchange for domestic security and external protection. Only the state had the right to use violence in order to protect and enforce a territorial regime of non-violence. The term civil society originally referred to the establishment of a domestic zone of peace, to the existence of legal, ‘civilized’ non-violent ways of managing human affairs, in contrast to the barbaric war methods adopted externally, to settle affairs between states.

13 Hoffman, *Beyond the State*, pp. 87-90.


Secondly, Hoffman shows that the state can be distinguished from government because whereas all social orders entail coercion, only the state requires force. Coercion is part of any social order because it arises from “constraints which individuals have [to] take account of in realizing their goals.”

But physical force need not be part of government in the same way it is part of the state. Hoffman demonstrates this proposition with anthropological evidence of forms of governance that have existed without the state. In other words, he provides examples of forms of government that do not rely upon physical force in the Weberian manner, in the sense of requiring a monopoly of legitimate force. Some Amerindian societies, for example, depended more on persuasion and co-operation than force—with the leader being met with certain refusal if he tried to issue a command backed by penal sanctions. This is not to say that force was not used at certain times by these kinds of pre-state governments. It was. Force existed to some extent in all pre-state societies. But the point is that force was not necessarily central to these societies in the same way as it is to the state. Rather than being an integral part of governance, force is a temporary exception to it,

16 Ibid., p. 7.

17 Dahl, in Democracy and Its Critics, at p. 107, makes a similar point when discussing the first component of a political order, the need for binding collective decisions:

That decisions are binding does not imply that the association is necessarily coercive, employs the threat of violent sanctions to bring about compliance, or possesses other similar characteristics that are often used to distinguish a state from other sorts of associations. Although the government of the association might create an expectation that violators will be punished by officials, in some circumstances decisions might be binding without punishments by officials or even by other members. To evoke an expectation of divine or magical sanctions might be sufficient. Or the mere process of enacting or announcing a rule might cause enough members to adopt it as a principle of conduct to produce a quite satisfactory level of compliance. In short, although the association could be a state in the usual sense of a coercive order, it might not be; likewise the government of the association need not be the government of a state. Thus we can describe a general theory of the democratic process applicable to associations whether or not they constitute a state.

18 Hoffman, in Beyond the State, at p. 38, comments:

After all, it is a fact that humankind has survived for most of its existence without the state—that is to say, it has conducted its affairs without the presence of an institution claiming a monopoly of legitimate force. If we assume, as I believe we must, that throughout these hundreds of thousands of years people have nevertheless had some kind of orderly existence, it becomes possible on the basis of Weber’s definition to conceptualize government without the state.

See also Spruyt, The Sovereign State and Its Competitors, for a detailed analysis of forms of organisation different from the sovereign state, including Italian city-states and the Hanseatic League.

19 Hoffman, in ibid., at p. 38, summarises: “In gathering data about processes for settling disputes in ways which do not rest upon physical force, anthropologists compel us to acknowledge ‘in any reasonable connotation of the term’ that stateless societies possess government.”

20 Ibid., p. 40 (citing: P. Clastres, Society Against the State (New York: Urizen, 1977), p. 131; p. 175). See also, ibid., pp. 40-42 (non-forceful forms of governance), and Rupert Ross, Dancing With A Ghost: Exploring Indian Reality (Markham, Ont.: Octopus Publishing Group, 1992) [aboriginal notions of justice and social ordering in Canada].

21 Hoffman, Beyond the State, pp. 39-40.
or more often, a failure of government.22 Hoffman also relies upon modern evidence of non-forceful governance. The things that Laver describes as the “anarchy of everyday life”—such as, “[d]riving on the same side of the road, queuing in an orderly fashion, abiding by rules of etiquette”—as well as similar “stateless moments within a state-centred system”—including the organisation carried out by churches, universities, families, businesses and voluntary organisations—are all indications of governance without force, according to Hoffman.23 These pre-modern and modern examples lead him to argue that government in fact “functions along different principles and with a different logic” than the state.24 Thus, the state and government represent distinct forms of social order, ones that can be differentiated according to the centrality of force.

2. The Contradictory Character of the State

The vital roles that force and related Weberian attributes play in the definition of the state lead Hoffman to admit that the state possesses a problematic and contradictory character. This does not mean that the state either does not exist or is undefinable.25 Rather, even if it is contradictory in nature the state, or an entity that performs the same functions, must be acknowledged to exist. Moreover, contradictions are inherent in the definition of the state and are important to an understanding of it. Some of the simpler ones were discussed earlier in Chapter 1, when we looked at the elasticity of the four requirements listed in the Montevideo Convention’s definition of statehood. But the state’s contradictory character is most visible in its four Weberian characteristics: monopoly, territory, legitimacy and force. Each characteristic is problematic, for the simple reason that each is unattainable in practice. No state has a perfect monopoly over legitimate force in its territory.

More interesting, however, is the fact that each characteristic is contradictory because its existence is sustained by challenge and opposition. For example, to best justify its possession and use of force, the state must have rivals that threaten the social order.26 To

22 Ibid., pp. 41-2.
23 Ibid., p. 45 (referring to M. Laver, Invitation to Politics (Oxford: Blackwell, 1983)). At the following page, Hoffman recognises that these forms of governance are located today in the background context of the state, with its ever-present recourse to force. Thus, each may not be replicable in a non-state environment. The key, however, is to see how it is logically possible to separate statehood from government.
24 Ibid., p. 45. See generally, ibid., pp. 42-6.
25 Ibid., ch. 2 (rejecting the indefinability thesis).
26 Hoffman states, in ibid., at p. 5:

The very need to exercise a monopoly of legitimate force arises only because states are challenged by rebels and criminals who themselves resort to force, and who (either implicitly or explicitly) contest the legitimacy of the laws they break. ... The state which actually succeeds in imposing a monopoly of legitimate force thereby makes itself redundant since a gulf between ideals and reality is essential to the state’s very raison d’être.
exert force over a populace, the state needs a territory. To most clearly define its territory, the state needs rival entities contesting its borders. To retain its monopoly over force, the state will frequently have to use force. But a state possessing a complete monopoly over force becomes redundant. Also, since force is, according to Hoffman, inherently illegitimate, the state must have compelling reasons to use it. Each time the state actually uses force, its legitimacy decreases. I will return to this in a moment. If the state gains complete legitimacy, so that it never needs to use force, then it once again makes itself redundant. Monopoly, legitimacy, territory and force all become most visible—most concretely defined—only when they are challenged. The inverse is also true. The state becomes less like a state, in fact may become irrelevant, when there are no challenges to its authority. The same holds for each of the four characteristics. They are essential for the definition of the state, and yet at the same time threaten its existence if fully satisfied. A state needs physical force in order to retain public order and unity in the face of challenge, both from inside and outside its territory. This force must be both monopolistic and territorial. Territory is required for efficiency. Without territory a state cannot focus its force. Monopoly is required to maintain both its territory and legitimacy. Without a monopoly over force, rival powers will move in and carve off sections of the state’s territory. Different allegiances then form, which in turn threaten the state’s legitimacy. Further, if the state’s use of force is perceived of as illegitimate, then any force used by the state may not compel obedience. The result of this downward spiral—with many non-state actors able to use force with impunity—is that the state itself will cease to exist. Or more accurately, the state will cease to have an internal justification for its existence. Hence, all of the criteria are interrelated and essential for the

See generally, ibid., ch. 5.

27 Cf. ibid., pp. 66-7.

28 Ibid., p. 65.

29 Ibid., ch. 6 (inherent illegitimacy of force, tainting both subject and object).

30 Hoffman, in ibid., at pp. 90-91, argues that the paradoxical relationship between legitimacy and force requires that use of force must be (1) rare, but also (2) sufficient to quell disorder.

31 Ibid., p. 65.

32 Ibid., pp. 5-8. See generally, ibid., chs. 3-5.

33 Hoffman, in ibid., at p. 35, explicitly requires all four elements: “What makes this definition [of the state] coherent is that each of the attributes forms an interrelated totality so that it is impossible for a state to exist which has some of the attributes but not the others.”

34 As noted earlier in Chapter 1, above, states enveloped in anarchic civil wars, such as Lebanon, Somalia or Sierra Leone, do not cease to be states in the eyes of international law or international society.
definition of the state. According to Hoffman, the rivalry between these four characteristics is essential, as each component must be contested in order for the state to survive.  

3. Force and Statehood

Nonetheless, all four characteristics are not equal. Force, in Hoffman's opinion, is the most important of the four Weberian criteria. It is the "conceptual 'glue'" that keeps them together and "thus constitutes the basic element of a structured and thus coherent definition of the state."

Force is also important because its very centrality allows Hoffman to argue that states existed in pre-Renaissance societies. Even though the modern and pre-modern states show significant differences, they can be seen to be part of the same species because of their Weberian linkage with force. However, force is deeply problematic for the state, and will perpetually undermine legitimacy. To explain the role of force in destroying legitimacy, Hoffman returns to the distinction between force and coercion. Coercion limits choices, but force completely prevents the exercise of choice, making the individual into an object or thing. Force taints both the wielder and the victim: "To treat a person as a thing is to dehumanize oneself." This unbreakable tie between the state and force leads Hoffman to argue in favour of creating and using structures other than states. This possibility can only

35 See also, Hoffman, Beyond the State, pp. 165-8 (deconstructing the 'logocentric' nature of the state and its four Weberian attributes in order to further highlight its paradoxical nature).

36 Ibid., p. 37.

37 Ibid., ch. 4. According to Hoffman, the modern state, unlike the pre-modern one, can be distinguished by the existence of (1) a public/private divide, (2) supreme and unitary power within the territory, (3) universally applicable rules and power, (4) relatively non-patrimonial and bureaucratic processes for appointment of officials, and (5), the ability to tax effectively. Ibid., pp. 50-3.

38 Weber, in "The Profession and Vocation of Politcs," at p. 364, describes force as the central problem that gives politics their character: "The specific means of legitimate violence per se in the hands of human associations is what gives all the ethical problems of politics their particular character." See generally, ibid., pp. 364-7 (cautioning us about the double-edged quality of violence, as both necessary for politics but as deeply corrosive).

39 Hoffman, Beyond the State, pp. 87-90.

40 Hoffman argues, in ibid., at p. 89:

[T]he distinction between force and coercion is absolutely crucial. When force is applied rather than merely threatened, relationships are disrupted. It is true that coercion itself may be unintentional but it is still relational in the sense that individuals subject to this coercion remain agents capable of making choices. Force however extinguishes agency, and Beetham is therefore right when he argues ... that to treat a person as a mere object is to deny legitimacy. He is wrong however to assume that people can be treated in this way in the contexts of relationships. When force is actually used, the individual becomes the mere property of another—the object of their punishment, rage, lust, anger or whatever.

[Referring to: David Beetham, The Legitimisation of Power (Basingstoke: Macmillan, 1991)].

41 Ibid., p. 91. Earlier on the same page Hoffman explains:

The point is that if force is illegitimate (as I argue it is), then it is not only illegitimate for the individual who receives it: it is also illegitimate for the individual who administers it. For force (as we have seen) violates social relationships by treating subjects as objects—people as things—and hence both the administrator and the victim of force are degraded as a consequence.
arise if statehood can be separated from the more consensual mechanisms used in government, and if the latter can be made to operate at sub- and supra-state levels.\textsuperscript{42}

It is interesting to observe that despite Hoffman's description of the problematic relation of force to the state, he does not reject the state out of hand in a utopian drive towards a stateless society. Instead, Hoffman emphasises that non-forceful kinds of governance can exist at sub-state and supra-state levels, and pragmatically shows how the state must be part of this movement.\textsuperscript{43} As he argues at the end of his work, in order to transcend something, not only must one recognise and accept its useful historical role. In the case of the state, one must use the state as the mechanism to go beyond itself.\textsuperscript{44} International society, representing an 'anarchic order' based for the most part upon consensus rather than force, represents one vision of the transcendence of the state.\textsuperscript{45} Thus, the state can be distinguished from both government and international society, as both of the latter share the same kind of non-forceful decision-making as sub-state tribal societies.\textsuperscript{46}

4. Sovereignty and Legitimacy

A weakness with Hoffman's approach is that although it is able to separate statehood from governance, it is unable to separate statehood from sovereignty. This is because the

\textsuperscript{42} Ibid., ch. 13 (arguing for post-state social structures, such as national governments and cosmopolitan international orders, that are to be based upon non-forceful governance).

\textsuperscript{43} In fact Hoffman, in ibid., at p. 188, points out that the liberal state is valuable because it (1) limits violence generally, (2) requires that any violence used be legitimate, and (3) subscribes to formal equality for its citizens. For another defence of the state and the justifiability of its use of force (contrasted with anarchist views), see Dahl, Democracy and Its Critics, pp. 44-7.

\textsuperscript{44} Hoffman, Beyond the State, pp. 191-2. See generally, ibid., pp. 190-94 (discussing the requirements of common interest necessary for states to transcend themselves). Earlier in the same work, at pp. 131-34, Hoffman argues that Marx endorses a similar view—not rejecting the liberal state but accepting that its realisation is a necessary step before it can be transcended. But cf. Mary Kaldor, “European Institutions, Nation-States and Nationalism,” in Cosmopolitan Democracy: An Agenda for a New World Order, edited by D. Archibugi and D. Held (Cambridge: Polity Press, 1995), pp. 68-95 (predicting a new international order based upon a combination of horizontal, democratic authority structures that very much stray from the traditional nation-state model).

\textsuperscript{45} As noted by Hoffman, in ibid., at p. 187, "when states co-operate through common rules and institutions, they do so in a way which necessarily transcends their own sovereign statehood." See also, ibid., pp. 186-7 and pp. 192-4 (offering cautions at the latter pages).

\textsuperscript{46} Hoffman, in ibid., at pp. 185-6, makes this parallel in a discussion of Hedley Bull's work:

Bull accepts the anthropological argument that tribal societies maintain order through non-statist means, and he defends international law as a body of 'anarchic' rules which secure compliance from states despite the absence of central authority commanding a monopoly of legitimate force. This leads him to reject Kelsen's argument that the legal character of international rules derives simply from the fact that states can resort to violent reprisals, and that the sanctions enforcing international law are analogous to blood feuding in tribal societies. As Bull rightly insists, in both tribal and international society the resort to violence is not only occasional and circumscribed, but it is incidental to the mechanisms of the anarchical order which seek compliance through consensus rather than force. By way of contrast, the violence employed by the state is integral to its very identity.

[Citing: Hedley Bull, The Anarchical Society (Basingstoke: Macmillan, 1947), pp. 62 and 132.] Note however, that Hoffman, contrary to Bull, explicitly links international society with governmental processes, and that both authors are aware that "international society differs radically from tribal anarchies." Ibid., p. 187.
concept of force, which is so central to statehood must, according to Hoffman, imply sovereignty.\(^{47}\) Sovereignty here is identified as a kind of concentration of power, or monopoly, and thus becomes part of the intrinsic logic of force.\(^{48}\) “To use force is to concentrate power,” and the optimum concentration of power is sovereignty.\(^{49}\) As a result, in Hoffman’s view sovereignty has been present, if only in embryonic form, throughout pre-modern history, as all monopolistic exertions of force were precursors to sovereignty. Hoffman explains:

Prior to Bodin […], traditional rulers had always been ‘sovereigns’ in the sense that they were acknowledged at least by those lower in the state apparatus to be the ‘supreme authority’ in the political order. True, they were not particularly effective and they sat astride societies they could not really control. But the modern concept of sovereignty can be understood only if we trace its roots back to more chaotic and diffuse notions of sovereignty in post-tribal societies.\(^{50}\)

As we will see later in Chapters 5-8, below, the difficulty inherent in this kind of formulation is that it defines sovereignty narrowly, in absolutist terms. Absolutism is only one variant of sovereignty. Although Hoffman is not alone in linking sovereignty to the state, I argue that the two terms can, and must, be separated.\(^{51}\)

Another difficulty with Hoffman’s work lies in the way it limits the role of legitimacy by using it solely as a basic Weberian element of the state. The complexity of this concept will be further explored in relation to democracy and sovereignty in later chapters.\(^{52}\) But for present purposes it may be noted that political and legal legitimacy are derived from a variety of factors, many of which may be unrelated to force. Weber himself distinguishes three models for legitimate authority: ‘traditional,’ ‘charismatic’ and ‘legal-rational.’\(^{53}\) Also, more

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47 Hoffman, in *ibid.*, at p. 59 explains:

The very notion of force as a method of rule is tied not merely to territoriality, public administration and law: it also connects with the idea of monopoly.


51 See further Chapter 7, below, distinguishing statehood, sovereignty and democracy from one another. But cf. Bartelson, *A Genealogy of Sovereignty*, p. 24, where the author argues that sovereignty constitutes the state:

To sum up, the ontological primacy accorded to the state in international political theory implies the givenness of sovereignty as its defining property; sovereignty signifies what is inside the state, either constituted by the fall from a primordial unity [international society], or simply taken for granted at the level of definition. In either case, sovereignty is constituted as a primitive presence from which all theorizing necessarily must depart, if it is to remain international political theorizing.

52 See Chapters 4 (democracy and legitimacy) and 6 (sovereignty and normativity), below.


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recent legal philosophers such as Herbert Hart have decisively rejected Austinian command-driven models of obedience to law in favour of internally-supported, self-perpetuating models.\textsuperscript{54} Hoffman himself recognises several difficulties in linking legitimacy to the definition of statehood, and yet he only explores the conflict between legitimacy and force—i.e., that use of force requires legitimacy, but force itself is always illegitimate. ‘Legitimacy’ in the sense that Hoffman uses it is related to obedience of hierarchically superior orders and thus fits well within the definition of the state. But as will be illustrated when looking at the recent European practice related to recognition of states, in Chapter 10, sovereignty and legitimacy may be linked at the international level in a very different manner. The legitimacy of a sovereignty-applicant may be judged by other sovereign states on the basis of criteria very different from the territorial monopoly of force, including such criteria as respect for human rights, adherence to the rule of law, and the existence of democratic processes and institutions.

Having deepened our understanding of the notion of the state, let us look at some of the challenges it faces as a result of two recent developments, namely, the processes of globalisation and the increases in non-state international actors.

\section*{II. LIMITATIONS ON THE STATE}

In the conclusion to his historical work explaining the factors leading to the selection of the state, \textit{The Sovereign State and Its Competitors}, Spruyt critically examines some of the challenges it faces today. He states:

Indeed, the very future of the sovereign state may be questioned. Global ecological problems, international financial transactions, unprecedented human migration, the potentially disastrous effects of nuclear force, and growing economic interdependence cast doubts upon the sovereign, territorial state as the system of rule most appropriate to deal with such issues. If nuclear weapons have made the territorial state less relevant, then the same might be said of financial institutions which move vast amounts of capital worldwide in the blink of an eye. “Modern global banking, and the new international economic realities it has created, challenges the world’s political systems.” Such international financial intermediation has multiplied a

\textsuperscript{54} See Hart, \textit{The Concept of Law}, ch. 4, for his explanation of the ‘internal aspect’ of rules and our acceptance of legal rules without need for immediate, active coercion or threat of coercion. Hart’s theory works against the older ‘command theory’ of law espoused by John Austin in his 19th Century work, \textit{The Province of Jurisprudence Determined}. In the latter text, at p. 165, Austin argues that “[e]very positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.” See also, \textit{ibid.}, pp. 172 and 188-91. For more recent theories of law as an at least partly self-referential system, see Neil MacCormick and Ota Weinberger, \textit{An Institutional Theory of Law: New Approaches To Legal Positivism} (Dordrecht: Kluwer Academic, 1986), Emelios A. Christodoulidis, \textit{Law and Reflexive Politics} (Dordrecht: Kluwer Academic, 1998) [also critiquing such theories].
hundredfold in less than twenty years. "Offshore production" and "joint ventures" can barely capture the nonstate centric nature of modern manufacture. Multinationals know no boundaries. Trade has also increasingly become the movement of services rather than exclusively material commodities.55

Spruyt’s summary of the challenges to sovereign statehood raises clear questions about the continued relevance of the state as an international institution. I will examine many of these factors when looking at the process of globalisation and its effects upon the state.

Spruyt’s overall conclusion about these challenges, however, a conclusion I share, is that even if such challenges may eventually precipitate institutional change away from the sovereign state, nonetheless at present, and for some time to come, the state will retain its pivotal position. Simply put, no alternative institutional model to the state exists. In agreeing with this general conclusion in favour of the continuing validity of the state, it is nonetheless important to examine more closely some of the challenges of globalisation. This is because even though they have not displaced the institutional role of the state, some of these developments remove areas from its exclusive competence, or at least alter the manner in which it may exercise its powers. Let us first define globalisation, then closely examine its effects.56

'Globalisation' is the amorphous process that can be defined as the increasing interconnectedness of the states and peoples of the world, manifested in both the quantity and quality of interaction, as well as in the political, economic and social consequences of that process.57 David Held describes the concept in spatial terms:

Globalization is best understood as a spatial phenomenon, lying on a continuum with 'the local' at one end and 'the global' at the other. It denotes a shift in the spatial form of human organization and activity to transcontinental or interregional patterns of activity, interaction and the exercise of power. It involves a stretching and deepening of social relations and institutions across space and time such that, on the one hand, day-to-day activities are increasingly influenced by events happening on the other side of

Spruyt, The Sovereign State and Its Competitors, p. 183 (citations omitted).

56 The following discussion of the effects of globalisation relies heavily upon two works: David Held's "Democracy and Globalisation," and Susan Strange's The Retreat of the State. However, Held's focus is upon how these developments challenge the suitability of democracy, whereas my focus at this point is narrower, upon how these developments challenge the state.

57 David Held, places emphasis upon both the scope and intensity of interregional and intercontinental interaction in his piece "Democracy and Globalisation," at p. 13. Susan Marks, in The Riddle of All Constitutions, at p. 76, discusses the various meanings of the term "globalisation" and quotes Anthony Giddens' definition, which describes the process as the "intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa" [citing: A. Giddens, The Consequences of Modernity (Cambridge: Polity Press, 1990), p. 64].
the globe and, on the other, the practices and decisions of local groups or communities can have significant global reverberations.\textsuperscript{58}

The processes of globalisation affect everyone, from the wealthy Western employer to the sub-Saharan worker. But their impact is uneven. A farmer in the developing world, for example, may be profoundly influenced by globalisation yet at the same time have no control over its processes. Held characterises this feature of globalisation as one of differential access to power.\textsuperscript{59} Differential access to power has clear implications for the effectiveness of statehood and democracy, as both concepts become meaningless if they do not allow their populations to control some aspects of their lives.

Certain developments brought about by globalisation have been argued to impact significantly upon the sovereign, democratic state. I will examine some of these changes under the following four general categories: (a) economic, (b) cultural and communication related, (c) environmental, and (d) force related.

A. **ECONOMIC**

Global developments have challenged the ability of sovereign states to facilitate, or even to have an impact upon, the international economy or their own economies. Susan Strange, for example, goes so far as to argue that in crucial areas the roles played by states and markets have been reversed: "Where states were once the masters of markets, now it is the markets which, on many crucial issues, are the masters over the governments of states."\textsuperscript{60} The state’s loss of control over the economy, whether national or international, affects its ability to manage its own development. Although economic difficulties, \textit{per se}, are not a challenge to the conception of the state expressed in the \textit{Montevideo Convention}, a state’s inability to exert control over this area may lead to difficulties with one of the \textit{Convention} requirements, namely, the ability to govern.\textsuperscript{61} Let us examine some of the impacts of

\textsuperscript{58} Held, “Democracy and Globalisation,” p. 13 (also citing Giddens, \textit{supra}).

\textsuperscript{59} Held, ibid., at p. 14, states:

What often differentiates [the position of those who live on the margins of central power structures] from what some have called the new ‘cosmopolitan elite’ is differential, unequal and uneven access to the dominant organizations, institutions and processes of the new emerging global order.

\textsuperscript{60} Strange, \textit{The Retreat of the State}, p. 4. This is a central argument to her work, as she states earlier on the same page:

The argument put forward is that the impersonal forces of world markets, integrated over the postwar period more by private enterprise in finance, industry and trade than by the cooperative decisions of governments, are now more powerful than the states to whom ultimate political authority over society and economy is supposed to belong.

\textsuperscript{61} This is a difficult point to make directly, since the most recent examples of failed economies, such as those of the former USSR, Yugoslavia and Albania, all seem to have \textit{followed} failed governance. As will be developed below, however, there is evidence that the underground economies which yield increased power to criminal groups challenge the state’s ability to govern. See generally, Strange, \textit{ibid.}, ch. 8.
economic globalisation upon the state, focusing upon those related to trade, finance, economic development, and the role of transnational corporations.

1. Trade

International trade levels have dramatically increased and such trade is less susceptible to state control. World trade has increased in scope, now being both intra- and interregional in form. Many states can no longer unilaterally determine trade levels, since international and regional bodies, from the World Trade Organisation to CARICOM, require them to reduce their traditional tariff and quota barriers. National attempts to exert control over imports have not been successful, as seen in the failed attempts of Americans and Europeans to protect their own markets from Asian trade. In the assessment of Susan Strange, the ability of states to control trade is marginal: “while the major changes in trade are finance-driven and demand and supply determined, government intervention can have some effect on trade-flows—but only at the margins.” The result of unrestricted trade is that a state becomes unable to protect and develop its own industries in the face of strong foreign competition.

2. Finance

Increases in global financial activity are equally striking, with the current foreign exchange turnover being without precedent. Financial activity has changed in quality as well as quantity, since much of it today is speculative in nature. In addition, the liberalisation of capital markets has created “a more integrated financial system than has ever been known.” These changes have had significant impact upon states, making entire economies susceptible to “rapid and dramatic shifts in [their] effective valuation.” The traditional role

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62 Although international trade levels may not appear to have significantly increased—only recently, for example, reaching the same levels as those existing 1914—if we compare trade levels to the gross domestic product of states the picture becomes clearer. David Held, in “Democracy and Globalisation,” at p. 15, argues that “using constant price data, it can be shown that the proportion of trade to gross domestic product (trade-GDP ratios) surpassed that of the gold standard era (that is, the period 1875-1914) by the early 1970s, and was considerably higher by the late 1970s and 1980s.” Recent trade levels become even more significant—increasing by as much as a third—if we remove government expenditure from our calculations and focus upon trade in relation to national economic activity. *Ibid.*

63 Strange, in *The Retreat of the State*, at p. 78, comments that “Since the late 1970s, there has been increased protectionist intervention in defence of American and European markets against Asian imports. Yet Asian imports and world trade continued year on year to rise.” The exception occurred during the debt crisis for developing and socialist countries, during which period their credit (and hence demand) dried up: *ibid.*


65 Held, “Democracy and Globalisation,” at p. 15, states: “The expansion of global financial flows around the world has been staggering in the last ten to fifteen years. Foreign exchange turnover is now over a trillion dollars a day. The volume of turnover of bonds, securities and other assets on a daily basis is without precedent.”


of states in maintaining the value of their currencies has been eroded. Many states have either pegged their currency to a foreign one, actually use foreign currencies, or have created a common regional currency. As a consequence, it is increasingly difficult for states to pursue independent monetary policies.

3. Economic Development

The ability of states to determine their own form of economic development also has been challenged by global economic processes. States are constrained in their ability to choose their preferred form of political-economic system. The convergence in economic forms towards liberal free market capitalism (and away from communism) has been striking over the last quarter century. Few states are willing or able to maintain alternative systems. Even within the confines of the capitalist system, states are restricted with respect to some of their economic choices. States cannot, or will not, independently attempt to correct economic booms and slumps with Keynesian counter-cyclical measures. The welfare safety net provided by the state seems to have reached, if not overreached, its limit. The taxing ability of the state is challenged by alternative taxing entities (criminal organisations and transnational corporations), as well as is eroded by the availability of foreign tax havens. The ability of the state to provide and maintain its economic infrastructure has been frustrated by the changes in form of that infrastructure: from ports, roads, posts and telegraphs, to modern telecommunication. This latter, modern form of infrastructure by and large is under the control of private corporations, sometimes even foreign or transnational ones, rather than the state. Other, more indirect forms of internal economic control, such as the state's

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68 See, e.g., Strange, The Retreat of the State, pp. 73-4. Some states, such as Barbados, peg their currency to the US dollar. France and Belgium linked their currencies firmly to the Deutschemark at the end of the 20th C: ibid., p. 74. Other states use foreign currencies rather than print their own currency—e.g., Andorra uses French and Spanish currency and Ecuador uses the US dollar. See, e.g., “Ecuador drifts between opportunity and deadlock,” The Economist (Dec. 21, 2000), as available at http://www.economist.com/displayStory.cfm?Story_ID=459282 (accessed 2 May 2001). Regional currencies also exist, such as the Euro for twelve Member States of the European Union and the Eastern Caribbean Dollar for the Member States of the Organisation of Eastern Caribbean States (with the exception of the British Virgin Islands, which uses the US dollar). The twelve EU Member States participating in the common currency as of May 2001, were Belgium, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, The Netherlands, Austria, Portugal, and Finland. European Union, “Participating Member States,” as available at http://europa.eu.int/euro/html/rubrique-participating5.html?lang=5&rubrique=218 (accessed 2 May 2001).

69 Held, “Democracy and Globalisation,” p. 16 (noting that these developments impact upon the ability of domestic political parties to adopt different or unique economic policies).

70 Strange, The Retreat of the State, pp. 74-5.

71 Ibid., pp. 75-6.

72 Ibid., pp. 76-77.

73 Ibid., p. 77.

74 Ibid., pp. 79-80. The telecommunications infrastructure in Barbados (and most of the Caribbean), for example, is controlled by Cable and Wireless—an overseas, British company.
previous ability to nurture local ‘champions’ (strong national monopolies), have fallen by the wayside as a result of global competition. The ability of the state to choose and promote a unique form of economic development has been greatly eroded.

4. Role of Transnational Corporations

As the economic power of the state has declined, the economic power of other actors has increased. Multinational or transnational corporations have become especially important in this regard for several reasons. Firstly, such corporations have become incredibly powerful. They control greater resources than many sovereign states. Transnational corporations account for “a quarter to a third of world output, 70 per cent of world trade and 80 per cent of direct international investment.” Secondly, in order to protect themselves from changing market conditions, transnational corporations have developed the capacity for high mobility. They now possess numerous ‘exit’ options, especially as related to capital and finance, that allow them to minimise the effects of weak or unstable markets. This capability makes them increasingly independent of states. Thirdly, transnational corporations have grown in number. Many ordinary corporations have become transnational in nature for the simple reason that the market itself has become global. Susan Strange explains this as follows:

[The change in the production structure of the world economy] is not so much the emergence of the ‘multinationals’ so-called—they have been around for a long time; it has been the change from production mostly designed and destined for one local or national market, to production mostly designed and destined for a world market, or at least for several national markets. In short, it is not the enterprises that are multinational. (The word has always been a misnomer, anyway.) It is the market. Production for the larger world market has transformed innumerable national or local enterprises into transnational corporations (TNCs).

75 Strange, in ibid., at pp. 80-81, provides examples of the collapse of South African and European monopolies as a result of global competition and change in national policies. To this list could be added the difficulties experienced by the European Union with such publicly supported ‘champions’ as Airbus, which is likely to face challenges before the WTO. See, e.g., “Super-jumbo trade war ahead—The Americans have Airbus subsidies in their sights again and will challenge them at the World Trade Organisation,” The Economist (May 4, 2000), as available at http://www.economist.com/displayStory.cfm?Story_ID=306381 (accessed 2 May 2001).

76 Held, “Democracy and Globalisation,” p. 17. For a more detailed analysis of the position of transnational corporations see Strange, The Retreat of the State, pp. 46-54. Notice that even though a substantial percentage of the profits of these corporations is generated domestically, this is largely due to the unique domestic market of the United States, which is the home of most of these companies. The proportion of profits generated domestically for non-US multinationals is much lower. See, e.g., Held, supra, p. 17.

77 Cf. Held, ibid., p. 18.

78 Strange, The Retreat of the State, p. 44. Strange also dedicates an entire chapter of her work to examine the role of cartels, arguing that they merit further study. Strange asserts that modern (and perhaps traditional) cartels exist and exert significant power even if they are harder to identify because of their sophistication, informality, innovative methods of maintaining dominance (such as by simply not sharing technology outside of their group), and general secrecy. Ibid., ch. 11.
Fourthly, these corporations have encroached upon certain traditional domains of state power. They challenge the state’s abilities to exert control over industry, to re-distribute wealth globally, to resolve labour conflicts and to collect taxes. All four developments pose a challenge to the ability of the state to control or regulate its national and international economic affairs. They also pose a challenge to the state’s ability to be the primary international actor in such areas.

The increased independence of corporations from their states of nationality is also noticeable from an international legal perspective. All corporations, including transnational ones, must have a national identity linked with a particular state. A corporation is deemed to be a national of the state “under the laws of which it is incorporated and in whose territory it has its registered office.” In the past only the state of nationality could provide protection at the international level for these corporations. Such diplomatic protection of corporations by their state of nationality of course remains an available remedy today. However, the point is

79 Strange, in ibid., at p. 54, summarises:

“[T]here is evidence to support four major hypotheses. All of them sustain the argument that TNCs have come to play a significant role in determining who-gets-what in the world system. The first is that states collectively have retreated from their former participation in the ownership and control over industry, services and trade, and even from the direction of research and innovation in technology. On the maxim continuum of state/non-state decision-making over what is produced, how, by whom and where, the median line can be said to have moved from left to right.

The second hypothesis is that TNCs have done more than states and international aid organisations in the last decade to redistribute wealth from the developed industrialised countries to the poorer developing ones. Investment and trade have created many more jobs and done more to raise peoples’ living standards than official aid programmes.

The third hypothesis is that in the important area of labour-management relations, TNCs have come to take away from governments the major role in resolving or at least managing, conflicts of interest. And the fourth is that in fiscal matters, firms have increasingly escaped the taxation of corporate profits by governments and themselves are in some respects acting as tax-farmers and collectors of revenues.

See further, ibid., pp. 54-65.


81 The case of Barcelona Traction, Light and Power Company, Limited, ibid., helps to explain the reasons why corporations may not be satisfied with leaving such claims to the sole discretion of their states of nationality. In this case Belgium tried to bring a claim on behalf of its nationals, who were the majority shareholders of the Barcelona Traction Light and Power Company, because the company’s state of nationality, Canada, declined to pursue the claim. The International Court of Justice upheld the exclusive right of the state of nationality (Canada) to bring claims on behalf of a corporation unless one of three exceptions was applicable: (1) the company had ceased to exist, (2) the company’s national state lacked the capacity to take action on its behalf, or perhaps (3) where considerations of equity require a court to allow the state of nationality of the shareholders to bring the claim. Ibid., pp. 40 (para. 64) and 48 (para. 92). Even though the Barcelona Traction Light and Power Company had lost all of its assets in Spain and had been placed in receivership in Canada, it had not ceased to exist. Ibid., pp. 40-41 (para. 65-7). Nor had Canada, under whose laws it had been incorporated and in whose territory it had its registered head office, lost capacity to bring a claim. Ibid., pp. 41-44 (para. 69-77). Rather, Canada, in its sovereign discretion, had discontinued its espousal of the claim of its own free will. Ibid., p. 44 (para. 77). The third exception was inapplicable. Ibid., p. 48 (para. 92). As a result, Belgium was unable to espouse the claim and the company and its shareholders were left to pursue whatever remedies might be available in Spanish municipal law. Ibid., pp. 44 (para. 78) and 50 (para. 101).
that it is no longer their only one. It has been supplemented by international arbitral and other processes, which increasingly allow corporations to bring claims directly against foreign states. A parallel development has been the way that the contracts being entered into between corporations and states are moving from the sphere of domestic law to that of international law. These contracts frequently stipulate that they are to be governed by rules of international law, rather than domestic legal rules, and thus become “internationalised” in nature. All of these developments tend to shift power and competence from the state to transnational corporations, again reducing the role of the former as the primary actor in the international economic sphere.

B. CULTURAL AND COMMUNICATION RELATED

The global spread of certain forms of culture, primarily as a result of changes in communication technology, has had a significant impact upon the state. Today no state can exist in splendid isolation. The dominance of English speaking culture and media is profound. The English language has assumed a near monopoly in the elite spheres of business, computing, law, science and politics. American and European multinational media conglomerates reach all corners of the globe, projecting programming on a transnational basis. Telecommunications have been profoundly internationalised and globalised, to the extent that most of the world is readily accessible by telephone as well as connected to the Internet. Even though these developments have not entailed the abolition of local cultures in favour of a single, global, media-led one, their impact upon citizens and states has been significant. As summarised by David Held:

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82 A case in which the state of nationality of the shareholders, Britain, was allowed to pursue a claim on their behalf was that of the Mexican Eagle Co. Case, Cmd. 5758, p. 9. This case may be said to fall under the third exception mentioned in the Barcelona Traction Case, above, since the state of nationality of the Mexican Eagle Co.—Mexico—was the very same state that injured it. In such a case equity may empower the state of nationality of the shareholders to bring the claim.

83 Several tribunals allow individuals or corporations locus standi to bring claims against states. Prominent recent examples include the Iran-U.S. Claims Tribunal and the International Centre for the Settlement of Investment Disputes (ICSID). See, e.g., Malamezuk, Akehurst’s Modern Introduction to International Law, 7th ed., pp. 38-9 and 293-8; Higgins, Problems and Process, pp. 54-55. ICSID decisions are frequently summarised in International Law in Brief, an on-line publication compiled by the editors of International Legal Materials, which is available at http://www.asil.org/ilibindx.htm. Note that only states can appear before the International Court of Justice, and so corporations do not have standing there: Art. 34(1), Statute of the International Court of Justice (1945).

84 Contracts between corporations and states may be “internationalised” (made subject to the rules of international law), if for example, they are interpretable with reference to “general principles of law,” or subject to international arbitration, or are economic development agreements: Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Libya (1977) 53 I.L.R. 389, at pp. 452-57 (paras. 40-45).


86 Cf. ibid., p. 18.
Citizens’ values and judgements are now influenced by a complex web of national, international and global cultural exchange. The capacity of national political leaders to sustain a national culture has become more difficult. For example, China sought to restrict access and use of the Internet, but found it extremely difficult to do so.\(^87\)

When states can no longer influence such cultural and communications-related developments, they lose their potential to be the primary *locus* for formation of national culture and identity.

Such challenges have not gone unnoticed. Recently states have attempted to re-assert control over both their cultural and communications-related development. The states meeting at the Third Summit of the Americas in Quebec in April 2001,\(^88\) for example, recognised the implications of communication to economic development and broader social and human rights issues in their special final declaration entitled “Connecting the Americas.”\(^89\) This declaration establishes a “Connectivity Agenda for the Americas,” which aims to promote “the development of the telecommunications infrastructure needed to support and enhance all sectors of society and the economy and [seeks] to provide affordable universal access.”\(^90\) The states of the region, with the exception of Cuba,\(^91\) intend to accomplish these goals by establishing a regulatory framework that will encourage greater investment in information and


\(^{88}\) The “Summits” of the Americas are international meetings between states in the hemisphere, including the Member States of the Organisation of American States, as well as other relevant regional and international actors. The Third Summit of the Americas “Summit of Americas 2001: Background” web page, as available at [http://www.americascanada.org/eventsummit/document/background-e.asp](http://www.americascanada.org/eventsummit/document/background-e.asp) (accessed 1 May 2001), describes the rationale behind the creation of the summit process as follows:

The new system of cooperation between the countries of the Americas meant a change in the traditional structure of inter-American cooperation from one focused on communications through the Organization of American States (OAS), to a new expanded system that enveloped the OAS, other international organizations—such as the Inter-American Development Bank (IDB) and the UN Economic Commission on Latin America and the Caribbean (ECLAC), and members of civil society, including public-private partnerships.


We, the democratically elected Heads of State and Government of the Americas, meeting in Quebec City, recognize that a technological revolution is unfolding and that our region is entering a new economy, one defined by a vastly enhanced capacity to access knowledge and to improve flows of information. We are convinced that the promotion of a Connectivity Agenda for the Americas will facilitate the beneficial integration of the hemisphere into an increasingly knowledge-based society. We share the goal of providing all citizens of the Americas with the opportunity to develop the tools to access and share knowledge that will allow them to fully seize opportunities to strengthen democracy, create prosperity and realize their human potential. Connectivity will open new opportunities to our society in all areas, for which equal access and appropriate training are necessary.

\(^{90}\) *Ibid.*

\(^{91}\) The only state from the region excluded from the Third Summit, reportedly for its non-democratic political system, was Cuba: Third Summit of the Americas, “Countries,” as available at [http://www.americascanada.org/countries/menu-e.asp](http://www.americascanada.org/countries/menu-e.asp) (accessed 1 May 2001). The latter page notes that “by resolution of the Eighth Meeting of Consultation of Ministers of Foreign Affairs (1962) the current Government of Cuba is excluded from participation in the OAS.”
communications technology, in part by strengthening and promoting "free and fair competition in all telecommunications services."92 A separate declaration of the Summit describes one of the institutional mechanisms that will help implement the "Connectivity Agenda," namely, the Institute for Connectivity in the Americas.93 This Institute is a Canadian initiative whose goal is to "support the Summit themes of strengthening democracy, creating prosperity and realizing human potential through the use of information and communications technology."94

These Summit of the Americas initiatives represent an attempt by the states of the region to harness and encourage communications-related developments. This can be contrasted with the strategies of other states, such as China, which have attempted to suppress or greatly restrict these developments (e.g., China's attempt to control use of the Internet). It will be interesting to see whether, aside from their numerous other goals, the states participating in the Summit of the Americas process will be able to achieve the sixth goal of the Institute, that of enhancing cultural diversity.95 If these states are able to promote and use English-speaking media and international communications technology, and at the same time preserve their linguistic and cultural identities, then this initiative will indeed represent a startling counter-trend to the general pattern of loss of control by states over such areas.

C. ENVIRONMENTAL

Environmental problems perhaps most dramatically reveal the substantial interconnections that have developed through globalisation. The shared nature of the world's ecosystem is evident when we try to address such things as global warming and ozone depletion. These difficulties simply cannot be overcome without international co-operation. Recognising this, states have entered into an increasing number of treaties to govern these and related environmental areas.96 Ongoing, more localised, environmental difficulties are caused


94 Ibid. The Institute has seven main "Priority Themes": [1] strengthening democracy and good governance, promoting human rights (including justice and the rule of law), labour and the protection of children, and development of civil society; [2] creating equitable economic development; [3] managing environmental issues and disaster assistance; [4] promoting social development, including health and education; [5] promoting gender equality; [6] enhancing cultural diversity, including protecting the traditional knowledge and cultural practices of Indigenous peoples; and [7] the goals expressed in the Summit statement 'Connecting the Americas.' It intends to address these themes by establishing various networks and linkages between national institutions, experts, cultural institutions, local communities and the youth of the region.

95 Ibid.

96 A large number of treaties have emerged in the last two decades that deal with environmental concerns. A sample of some of the more well-known ones include (in rough chronological order), the: Convention on
by humankind’s demographic expansion and increased resource consumption. Such factors have produced increased deforestation and desertification. Other problems have little respect for international boundaries and may easily harm neighbouring populations. Industrial and other forms of pollution may cause transboundary environmental destruction. Radiation leakage from decaying nuclear reactors represents the most extreme form of such transboundary environmental harm.97 Interestingly, the global impact of environmental problems has in turn generated a global response. Environmental movements attempt to attract regional or even global membership, and do not limit their energies to domestic issues.98 In sum, environmental problems pose challenges to the state’s ability to control its territorial composition (i.e., desertification), as well as to its general authority over that territory.

D. FORCE RELATED

Statehood requires effective government. In order to be effective, that government must be able to defend the state, both from internal and external aggression. Changes in the available forms of force over the last fifty years challenge the ability of states to fulfil this defensive role.99 Three important changes in the modalities of force at the international level are those regarding the forms of weaponry, the tendency towards multilateral rather than unilateral force, and changes in warfare generally.

1. Weapons of Mass Destruction

Weapons of mass destruction such as chemical, biological and nuclear weapons are of an entirely different character than conventional weapons because their effects are neither territorially or chronologically restricted. The harmful effects of biological and nuclear weapons may be carried by winds and ocean currents far beyond their intended target and the radioactive

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98 Cf. ibid., pp. 19-20.
99 Cf. ibid., pp. 20-21.
residue of nuclear weapons may be harmful for generations to come. Both types of weapons can be assembled by many states, perhaps even individuals, in relative secrecy. These changes in the form of force available to states and other actors undermine the ability of each state to be able to claim to protect its citizens from external aggression. In recognition of this fact some states have abdicated, or effectively abdicated, a defensive military role.

2. Multilateral Arrangements

There also have been changes related to the kinds of actors that may use internationally significant force. States have moved away from unilateral and towards collective, multilateral uses of force. Collective defensive arrangements existed before and during the Cold War, but due to the nuclear stalemate were rarely put to use. Since the end of the Cold War, however, increasing resort has been made to such arrangements, both internationally (UN actions in

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101 Despite modern surveillance techniques the international community may still occasionally be surprised, as was demonstrated by the reactions of several states to India's underground nuclear tests in 1998. For a very brief synopsis of the legal implications of this event see Frederic L. Kirgis, "India's Nuclear Tests," ASIL Insight, May 1998, as available at http://www.asil.org/insight18.htm (accessed 29 April 2001).

102 If any nuclear state can destroy another state with a single, surprise nuclear strike, then it becomes difficult for a state to be able to claim to fulfil this primary, defensive role. Strange, in The Retreat of the State, at p. 8, explains that since the Cold War people have come to understand their relative helplessness in terms of defence, with the consequent removal of one of the primary rationales for the existence of the state:

After the paradoxical long peace of the Cold War, confidence began to wane that the state could, by a defensive strategy, prevent [nuclear war from] happening. Either it would or it wouldn't, and governments could do little to alter the probabilities. Thus, technology had undermined one of the primary reasons for the existence of the state—its capacity to repel attack by others, its responsibility for what Adam Smith called "the defence of the realm."

103 Several states have never had, or no longer have, independent defensive military capacities, including: Andorra (defence is the responsibility of France and Spain), the Federated States of Micronesia (a sovereign, self-governing state in free association with the US, which is totally dependent on the US for its defence), Iceland (no regular armed forces, but with a Police and Coast Guard; Iceland’s defence is provided by the US-manned Icelandic Defense Force, headquartered at Keflavik), Liechtenstein (defence is the responsibility of Switzerland), Monaco (defence is the responsibility of France, Niue (self-governing state in free association with New Zealand, which is responsible for defence), Palau (in free association with the US, which is responsible for defence), Vatican City (defence is the responsibility of Italy, Swiss Papal Guards are posted at entrances to the Vatican City). Some small states only have police forces, which can be used for limited defensive or interdiction capabilities (i.e., including a ‘Coast Guard’ component). These include: Antigua and Barbuda, The Bahamas, Dominica, Grenada, Kiribati, Maldives (the "National Security Service" is classified as a paramilitary police force), Marshall Islands, Nauru, St. Lucia, Saint Vincent and the Grenadines, Samoa, San Marino (police, with a Voluntary Military Force), Solomon Islands (no regular military forces, but there is a Solomon Islands National Reconnaissance and Surveillance Force and the Royal Solomon Islands Police), Tuvalu, Vanuatu (no regular military forces, but the Vanuatu Police Force includes the paramilitary Vanuatu Mobile Force). The above list was compiled from statistics available in the Central Intelligence Agency’s (US), World Factbook 2000, available online at http://www.cia.gov/cia/publications/factbook (accessed 25 April 2001). See also, Crawford, "Islands as Sovereign Nations," pp. 288-89 (commenting that most small island states have "no defence" against a predatory external attack by another state, it "being both futile and even counterproductive to seek to acquire such a defence").
Kuwait) and regionally (NATO actions in Kosovo). Such developments are interesting because they reveal the reluctance on the part of states to engage in unilateral military intervention in foreign territories. This reluctance largely may be based upon the restrictions that modern international law places on the use of force. But it also reflects practical necessities, in a world where states may no longer be militarily self-sufficient. In Mary Kaldor's view, "[n]o European country any longer has the capacity to fight a sustained war independently."106 Weapons production and distribution processes, for example, are transnational and international in nature. As a result, most states no longer have comprehensive independent military capacities.107

3. Changes in Warfare

The third change is regarding the type of warfare. All-out, full scale conflicts such as those of the First and Second World War were prevented during the Cold War period where mutually hostile blocs existed in a state of perpetual hostility and détente. A few state-to-state wars took place during that period, but these tended to be limited in scope (if not duration) as a result of the intervention of the US and USSR. More recent conflicts, on the other hand, involve new patterns of violence. Kaldor, for example, comments that whereas "[a]ll wars are

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108 Most Cold War conflicts were characterised as ‘internal’ in nature, even though some served as proxy battlefields for Cold War antagonists. See, e.g., Kaldor, "Reconceptualizing Organized Violence," pp. 95-6.
destructive in societal terms ... this is generally considered to be a consequence or by-product of military activities; in contrast, recent wars appear to be aimed at societal destruction."\textsuperscript{109}

The numbers of civilian casualties and refugees produced by recent conflicts have risen dramatically, as has the frequency of use of ‘ethnic cleansing’ as a tool of warfare.\textsuperscript{110} Recent conflicts also tend to be characterised by their ‘unending’ character, in that they do not result in decisive conclusions.\textsuperscript{111}

Kaldor explains five significant differences between the new types of warfare and the more traditional ones. These are the differences related to (1) the nature of the actors, (2) the goals of warfare, (3) the mode of warfare, (4) the character of the war economy, and (5) the role of external support. Let us look briefly at each. Firstly, the nature of the actors has changed, with new, non-state elements being involved in modern warfare. These new actors diminish the ability of the state to control the conduct of the war, often appearing at the moment the state is at its weakest and leading to rising levels of organised crime and ready availability of weapons.\textsuperscript{112} Secondly, the goals of warfare have changed to “identity politics—the capture of power by particular groups defined in terms of identity (racial, ethnic, religious, tribal, linguistic, etc.) and/or the exclusion or expulsion of other groups.”\textsuperscript{113} Modern wars also may be financed by organised criminal elements and this changes both the nature of the warfare (i.e., conflicts being prolonged by the actors involved in order to sustain criminal profit margins), and the public perception and support for the campaign.\textsuperscript{114} Such factors appear to

\textsuperscript{109} Ibid., p. 96.

\textsuperscript{110} Ibid., pp. 96-7.

\textsuperscript{111} As summarised by Kaldor, in ibid., at p. 97: “[u]nlike earlier wars, which were contained in time and tended to end in victory or defeat, few recent wars have had decisive endings; even where cease-fires are declared, they tend to usher in uneasy periods of low-level violence, neither war nor peace.”

\textsuperscript{112} Ibid., p. 98. The effect of these actors may be made more damaging because they become involved in wars following the disintegration or erosion of state structures, including the fragmentation of armies and police forces. The role played by these non-state (or in some cases, ex-state) actors—including international criminal organisations (Mafia), paramilitary groups, mercenaries, and ex-military personnel—has become significant. Some of these actors are transnational or even international in nature, and their conduct now transcends normal categories. Mercenaries, for example, are no longer hired solely for battle campaigns. They now may be hired to commit acts of terrorism or to help in the trafficking of illegal weapons and drugs. E.g., in a report on a meeting of experts on mercenaries the United Nations High Commissioner for Human Rights stated:

103. Among the types of mercenary activities are the traditional ones, including direct hiring of individuals with military experience for use in armed conflicts or in criminal activities in the interest of parties who have hired them. Another type of activity involving mercenaries is terrorist acts, illegal arms and drug trafficking. Lastly, there are the modern multipurpose security corporations which may include forms of military service provided by mercenaries.


\textsuperscript{113} Kaldor, “Reconceptualizing Organized Violence,” pp. 98-99. In the past, as noted by Kaldor, wars tended to be “justified in terms of geopolitical interest or in terms of some universalizing mission.”

\textsuperscript{114} The goals of modern conflicts are complicated by the methods chosen to finance them, including organised forms of criminal activity such as “robbery, kidnapping for ransom, illegal trading in drugs and arms,
have decreased the willingness of citizens to participate in any form of foreign military activity on behalf of their state.\textsuperscript{115} Thirdly, the mode of warfare has been altered, both in terms of the methods of combat and targets chosen. Hierarchical, relatively well-disciplined military forces have been replaced by paramilitary units and other actors, and ‘collateral damage’ is now maximised rather than minimised.\textsuperscript{116} Kaldor suggests that the resulting military atrocities are not the by-product of chaos or disorganisation, but rather are systematic, ‘rational’ mechanisms used to accomplish specific goals.\textsuperscript{117} Fourthly, the character of the war economy has changed from the extreme economic mobilisation of all-out wars (such as the two World Wars), to recent situations in which the state's formal economy has disintegrated.\textsuperscript{118} Such economic difficulties pose problems for attempts to end the conflict, since even if the hostilities formally end (e.g., under a cease-fire), the underlying economic tendencies that fuelled the beginning and continuation of the conflict may keep the state in a ‘near-war’ status.\textsuperscript{119} Finally, the role of external support for conflicts has changed. Such support no longer

counterfeiting money, protection rackets and running unlicensed bars and casinos.” \textit{Ibid.}, p. 98 (citations omitted). In addition, just as the rapid dissolution of a state’s military may make it difficult to distinguish between military and paramilitary forces, in a similar manner the criminal activity of a paramilitary force may make it difficult to distinguish between paramilitary and criminal actors: \textit{ibid.}, pp. 98-99. Some revolutionary forces simply became criminal organisations over time, as did the Chinese triads. E.g., Strange, in \textit{The Retreat of the State}, at p. 111, notes that the “Chinese Triads were founded three centuries ago with the express aim of fighting the foreign Ch’ing dynasty and restoring the Mings, even though today their political purpose is forgotten” (citation omitted).

\textsuperscript{115} It would be difficult to ascribe a causal connection here. But it should be noticed that recently, as ‘traditional’ wars (such as those involving conquests of foreign lands or defending territory from foreign invasion), are becoming less common citizens are becoming more reluctant to participate in warfare overall. The combination of permanent professional armies and an increasing perception that risk of foreign invasion has been minimised, both influence citizens to no longer feel a heightened sense of obligation to their state. This public reluctance has grown to the point where the civilian population of a state may even be reticent about sending professional soldiers to foreign conflicts.

\textsuperscript{116} Kaldor, in “Reconceptualizing Organized Violence,” at p. 99, explains:

Because the aim is often destabilization and population displacement rather than destruction of a clearly defined opponent, what were side-effects have become central to the mode of fighting. Conspicuous atrocity, systematic rape, hostage-taking, forced starvation and siege, destruction of religious and historic monuments, the use of shells and rockets against civilian targets, especially homes, hospitals or crowded places like markets or water sources, the use of land mines to make large areas uninhabitable: all are deliberate components of military strategy.

\textsuperscript{117} Kaldor, in \textit{ibid.}, at p. 100, points out that these conflicts are not primitive, but are modern and ‘rational’ in nature: “It is sometimes said that the new wars are a reversion to primitivism. But primitive wars were highly ritualistic and hedged in by social constraints. These wars are rational, in the sense that they apply rational thinking to the aims of war and reject normative constraints.”

\textsuperscript{118} Economic embargoes displace external markets and the internal military conflict destroys local markets. Widespread unemployment, loss of infrastructure, and loss of the elites and specialists who could support the economy, all wreak havoc on local production. Both the local populace and the war itself come to depend upon outside support for humanitarian assistance and weapons supply. See, e.g., \textit{ibid.}

\textsuperscript{119} Kaldor, in \textit{ibid.}, at pp. 100-101, explains:

Since the war accentuates the very economic tendencies which contributed to the outbreak of war, it generates additional reasons to continue the war. Even where exhaustion may establish the conditions for cease-fires, the failure to reverse some of these underlying tendencies means that war could easily break out again. Hence, it is possible to talk about large parts of the global economy that are near-war, prewar or postwar economies.
exclusively comes from allied states or allied blocs of states, but rather can come from as varied elements as a foreign diaspora, transnational commercial and criminal networks, and other foreign non-state actors, including everything from mercenary groups to humanitarian aid agencies.120 All of these external actors tend to globalise disputes in a manner different from earlier wars and directly limit the ability of the state to control the conflict.

III. RIVALS TO THE STATE

Various international actors, some new, have attracted increasing attention for the ways in which they either limit or modify state authority.121 We have already examined one form of new international organisation—the transnational corporation. Let us briefly examine other forms of non-state actors, including international organisations, non-governmental organisations (NGOs), transgovernmental actors, ‘transovereigns,’ and transnational criminal organisations.

A. INTERNATIONAL ORGANISATIONS

The exponential growth of international and regional organisations since the Second World War is striking. According to Peter Malanczuk “some 500 international organisations of very different types” exist at present.122 Regional economic, defence, and human rights-related organisations can be found in most areas of the world, and the United Nations has expanded its areas of competence by creating a number of new bodies.123 This numerical

120 Ibid., pp. 101-102. Foreign diaspora elements may exist in neighbouring states or in wealthy Western nations. They may support the conflict both financially and militarily, for example, with men who have been working in foreign countries returning to fight in the war. Transnational commercial and criminal networks both fund and supply armaments to factions. Foreign non-state actors, including mercenaries and ‘military experts’ may offer their services to both sides of the conflict. Ironically, humanitarian aid groups sometimes inadvertently fuel the conflict by feeding soldiers rather than civilians. Cf. Ibid., p. 102. It is now known, for example, that after the Rwanda genocide humanitarian aid agencies nourished both the génocidaires and civilians in the refugee camps across Rwandan borders. The inability of these agencies to disarm the paramilitary elements in these camps, or even to prevent further training and cross border raids, has been the subject of strong criticism. For a graphic, non-fiction account of the Rwandan conflict and subsequent events see Philip Gourevitch, We Wish To Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda (New York: Picador USA, 1998). For an assessment of the conflict by a special panel created by the Organisation of African Unity—the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events—see Organisation of African Unity, Rwanda: The Preventable Genocide, Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (transmitted 29 May 2000), as accessible at http://www.oau-oju.org/Document/ipep/ipep.htm (accessed 5 May 2001). Chapter 19 of the report, Ibid., examines the specific problems posed by humanitarian aid in the Kivu refugee camps in Zaire.


122 Malanczuk, Akehurst’s Modern Introduction to International Law, 7th ed., p. 94.

123 Examples of such regional organisations include the European Union (EU), the Commonwealth, the Commonwealth of Independent States (CIS), the Organisation of American States (OAS), the Caribbean Community and Common Market (CARICOM), the Organisation of Eastern Caribbean States (OECS), the Association of Caribbean States (ACS), the Organisation of African Unity (OAS), the Economic Community of
growth of organisations, when combined with their increases in their power, scope and diversity, all tend to restrict the ambit of sovereign choice.  

At the same time international and regional organisations encourage different forms of interaction, both for states and non-state actors. They have pushed states towards new forms of decision-making. For example, the unanimity principle governing decision-making in the historic League of Nations has been complemented today by majority and supra-majority voting rules in the United Nations, near-unanimity rules in the Caribbean Community, and consensus procedures in treaty-drafting processes. In addition,


Brownlie, in Principles of Public International Law, 5th ed., at p. 292, comments that the "institutional aspects of organizations of states result in an actual, as opposed to formal, qualification of the principle of sovereign equality. Thus an organization may adopt majority voting and also have a system of weighted voting; and organs may be permitted to take decisions, and even to make binding rules, without the express consent of all or any of the member states" (citations omitted). Cf. Marks, The Riddle of All Constitutions, pp. 80-81.

Art. 5(1) of the Covenant of the League of Nations (1919) stipulates that "Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting." Art. 27(2)-(3) of the Charter of the United Nations (1945) provides an example of supra-majority voting rules, stating that "2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." Art. 28(1)-(2) of the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (2001), illustrates a near-unanimity rule: "1. Save as otherwise provided in this Treaty and subject to paragraph 2 of this Article and the relevant provisions of Article 17, the Conference shall take decisions by an affirmative vote of all its members and such decisions shall be binding. 2. For the purpose of this Article abstentions shall not be construed as impairing the validity of decisions of the Conference provided that Member States constituting three-quarters of the membership of the Community, vote in favour of such decisions." The drafting process for the Third United Nations Conference on the Law of the Sea (UNCLOS III), which produced the United Nations Convention on the Law of the Sea (1982), worked by means of consensus. See, e.g., E.D. Brown, The International Law of the Sea, Vol. 1: Introductory Manual (Aldershot: Dartmouth, 1994), ch. 2. See also the sources listed in footnote 123, above, for more on the general law of international organisations, including discussions of voting rules and procedures. For a commentary on the original 1973 CARICOM Treaty, see Hans J. Geiser, Pamela Alleyne, Carroll Gajraj, Legal Problems of Caribbean Integration: A Study of the Legal Aspects of CARICOM (Leyden: Sijthoff, 1976).
international organisations such as the UN have encouraged increased contacts between the organisation and lower-level state political actors. In the United Nations Millennium Declaration, for example, the General Assembly resolved "[t]o strengthen further cooperation between the United Nations and national parliaments through their world organization, the Inter-Parliamentary Union, in various fields, including peace and security, economic and social development, international law and human rights and democracy and gender issues."126 Such a resolution is fascinating because it encourages direct interaction between the main deliberative political body of the UN and the deliberative political bodies of its Member States—skipping over each state’s executive, which is the usual point of contact for an international organisation.

The strictures and rules of these organisations also have influenced the manner in which their member states make their sovereign choices, perhaps even changing the nature of the choice itself. For example, it could be argued that both prior to and following the UN Security Council’s authorisation of ‘Operation Desert Storm’ (the Gulf War), UN Member States carefully followed the substantive and procedural requirements of Chapter VII of the UN Charter. This can be seen in the way in which the series of resolutions issued by the Security Council carefully adhered to the ‘pattern’ established in the Charter regarding Chapter VII actions.127 Following this pattern, the Security Council resolutions determined that there had been a breach of international peace and security, demanded the cessation of illegal actions by Iraq, demanded non-recognition of the illegal actions by other states, implemented economic sanctions against Iraq, enforced the embargo by air and sea, and when all of these measures were deemed insufficient, authorised Member States to use “all necessary means” (i.e., force) to stop the aggressor.128 Whether one deems such resolutions to


127 As closely, that is, as one could follow those requirements in the light of the absence of the Art. 43 agreements envisioned under the UN Charter. These agreements were supposed to have created a standby military force for the UN to draw upon in times of emergency. But no state has entered into one of these agreements in the more than half-century since the creation of the Charter, and this creates a gaping hole in the structure of Chapter VII. Arguments can be made that without these Art. 43 agreements, in the light of the other provisions of Chapter VII and later Charter articles (e.g., Art. 106), the UN should not be able to authorise force under Chapter VII. A general practice has developed, however, of considering such forcible measures permissible under the general ambit of Chapter VII (i.e., rather than as tied to a specific article). See, e.g., Alex Morrison, “The Theoretical and Practical Feasibility of a United Nations Force” (1995) 28 Cornell Int’l J. 661-72; David J. Scheffer, “United Nations Peace Operations and Prospects for a Standby Force” (1995) 28 Cornell Int’l J. 649-60. For an excellent current analysis of Security Council practice under Chapter VII, see Niels Blokker, “Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’” (2000) 11 EJIL 541-68, also available on-line at http://www.ejil.org/journal/Vol11/No3/art1.html (accessed 20 May 2001).

128 See the following United Nations Security Council Resolutions on the topic, under the heading, “The Situation Between Iraq and Kuwait”: UNSC Res. 660 (1990), (1990) 29 I.L.M. 1325 (determination of breach,
be merely a ‘smoke screen’ hiding hegemonic action by the US and UK, or takes them at closer to their face value as incremental requests, demands and determinations, the process of formulating and issuing these resolutions appears to have modified the behaviour of the states concerned. The resolutions themselves also brought an air of legitimacy for the Security Council actions, and would seem to have helped create a relative consensus amongst the Member States of the UN regarding the (at least initial) justifiability of the Gulf War.

Lengthy arguments could be made about the impact of the procedural and substantive rules of the United Nations upon state behaviour. This is not the focus of the instant work. For present purposes, it may be noted that the question of the effect of rules upon action is also a feature of the institutional law governing international organisations themselves. Not only do these rules potentially affect the relations of Member States, they also affect the relations of organs. They circumscribe the international organisations, their Member States and other international actors. They also challenge the role of the state by providing an alternative, predictable mechanism for international relations. In other words, the rules regulating international organisations help to foster the kind of stability and predictability that the actions of an untrammelled sovereign cannot. Thus state and non-state actors alike tend to turn to these more predictable processes when vital interests are not threatened. States will

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choose well-established dispute settlement processes, rather than abrupt, unilateral actions, where their interests are not foreclosed by those processes. This point is especially important in the area of international economic law, where private national and transnational corporations welcome the potential for predictability that may develop through rule application by bodies such as the WTO or the organs of the European Community.\textsuperscript{130} To the extent that stable and reliable mechanisms for settlement of international economic disputes exist, these are likely to be more frequently used than \textit{ad hoc} mechanisms. At the broadest level, in fact, one could argue that the predictability created by the subtle constraining effect of rules—even where no clear and effective enforcement mechanism exists—is a significant factor underlying compliance with public international law as a whole.\textsuperscript{131} In sum, international organisations challenge the state by offering alternative forms of international interaction, by restricting and channelling their action within boundaries established by rules, and by providing a predictable and stable mechanism for states and other actors to pursue their interests.

\textbf{B. NON-GOVERNMENTAL ORGANISATIONS}

Non-governmental organisations (NGOs) affect the authority of states at the international level by providing another alternative source for international action. States no longer exclusively determine the shape of international developments. Recent gatherings such as the Earth Summit in Rio de Janeiro in 1992 and the Fourth World Conference on Women in Beijing in 1995 illustrate that non-governmental organisations can substantially affect international agendas.\textsuperscript{132} This is the case even though the participation of non-state actors such as NGOs is formally based upon the consent of states. NGOs are so effective because they can develop and press for a single issue in a sustained manner. They thereby have the potential to push international law in directions in which it might not otherwise

\textsuperscript{130} Cf. Strange, \textit{The Retreat of the State}, ch. 12. Note, however, that Strange, in \textit{ibid.}, at pp. 174-6, points out that the Member States of the European Community are not united when dealing with important issues, nor have they delegated open-ended powers to Commission. Such considerations limit the predictability of the EC.

\textsuperscript{131} The difficulties in ascribing a binding, enforceable quality to rules in international law gives rise to the introductory question of “whether international law is really law?” For discussion of this topic see, e.g., Ian Brownlie, “The Reality and Efficacy of International Law” (1981) Brit. Yrbk Int’l L. 1-8, Malanuczak, Akehurst’s \textit{Modern Introduction to International Law}, 7\textsuperscript{th} ed., pp. 3-7, Williams and de Mestral, \textit{An Introduction to International Law}, 2\textsuperscript{nd} ed., pp. 6-12, Jennings and Watts, \textit{Oppenheim’s International Law}, 9\textsuperscript{th} ed., pp. 8-16. For more detailed attempts to explain the role of rules, using both international relations theory and international law, see Michael Byers, \textit{Custom, Power and the Power of Rules: International Relations and Customary International Law} (Cambridge: Cambridge University Press, 1999), and Anthony Clark Arend, \textit{Legal Rules and International Society} (Oxford: Oxford University Press, 1999).

develop, or at least not develop as quickly. Their role is not to displace the state, but to provide counterpoints and alternate avenues for action.

Along a similar line, the views of powerful national organisations and business interests are being courted more frequently at the international level. This is indicated, for example, by the participation of the National Rifle Association of America in the Preparatory Committee discussions for the UN Conference on the Illicit Trade in Small Arms and Light Weapons. It is illustrated by the UN Secretary-General’s recent appeal to business leaders to follow his “Global Compact” strategy of incorporating human rights, labour standards and respect for the environment into corporate practices. The United Nations Environmental Program has even launched an internet site to facilitate the international exchange of ‘banked’ halons between businesses in order to help protect the ozone layer. The voice of the state remains dominant, but it is heard against the background of many, quieter non-state voices.

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134 E.g., “Employment conditions, multi-national agreements, Global Compact,” ibid. John Carey, Editor of the UNLR, summarises, in ibid.: On 28 March the Secretary-General, addressing a business audience in Zurich, Switzerland, stated in part: “Most of you have heard by now of the Global Compact between the United Nations, the private sector and civil society, which I first proposed at Davos in 1999. Indeed, I’m glad to say that many leading Swiss companies have responded to my call and adhered to the Compact. By so doing, they agree to incorporate universal principles of human rights, labour standards and respect for the environment into their corporate practice. In asking other companies to follow their example, I am not asking them to sacrifice their corporate interests. On the contrary, I believe they will find that these principles provide the basis for an excellent corporate culture—a set of values that employees from all over the world can identify with, and will be glad to see their company reflect.”

135 John Carey, in “Out-sourcing, sanctions monitoring mechanism, UN lobbying,” UNLR, Vol. 35, No. 9 (1 May 2001), notes: On 16 March the UN Environmental Program (UNEP) launched a Business-to-Business (B2B) web portal, the On-line Halon Trader (www.halontrader.org), to facilitate the international exchange of “banked” halons and reduce the use of newly-produced halons that damage the ozone layer. “It is the first business-to-business web portal to support compliance with a multilateral environmental agreement,” said Gary Taylor, Co-Chair of UNEP’s Halons Technical Options Committee, at a meeting of the Parties of the Montreal Protocol on Substances that Deplete the Ozone Layer.

C. **Transgovernmental Actors**

In the same way that decision-making has been vertically expanded—with less powerful actors interacting with more powerful ones across the international hierarchy—so too has it been horizontally expanded. At the sub-state, governmental level, individuals and branches are starting to network directly with other governmental actors in foreign states.\(^{136}\) This is fascinating because in the past such interaction was more likely to go through formal, executive or foreign affairs branches of the state. Now it is direct. Connections occur, according to Anne-Marie Slaughter, between "courts, regulatory agencies, executives, and even legislatures [...] networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order."\(^{137}\) These direct linkages are developing between governmental units because they help overcome the difficulties of traditional, formal inter-governmental relations. Transgovernmental relations, for example, tend to be more flexible and 'non-threatening' in nature.\(^{138}\) Interestingly, they may also be viewed as more 'legitimate' because they involve local governmental entities that are subject to domestic checks and balances.\(^{139}\) Although transgovernmental relations do not challenge statehood or state sovereignty *per se*, they do represent an alternative method of interaction, one that moves beyond the formal, traditional methods of state-to-state contact. To the extent that such relations become independent of the central authority of the state, they challenge its monopoly over such matters.

D. **‘Transovereigns,’ Transnational Ethnic and Religious Movements**

International relations increasingly are being shaped by strong non-statal, supranational movements or entities that do not easily fit into the previously-mentioned categories.

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\(^{137}\) Anne-Marie Slaughter, "The Real New World Order" (Sept./Oct. 1997) 76 *Foreign Affairs* 183, at p. 184 [as reproduced in Marks, *The Riddle of All Constitutions*, at p. 88].

\(^{138}\) For example, it may be easier for one national police unit to place a telephone call to request criminal interdiction assistance from a foreign police unit, than it would be for two foreign ministers to arrange a meeting to discuss the matter.

\(^{139}\) Marks, *The Riddle of All Constitutions*, at p. 88. The term "legitimate" is highlighted because the legitimacy of these transgovernmental networks will only extend to those states that are part of them, not to the many states potentially affected by their activities. Slaughter’s example, referred to in Marks, *ibid.*, at p. 88-9, is the Basle Committee on Banking Supervision, which is made up of twelve central bank governors. The influence of this Committee is purported to be extensive, yet those states *not* represented in the Committee will not have a significant role in its deliberations or outcomes. Slaughter is aware of this under-inclusion, but still favours transgovernmental networks over international organisations: Marks, *ibid.*, p. 89.
Transovereigns encompass entire movements, which may be made up of individuals, groups, collections of non-governmental and governmental organisations, and states. Examples are said to include “the Catholic Church, the ‘Green’ movement, fundamentalist Islam, international communism, and in many ways the United Nations.”

Transovereigns differ from sovereign entities because they do not focus upon the task of “actually governing,” and often are centred around a “single purpose ... concentrat[ing] their energies on particular goals without regard for national boundaries.” To the extent that they challenge governmental abilities, they may also challenge this aspect of statehood.

Transnational ethnic movements with secessionist tendencies also pose a significant challenge to the state because they operate beyond national borders and threaten its territorial basis. Groups such as the Kurds span several states and claim lands in each. However, one must be careful not to overemphasise the importance of these movements with respect to the concept of statehood. Ethnic movements tend to threaten existing states more than they threaten the notion of statehood itself. This is because they tend to reconstitute themselves as new states if they are successful.

In contrast, transnational religious movements more directly threaten the concept of statehood. Islamic movements, for example, directly challenge several important aspects of statehood when they use fatwas to condemn individuals to death anywhere on the globe. But their threat is muted by the fact that these movements are both based in, and expressed by, sovereign states. The same Islamic states that allow and encourage fatwas also strongly support and demand respect for state sovereignty, especially when they face external scrutiny in relation to human rights abuses. As pointed out by Spruyt, “[b]oth in theory as well as in practice, Islamic doctrine and the modern nation-state have proven quite compatible.”

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141 Ibid., p. 460.
142 Ibid., pp. 460-61. Terrell and McNamee explore the role of the Catholic Church in Poland near the end of the Soviet era as an example of a “transovereign.” The Catholic Church is argued to have been historically opposed to communism generally, and to communism in Poland: Ibid., 473-5. Hence, when Pope John Paul II participated in this drive against communism, he was fulfilling a church role as well as providing a symbol for Poland. Ibid., 475-6. When the Church allied with unions against the state it further fulfilled its goals by creating competing political visions, ones that eventually triumphed against communism. Ibid., 476-9. Because ‘transovereigns’ are non-territorially defined they tend to have a different vision of human rights, basing them upon morality rather than nationality (as is more common with states). Ibid., p. 461.
144 E.g., Charlesworth and Chinkin, The Boundaries of International Law, p. 135.
E. TRANSNATIONAL CRIMINAL ORGANISATIONS

The final international actor deserving of scrutiny is the transnational criminal organisation. International criminal organisations have existed for some time but are posing greater challenges because, like large multinational corporations, some now possess greater resources than states. As summarised by William Gilmore:

‘Illegal drugs were estimated to have overtaken oil as a source of revenue globally; they were now the world’s second biggest trading commodity, next to armaments, and amounted to nine per cent of international merchandise in value. In some cases, the astronomical profits of the drug trade were used to create alternative economies and to undermine legislative and political systems.’ More recent estimates within the United Nations put the value of the world trade in illicit drugs at about US $300 billion per year. Although a large number of individuals are involved at the many differing levels of this illicit trade, ‘most of the gains go to a rich, small elite that has come to wield impressive economic and political power. Some members are believed to have a personal worth that exceeds their country’s national debt.’

In the still volatile states of the former USSR criminal organisations have stepped into the vacuum and seized control over substantial sections of the economy. Because of their increased sophistication, new and expanding areas of operation, and use of modern transportation and communication technology these non-state actors can no longer be controlled by national law enforcement authorities. The variety of activities that international criminal organisations engage in is astonishing. They include trafficking in drugs, arms, nuclear materials, and human body parts, as well as gambling, extortion, prostitution, counterfeiting, environmental crime, computer related crime, technology theft, industrial espionage, copyright infringement, smuggling of illegal migrants, theft and smuggling of vehicles, and money laundering.

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147 Strange, in The Retreat of the State, at p. 112, reports:
One estimate cited in 1995 by the chief prosecutor of Florence suggested that organised criminal groups in Russia then controlled 35 per cent of the commercial banks, 40 per cent of former State-owned industry, 35 per cent of private enterprise—and as much as 60 per cent of commerce and 80 per cent of joint ventures with foreign firms (see La Repubblica, 28 January 1995).


In stark contrast with the nineteenth century when issues of criminal justice policy were thought of in almost exclusively national terms, the need for enhanced international co-operation and co-ordination in this sphere now occupies an important position on the political agenda. This represents an inevitable recognition of the fact that reliance on unilateral domestic legislative and law enforcement measures is no longer sufficient.

149 List compiled from Gilmore, ibid., pp. 19-20. For a collection of essays on transnational crime, looking at the problem from international, European and UK perspectives, see Peter J. Cullen and William C. Gilmore, eds.,
The increased threat posed by these criminal organisations is notable in light of the fact that in earlier periods some states shared a symbiotic relationship with them.¹⁵⁰ This has made the process of reform more difficult because these criminal groups are so deeply entrenched, both locally and globally. Also, in a manner similar to transnational corporations, they have expanded beyond the jurisdiction of any single state, or even regional state groupings. Transnational criminal organisations engage in more frequent interaction with other such organisations. Items are passed from one group to the next in a complicated chain of dealings, in part to conceal the origin of the goods or to isolate the proceeds of crime from the criminal activities.¹⁵¹ These organisations also have branched out, establishing subsidiary groupings in states spanning several regions.¹⁵² As these groups expand, they network and consolidate their power within states. For instance, one yakuzza syndicate in Japan has increased its control over smaller criminal groups from an eleven per cent share in 1980 to a forty per cent share in 1992.¹⁵³

The seriousness of transnational criminal activity has put states on the defensive. They have reacted in part by creating the United Nations Convention against Transnational Organized Crime, which received 124 signatures when concluded on 15 December 2000.¹⁵⁴ This Convention attempts to deal with the problems of transnational crime in the broadest

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¹⁵⁰ Strange, for example, in The Retreat of the State, at pp. 114-15, points out that in Italy criminal organisations helped those in power maintain order and secure votes. However changing Italian political attitudes and the increasing power of these organisations forced politicians to attempt to assert control over the mafiosi: ibid., pp. 116-17.

¹⁵¹ Cf. ibid., pp. 111-12. Indeed, as Strange points out in ibid., at pp. 118-19, states aggravate the problem on the one hand by criminalising parts of the activities of the organisations (such as drug trafficking, thereby making it incredibly profitable), yet on the other hand, by supporting other parts of their activities (by turning a blind eye to money-laundering and protecting banking secrecy). But see generally William C. Gilmore, Dirty Money: The Evolution of Money Laundering Counter-measures (Netherlands: Council of Europe Press, 1995) [describing the recent steps being taken to prevent money laundering].

¹⁵² As noted by Strange, for example, in ibid., at p. 112, “as a consequence of long-term emigration fluxes and their expulsion from mainland China after the Communist Revolution, the Chinese triads are nowadays to be found in Hong Kong, Malaysia and Singapore, Thailand, Burma, the Philippines, Australia and New Zealand, the United States, Canada and several European countries.”

¹⁵³ Ibid., p. 112 (discussing the rise of the Yamaguchigumi syndicate on the basis of Japanese police statistics).

manner, filling in the gaps left by national legislation and allowing states to co-operate internationally:

The Convention extends well beyond the sphere of cooperation on drug trafficking. It seeks to strengthen the power of governments in combating serious crimes. The new treaty will provide the basis for stronger common action against money-laundering, greater ease of extradition, and measures on the protection of witnesses and enhanced judicial cooperation. It will also establish a funding mechanism to help countries implement the Convention. An important goal of the instrument is to get all countries to synchronize their national laws, so that there can be no uncertainty as to whether a crime in one country is also a crime in another.\(^{155}\)

The *Convention* defines ‘transnational crime’ as crime committed in more than one state, or crime committed in one state but with either substantial parts of it taking place in other states, or involving an organised criminal group active in more than one state, or having substantial effects in another state.\(^{156}\) Under the *Convention* States Parties must criminalise four general categories of transnational behaviour, namely, (1) participating in an organised criminal group, (2) laundering proceeds of crime, (3) engaging in corruption, and (4) obstructing justice.\(^{157}\) The *Convention* helps states to deal with these offences through increased co-operation, the promotion of joint investigations, exchanges of information and by encouraging technical and other assistance.\(^{158}\) It requires States Parties to adopt measures to improve their ability to prevent and prosecute such criminal activity.\(^{159}\) Two additional protocols adopted with the *Convention*

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2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.

\(^{157}\) *Ibid.*, Arts. 5, 6, 8, and 23, respectively.

\(^{158}\) The *Convention, ibid.*, helps co-ordinate state activity in dealing with these offences by allowing increased co-operation for confiscation of proceeds of crime or property to be used for criminal offences (Arts. 12-13), by enabling and improving extradition (Art. 16), and by providing for mutual legal assistance (Art. 18). It also promotes joint investigations (Art. 19), enhances co-operation with law enforcement authorities (Arts. 26-27), allows exchange of information on the nature of organised crime (Art. 28), assists with training and technical assistance (Art. 29), and encourages economic development and technical assistance for developing countries (Art. 30).

\(^{159}\) Under the *Convention, ibid.*, parties must provide for liability of legal (juridical) persons within their national laws (Art. 10), as well as increase confiscation and seizure powers (Art. 12). The *Convention* also expands and further specifies grounds for international criminal jurisdiction (Art. 15) and encourages use of special investigative techniques.
aim to prevent behaviour associated with transnational criminal activity, namely, trafficking of persons and smuggling of migrants.\textsuperscript{160} An additional protocol on illegal manufacturing and trafficking of firearms and related materials is in the process of being drafted.\textsuperscript{161} Whether this new Convention and protocols are able to deal with the increasingly sophisticated and powerful transnational criminal actors remains to be seen.

In sum, all of these non-state actors, from international organisations to transnational criminal organisations, have one thing in common. They usurp the state’s claim to be the only relevant international actor. In doing so, they challenge or displace the ‘monopolistic’ aspects of statehood. In addition, to the extent that non-state actors encourage new styles or methods of relating, then they may be said to be helping to usher in a new form of ‘international politics,’ one that involves relations across boundaries and categories.

IV. ASSESSMENT

The changes and developments brought about by globalisation have had a significant impact upon many states. However, not one of the new forces of globalisation fundamentally challenges statehood per se. In other words, none challenges the state as an institutional mechanism for participation in the international arena. One must be careful to distinguish between the functional restrictions brought about by globalisation, on the one hand, and the lack of institutional change, on the other. New voting mechanisms in international organisations and international gatherings, for example, at most create a functional restriction upon the state. They do not challenge statehood per se because the state remains the actor privileged to use those mechanisms. Other actors still tend to derive their international legal privileges (at least formally) only as a result of the explicit consent of states. The state remains the dominant mechanism for international interaction.

\textsuperscript{160} These protocols, attached to the Convention, \textit{ibid.}, as Annexes II and III, respectively, are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2001), and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2001).

The importance of these developments therefore does not lie in their indication of the imminent collapse of the state as an institution. They do not do so, and the state is not about to expire. Rather, their importance lies in the way that they indicate a level of dissatisfaction with the state as the ‘sole’ mechanism for international legal and political relations. This dissatisfaction is understandable. The unified voice of the state cannot easily represent the plurality of voices within its borders. What has changed is that the state now receives significant input from other actors in making decisions, as well as may allocate certain restricted areas of competence to other bodies. The state has become one of many actors in such areas as political economy or the international environmental movement. It remains the primary, but not exclusive actor.\footnote{162} The long-term implications of such dissatisfaction and the resulting re-allocations of competence are difficult to predict. They may lead to further alteration of state and non-state relations, or they may culminate in a “silent revolution” moving us away from statehood, as suggested by one author.\footnote{163} In contrast, others have suggested that the state will become more important as a result of such processes.\footnote{164} It is simply too soon to foresee an outcome at this point.

\footnote{162} Even Susan Strange, in The Retreat of the State, after going to great lengths to reveal the impact of these other actors in the international sphere, admits that the state remains primary: “Nevertheless, it still remains an axiom of most scholars interested in international politics that, to use Caporaso’s formulation, ‘the primary unit of analysis remains the legally sovereign, if not operationally autonomous, state’” [citing: James Caporaso, The Elusive State: International and Comparative Perspectives (London: Sage Publications, 1989), p. 9].

\footnote{163} Bengoetxea, in “Nationalism and Self-Determination,” at p. 141, uses the term “silent revolution” to describe the gradual movement away from state-centred international participation. He argues, ibid., that since states are no longer serving all of their original purposes different entities are being created to fill the gaps:

Without going so far as to predict or desire the withering away of the state, there are several factors which point to the idea that the state may no longer be the idol Hegel thought it to be, i.e. the culmination and embodiment of reason. The fact that states still are the main units that integrate the international community does not mean that any attempt to organise the international community and international law on the basis of alternative (not necessarily mutually exclusive) institutions is doomed to fail, nor that any hope for the transformation of the classical Hegelian model of the state should be abandoned. There are some signs that point to the idea that precisely such a transformation may already be taking place: the growing polymorphism in international law and the transformation of modern (especially Western European) states in two directions arguably inspired by sub-state nationalism and supranationalism respectively: decentralisation or devolution and the sharing of sovereignty in certain spheres of traditional state competence. It is not exaggerated to say that this transformation amounts to a silent revolution.

\footnote{164} Nico Schrijver, for example, in “The Changing Nature of State Sovereignty,” argues that the sovereign state may become more important in light of the increasing number of issues that need to be addressed in the international sphere because of the processes of globalisation and other factors. In ibid., at pp. 95-6, he concludes:

Globalization, liberalization and privatization are causing a great number of changes but they have not pushed sovereignty and the national [sic] State to one side. On the contrary, much of the modern international law movement focuses on the responsibility of a State to adopt regulations, to monitor and secure compliance and exercise justice in order to ensure that principles and rules of international law are being observed within its territory and domestic jurisdiction. For these reasons, claims of the retreat of the State are not now made so loudly. The aim is rather to eliminate obstacles which obstruct change in the process of achieving an effective State. [Citations omitted.]

At the latter page he sums up by explaining that “[w]e may be moving away from a primarily State-based system towards a more variegated system. But it is a system in which the sovereign State will still be a prime actor.”

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Nevertheless, one of the more interesting things to notice about these developments is how the shifts of power and authority away from the state have not been accompanied by an increase in democratic accountability. In other words, the spread in power has not filtered down to the individual level. Also, many of the previously mentioned non-state actors are themselves non-democratic in nature. Until this changes the flawed democratic mechanisms of the state remain superior to the non-democratic mechanisms of the transnational corporation or transnational criminal organisation. This is one of the more worrying impacts of globalisation generally.

In any event, for the present the state appears to be weathering the assaults of globalisation with some success, retaining its role as the primary actor in the international sphere. As summarised by Spruyt, "Although the abilities of the state vis-à-vis society might have changed, the institutional principle of sovereign, territorial rule as the foundation of the international system has not." The state as an institution is not disappearing. It is merely changing from being the sole source of authority to one source among many.

** * **

Let us tie together some of the various strands of this Chapter. The impact of globalisation upon states has been significant. It has affected the ability of states to regulate national and international trade and finance, as well as the transnational corporations that engage in such activities. States have become more limited in their ability to choose unique forms of economic development or to protect national cultural and linguistic traditions. Many environmental issues are now outside the scope of state competence, and various international actors are displacing or limiting the state’s ability to be the sole actor in international affairs. The state’s central role of providing national security is challenged by ubiquitous weapons of mass destruction, the increasing numbers of non-state military actors, and the changing forms, goals and economies of warfare. All of these by-products of globalisation and the changing

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165 See Chapters 3 and 4, below, for more on democracy and the difficulties involved in implementing it.

166 Cf. Strange, The Retreat of the State, pp. 197-99. Strange makes some interesting points about how to correct this imbalance, suggesting either the creation of some form of global 'opposition' (like a parliamentary opposition), or some simpler mechanisms that will provide checks and balances to these new actors exercising authority at the international level. In making the latter point she suggests that such checks and balances—which she calls 'negarchy'—may simply represent another form of the classic international relations concept of 'balance of power.' Ibid.


168 Strange, in The Retreat of the State, at pp. 72-3, makes this point clearly:

To say [that in some circumstances state authority will not be given priority] is not the same as saying that the state as an institution is disappearing, that it is on the way out, or that it is being ousted by the multinationals or any other kind of authority. It is only saying that it is undergoing a metamorphosis brought on by structural change in world society and economy. This metamorphosis means that it can no longer make the exceptional claims and demands that it once did. It is becoming, once more and as in the past, just one source of authority among several, with limited powers and resources.
international environment have the potential to remove certain matters from the state's exclusive control or competence. But none makes the state irrelevant; none challenges statehood per se. No alternative form of international representation fulfils the needs of national populations in the same manner as the state. The state as an institution remains relevant, especially in the way it combines the crucial Weberian characteristics of monopoly, legitimacy, territory and force. These characteristics exist in a state of perpetual tension in each state, but the ability of the notion of statehood to harness all four makes it indispensable to national and international order. As a result, we may re-phrase our definition of the state as follows:

The state is the recognised international entity that claims to exert a monopoly of legitimate force over a defined territory, with a permanent population and effective government, and which possesses the capacity to enter into relations with other states.

This new definition's requirement of force, as we have seen, is fundamental to the state. Force, of course, is also a frequent tool of governments, although not a precondition for their continued existence. Neither is force a sufficient condition for legitimacy, either for states or governments. Let us now turn to the dominant mechanism for legitimacy today, namely, democracy.
Chapter 3: Democracy

Chapter 1 briefly defined “democracy” as well as glanced at the related notions of “cosmopolitan democracy” and “democratic governance.” This Chapter begins with a short examination of the increased importance of democracy in the international sphere, and then moves to a more comprehensive analysis of the content of the term. It focuses upon each of the four basic elements of democracy, namely, (1) the people subject to the democratic process, (2) the subgroup of the people who are able to participate in governance (demos), (3) the democratic unit (polis), and (4) the systems of governance permissible for that unit (the type of polity). After analysing democracy’s central elements, I will describe the minimum set of human rights and freedoms that are required by it and sketch an outline of the democratic state. In the next Chapter I will look at justifications for democracy. As a result, the present Chapter answers questions regarding what is democracy; Chapter 4 answers questions about why we should have democracy.

I. The Dominance of Democracy

One of the most striking things about democracy at present is its clear dominance over any other form of political decision making. We can see this dominance reflected in three ways. Firstly, the number of democratic and near-democratic states around the globe has increased exponentially over the last century. According to a recent Freedom House report the number of democratic “sovereign states and colonial units” has increased from zero in 1900, to twenty-two in 1950, to one hundred and twenty by the year 2000.1 If we add to these figures the number of states and colonial units classified as having “restricted democratic practices,” the total number of democratic or pseudo-democratic countries rises.2 Both sets of figures described in the Freedom House report can be expressed as follows:

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2 The Freedom House survey, ibid., tracks the numbers and percentages of states, colonial units and their populations under the following nine political categories: Democracy, Restricted Democratic Practice, Constitutional Monarchy, Traditional Monarchy, Absolute Monarchy, Authoritarian Regime, Totalitarian Regime, Colonial Dependency, Protectorate. The two categories that concern us here, democracy and restricted democratic practice, are defined as follows in the report, ibid.:

**Democracies:** These are political systems whose leaders are elected in competitive multi-party and multi-candidate processes in which opposition parties have a legitimate chance of attaining power or participating in power.
Figure 3.1: The Numerical Increase of Democracies from 1900-2000

<table>
<thead>
<tr>
<th>Sovereign States and Colonial Units</th>
<th>1900</th>
<th>1950</th>
<th>2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democracy</td>
<td>0 (0.0%)</td>
<td>22 (14.3%)</td>
<td>120 (62.5%)</td>
</tr>
<tr>
<td>Restricted Democratic Practice</td>
<td>25 (19.2%)</td>
<td>21 (13.6%)</td>
<td>16 (8.3%)</td>
</tr>
<tr>
<td>Total</td>
<td>25 (19.2%)</td>
<td>43 (27.9%)</td>
<td>136 (70.8%)</td>
</tr>
</tbody>
</table>

As a result, the proportion of democratic and quasi-democratic entities has increased from under twenty percent to over seventy percent globally during the last one hundred years. The striking increase in democracies, and the related decrease in countries with restricted democratic practices, are both heartening. Since a large part of this democratic transition took place after the early 1990s, the recent nature of the dominance of democracy is both obvious and dramatic.

Secondly, democracy and democracy-related rights are guaranteed in a host of treaties, formulated at both regional and international levels. These developments will be discussed in Chapter 11, below. For present purposes it is sufficient to mention that these treaties include the Charter of the Organization of American States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention on the Political Rights of Women, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the African Charter on Human and Peoples’ Rights [Banjul Charter]. Democracy and democracy-related rights are also promoted and supported in a wide variety of non-binding international and regional declarations, judicial decisions, and other instruments. The combination of these treaties, ‘soft law’ declarations, judicial decisions and other instruments has even given rise to arguments that a right to democratic governance exists, or will soon exist, at the international level. In other words, democratic governance is now regarded as a human right in some quarters.

Restricted democratic practices: These are primarily regimes in which a dominant ruling party controls the levers of power, including access to the media, and the electoral process in ways that preclude a meaningful challenge to its political hegemony. In the first half of the century, states with restricted democratic practices included countries which denied universal franchise to women, racial minorities, and the poor and landless.

3 Figure 3.1 is derived from the table entitled “Tracking Polity in the Twentieth Century” in ibid., with the following changes: the three columns have been reversed (to start with 1900 and end with 2000), and the third row, which totals the figures, has been added.

4 See further Chapter 11, below, for a more detailed discussion of these developments. I argue that such a ‘right to democratic governance’ has not yet emerged as a matter of customary or conventional international law, and further, that there are grave weaknesses involved in formulating democratic governance in terms of a simple human right. For such reasons I conclude that it is necessary to link democracy directly to sovereignty itself.

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Thirdly, requirements of respect for democracy and related human rights have been attached to important international legal practices and initiatives. Thus, as discussed in Chapter 10, below, an attempt was made to add democracy and human rights to the requirements for recognition of states in the context of the dissolution of Yugoslavia. Democratic conditions also have been added to loans and other forms of aid from the World Bank and other international actors. Furthermore, the possession of a democratic system has become a pre-requisite for participation in some regional or international organisations or integration movements. For example, the Organisation of American States excluded Cuba because of its non-democratic political system in 1962. Cuba was again excluded in 2001 from the Third Summit of the Americas for the same reason. The latter Summit’s final “Declaration of Quebec City” clearly emphasises the importance of democracy and democracy-related rights for the participating states. The Summit’s “Plan of Action” even begins with “Making Democracy Work Better” as the first task for states in the region. Such developments reveal in a striking manner the way in which democracy has penetrated regional economic integration processes—processes that one might not expect to be associated with democracy. The Commonwealth has also attempted to prioritise respect for democracy amongst its member states, as seen in its 1991 “Harare Declaration.”

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5 See, e.g., Third Summit of the Americas, “Countries,” as available at http://www.americascanada.org/countries/menu-e.asp (accessed 1 May 2001) [list not including Cuba]. The latter page also notes that “by resolution of the Eighth Meeting of Consultation of Ministers of Foreign Affairs (1962) the current Government of Cuba is excluded from participation in the OAS.”

6 The relevant paragraphs of the Third Summit of the Americas, “Final Declarations: Declaration of Quebec City” (April 22, 2001), as available at http://www.americascanada.org/eventsummit/declarations/declara-e.asp (accessed 1 May 2001), state:

We acknowledge that the values and practices of democracy are fundamental to the advancement of all our objectives. The maintenance and strengthening of the rule of law and strict respect for the democratic system are, at the same time, a goal and a shared commitment and are an essential condition of our presence at this and future Summits. Consequently, any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state’s government in the Summit of the Americas process. Having due regard for existing hemispheric, regional and sub-regional mechanisms, we agree to conduct consultations in the event of a disruption of the democratic system of a country that participates in the Summit process.

Threats to democracy today take many forms. To enhance our ability to respond to these threats, we instruct our Foreign Ministers to prepare, in the framework of the next General Assembly of the OAS, an Inter-American Democratic Charter to reinforce OAS instruments for the active defense of representative democracy. [Note omitted.]

7 See the Third Summit of the Americas, “Plan of Action,” as available at http://www.americascanada.org/eventsummit/declarations/plan-e.asp (accessed 1 May 2001). The Plan of Action, ibid., addresses the question of “Making Democracy Work Better” by focusing on five main areas for improvement: electoral processes and procedures, transparency and good governance, media and communications, the fight against corruption, and empowering local governments.

8 See also the discussion of the inclusion of respect for democracy and human rights in various European Union processes, in Chapter 11, below.

As a result we may say that democracies are more numerous today, with democracies and democracy-related human rights being protected by a greater number of mechanisms and required by a wider variety of practices. Democracy is the dominant political vision at present. So much so that Susan Marks argues that it has become form of ideology. The relative successes of democracy do not mean, however, that its implementation has been perfect (it has not), or even that there is clear agreement about its meaning and content (there is not).

II. THE CONTENT OF DEMOCRACY

Let me attempt to clarify the content of democracy. In doing so, I will make explicit some of the underlying meanings of the term and at the same time examine some of the fundamental issues related to its conceptualisation and implementation. This is necessary because democracy is a normative, perhaps even ‘essentially contested,’ concept—one that cannot be defined in a value-free manner. As highlighted by Carlos Santiago Nino, no description of democracy is possible without articulating its evaluative conception:

http://www.thecommonwealth.org/htm/commonwealth/about/declares/harare.htm (accessed 4 May 2001), states in paragraph 9:

Having reaffirmed the principles to which the Commonwealth is committed, and reviewed the problems and challenges which the world, and the Commonwealth as part of it, face, we pledge the Commonwealth and our countries to work with renewed vigour, concentrating especially in the following areas:

- the protection and promotion of the fundamental political values of the Commonwealth:
- democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;


Marks, The Riddle of All Constitutions.


Philosophical accounts of democracy analyse its nature and discuss its value. The two cannot be completely separated. Any account which explains the value of democracy has to provide or presuppose an account of what it is holding to be of value. Conversely, supposedly neutral analyses of the nature of democracy are influenced by values. For example, someone who thinks that democracy is a good thing is liable to analyse it in terms of other features also thought to be good.

The concept of democracy therefore may naturally be thought of as what W.B. Gallie called an essentially contested concept. Such concepts are those whose analysis is unresolvable because different analysts read into it their favoured values.
Democracy, as Giovanni Sartori says, is a normative concept and cannot be identified in depth without articulating fully the evaluative conception that justifies its distinctive institutions. In his words, "what democracy is cannot be separated from what democracy should be." The inevitability of this normative inquiry is demonstrated by the inherent conflicts and tensions within the distinctive institutions of democracy, making it impossible simply to identify and adopt appropriate democratic institutions.\(^{12}\)

In developing an understanding of the meanings of democracy I will rely upon two influential theorists, Robert Dahl and Carlos Nino, focusing on their respective works, *Democracy and Its Critics* and *The Constitution of Deliberative Democracy*.

**A. ISSUES AND TERMINOLOGY**

Basic issues that need to be clarified when discussing democracy include firstly, what group constitutes the "people" who are subject to the democratic process?\(^{13}\) Secondly, what subgroup of the people should be able to participate in governance (the *demos*)?\(^ {14}\) Thirdly, what potential *scale* or *size* can the democratic unit (*polis*) be?\(^ {15}\) Finally, what forms of


\(^{13}\) The terminology associated with democratic theory is complex and sometimes contested. Difficulties with the term "people," for example, can be seen in the struggles over its definition in the context of the international legal right of self-determination, since at the formal level, only a "people" or "peoples" can possess such a right. E.g., the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* both begin their identical Art. 1 with the sentence "All peoples have the right of self-determination" [emphasis added]. For more on the development and status of this right see Chapter 9, below, and Cassese, *Self-Determination of Peoples*. "People" here is simply meant to refer to those natural persons within an entity (i.e., state, city), who are subject to democratic processes.

\(^{14}\) "Demos" is defined in *The Oxford Companion to Classical Literature*, 2nd ed., ed. M.C. Howatson (Oxford: Oxford University Press, 1989), at p. 179, as: "dēmos, in Greece, 'the people'; the term sometimes denoted the whole citizen body (and its assembly), sometimes only the lower classes in contrast with the upper." It is defined in *The Compact Oxford English Dictionary*, 2nd ed., ed. J.A. Simpson and E.S.C. Weiner (Oxford: Clarendon Press, 1991), at p. 410, as: "1. One of the divisions of ancient Attica" and "2. The people or commons of an ancient Greek state, esp. of a democratic state, such as Athens; hence the populace, the common people: often personified." In Joseph T. Shipley’s *Dictionary of Word Origins* (New York: Philosophical Library, 1945), at p. 112, "demos" is defined in the context of "democracy" as follows:

The suffix -cracy (Gr. kratia, power, rule, from kratos, strength, whence kratin, to rule), means government by, as in aristocracy ... Gr. demos from Sansk. de, divide, point, originally meant the division of a country or a tribe; thence the people.

Following Dahl, I restrict the meaning of the term "demos" to refer to those citizens that are *able to participate* in the democratic process (i.e., full citizens). Dahl, *Democracy and Its Critics*, pp. 3-4. Thus, in my usage, the *demos* will be a *subset* of the people (since some persons, for example young children, will not be able, or entitled, to participate fully in a democratic process).

\(^{15}\) "Polis" is defined in *The Compact Oxford English Dictionary*, ibid., at p. 1380, as "Hist. [Gr.] A Greek city-state; spec. such a state considered in its ideal form." See also the definition of *polis* in *The Oxford Companion to Classical Literature*, ibid., at p. 451 [explaining the nature of the *polis*, its ancient Greek components and features]. In my usage the term *polis* refers to the territorially bounded, self-governing democratic unit. Cynthia Farrar, in "Ancient Greek Political Theory," at p. 18, highlights the strong "boundary" connotations of the term, since it "derives from a root meaning 'wall.'" According to Farrar, the *polis* in ancient Greece was the territorially bounded city-state that divided one population from all others and created a strong sense of normative community and duty. Citizenship in the *polis* created rights and responsibilities, including participatory ones:
governance, or what form of polity can be considered a democratic society? The answers to each of these questions have varied significantly over time. The nature of a 'people' has changed both numerically and in terms of composition. Ancient societies were smaller and more homogenous than modern, potentially multi-ethnic, multi-racial and generally heterogeneous states. The participating demos has progressed on quantitative and qualitative grounds, changing from small, restrictive classes of citizens in the ancient Greek city-state to the nearly universal participation we find in modern nation-states. The qualitative contrast between the ancient and modern demos is stark in terms of the categories of persons that could participate during these periods. In the ancient Greek city-states, for example, slaves and women, amongst others, were denied the right to participate in government. The polis, or bounded self-governing political unit, has changed from the small city-state and its surrounding territories to today's vast nation states. To the extent that the European Union acts democratically on behalf of the citizens of its Member States (as an entity in some ways distinct from those states), we may be able to say that the notion of polis has stretched to an entire region. The kinds of institutions that may fall within a "democratic" polity also have changed and developed. Active, personal democratic participation in the Athenian form has largely been replaced by representative forms of

All citizens, whatever their social or economic status, had an assigned role, although the role varied according to the amount of property they possessed. By law, any citizen who failed to take sides in a factional dispute would lose his membership in the polis. The preservation of a just order was implicitly defined as the responsibility of every citizen.

Ibid., pp. 18-19. Notice, however, that the strength of the notion of citizenship in ancient Greece was supported by a strong exclusiveness with respect to non-citizens (who had little or no rights): Dahl, Democracy and Its Critics, pp. 22-3.

16 "Polity," is defined in The Compact Oxford English Dictionary, ibid., at p. 1380, as "[a. obs. F. politie (1419), ad. L. politia ...] 2.a. A particular form of political organization, a form of government" and "b. An organized society or community of men [sic]; a state." Polity therefore can be distinguished from polis since the former refers to the society and its form of government and latter refers to the territorial unit.

17 Dahl, in Democracy and Its Critics, at pp. 18-19, analyses the nature of the 'people' in terms of three related criteria: (1) they must have harmonious relations, (2) be homogeneous, and (3) be small in number. With respect to the latter, he points out that there were between forty to fifty thousand citizens in Periclean Athens, which exceeded the optimal size for Greek-style democratic participation.

18 See, e.g., Dahl, ibid., pp. 18-23 (contrasting ancient Greek system and modern states); see generally, Dunn, Democracy.

19 Hornblower, in "Creation and Development of Democratic Institutions in Ancient Greece," at p. 12, mentions that "slaves, women, subject-allies in the two periods of naval hegemony, [and] metics" were all excluded from participation in Athenian democracy. See also, Dahl, Democracy and Its Critics, pp. 20-23, for a critical look at this aspect of Athenian democracy.

democracy, interspersed with methods of direct democracy, including use of plebiscites, referenda, initiatives, and forms of representative recall.21

Each of these distinguishing features of the modern democratic state has implications for democracy’s relationship to sovereignty at the international level. Let us examine several of these issues, starting with the first two questions related to determining the ‘people’ and the appropriate scale or size of the democratic unit (questions regarding the polis).

B. THE DEMOCRATIC ‘PEOPLE’

The question of what group should constitute the ‘people’—in terms of choosing between and identifying such groups—is subject to such wide-ranging political, philosophical and legal debate that it cannot be addressed in any meaningful way in this work. The identification of who can be a people or ‘peoples’ for the purposes of self-determination, for example, is perhaps the most important criterion for exercise of the right.22 Even from a purely democratic perspective, this question may prove to be unanswerable. This is because, as clearly argued by Dahl, democratic theory pre-supposes the existence of such a unit:

[W]e cannot solve the problem of the proper scope and domain of democratic units from within democratic theory. Like the majority principle, the democratic process presupposes a proper unit. The criteria of the democratic process presuppose the rightfulness of the unit itself.23

This does not mean that no criterion can be applied to help answer such questions, but merely that democratic procedures are inapplicable, for the simple reason that one must have already identified the unit in order to vote. Thus, for the purposes of democratic theory, we must assume the pre-existence of the polis.

Stepping outside of narrow bounds of theory about democratic per se, however, we can see that a variety of principles could guide such a decision. For example, whether we decide to create a town council or an entire state as our democratic unit, basic principles of equality and non-discrimination clearly must be applicable. These principles, as we will see later, also clearly underlie democracy. In addition, when dealing with states international law imposes strong constraints upon the exclusion of certain groups from being part of a people. Thus, regimes based upon apartheid, slavery, or racist or sexist regimes of exclusion, are

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21 E.g., Nino, The Constitution of Deliberative Democracy, pp. 146-54 (discussing forms of direct democracy and suggesting methods for retaining it in large modern states). See generally, Lijphart, Patterns of Democracy (examining and comparing 36 countries in terms of democratic variables).

22 See further Chapter 9, below.

clearly contrary to customary international law, and likely violative of *jus cogens* rules.\(^2\) Interestingly, the importance of ensuring a strong role for women in the ‘people’ is becoming increasingly understood. As more detailed studies are made of the impact of sexism upon political processes, it is becoming apparent that the degree of participation of women in political units has striking consequences. Even though women remain disproportionately underrepresented in politics, their general educational and political empowerment has been linked to such developments as stronger economic growth and less corruption.\(^2\) For present purposes, let me conclude that the choice of who can be the ‘people’ subject to democratic decision-making is by and large external to democracy (narrowly conceived), but that important criteria of equality and non-discrimination must be applicable.

**C. THE** **POLIS** **(UNIT)**

Although political philosophers may yearn nostalgically for the small, Athenian city-state, modern realities would seem to require considerably larger units of governance in order to allow citizens to make effective decisions regarding their lives. The same globalisation trends that challenge the modern state make the ideal of the small sized, independent democratic *polis* more difficult to achieve. As seen in Chapter 2, these trends include, *inter alia*, the displacement of military functions from the national to regional levels, the mobility of finance, the mobility of individuals and the increasing power of transnational economic

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\(^2\) Art. 53 of the 1969 Vienna Convention on the Law of Treaties defines a *jus cogens* norm as: “a peremptory norm of general international law ... accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” If a treaty violates such a norm at the time of its conclusion it becomes void: *ibid.* See also Art. 64, *ibid.* Jennings and Watts in Oppenheim’s *International Law*, 9\(^{th}\) ed., at p. 8, discuss the following rules as possibly having a *jus cogens* character: the prohibition on the use of force, prohibition of criminal acts under international law, acts such as slave trade, piracy, genocide, as well as the requirements for the observance of human rights, the equality of states and the principle of self-determination. Ian Brownlie, in *Principles of Public International Law*, 5\(^{th}\) ed., at p. 515, adds the principle of racial non-discrimination, crimes against humanity and the principle of permanent sovereignty over natural resources to this list. See also Gordon A. Christenson, “The World Court and *Jus Cogens*” (1987) 81 A.J.I.L. 93-101.


> “Analysing the links between gender and economic progress in developing countries, the [World Bank] report shows that women’s empowerment strengthens countries’ ability to grow, to reduce poverty, and to govern effectively. It shows how countries that reduce gender inequality in areas such as education, employment and property rights can reap significant rewards. Benefits range from falling infant and child mortality to improved nutrition and lower fertility rates, from higher economic productivity and faster growth to lower rates of AIDS prevalence, and, quite intriguingly, less corruption. Countries where women have more rights and play a bigger part in public life tend to have cleaner business and government. And that is true even when comparing countries with the same levels of income, civil liberties, education and legal institutions. That certainly gives us one more strong argument for increasing women’s access to employment and positions of power.”

> “[...] In politics too, women’s particular skills and experiences can bring a valuable contribution, and to all issues, not only to the social agenda or the so-called ‘women’s issues’. As far as I am concerned,
interests. Such factors create difficulties for large states, but would almost prove insurmountable to smaller city-state sized communities. Also the powerful incentive of economies of scale push smaller units towards increasing their resources. This traditionally was achieved through territorial acquisition (imperialism), but today is being achieved through more subtle, deep forms of regionalization. Even if the small *polis* could resist the onslaught of globalisation, it would face strong challenges from the imperialistic desires of larger states, as well as would itself be tempted to increase in size or enter into larger alliances in order to achieve economies of scale.26

As a result, the most efficient size for the territorially bounded democratic political entity must for the present remain the state. We examined the state in the previous Chapter. But at this point it may be mentioned that a variety of different international legal discourses help us identify and structure the state as *polis*. The existence of a state, for example, is determined *inter alia* by the international legal rules regarding the creation, continuance, succession and recognition of states.27 Rules regarding secession and self-determination also affect who or what may become a state.28 Nevertheless, it must be emphasised that even if the state represents the most desirable form of *polis* today, this does not mean it must be the only one. There are no practical or theoretical reasons against groups of individuals being part of more than one *polis*, as long as each *polis* clearly demarcates its areas of authority. Within national jurisdictions individuals may participate in several overlapping democratic processes, each dealing with different issues or jurisdictions, from municipal, to provincial, to national. At the international level, models such as federalism or “nested” democratic communities offer the potential for smaller units within states to make democratic decisions regarding local, national and international concerns.29

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26 Dahl reveals how imperialism may arise even in the context of a group of small democratic entities. It arises because any conflict between these entities that produces one larger unit will give that unit a comparative resource advantage over its neighbours. The ensuing dynamic forces surrounding units to either unite or form alliances in order to compete. The result is that small democracies tend to be replaced by larger federal or unitary structures. See Dahl, *Democracy and Its Critics*, ch. 16.

27 See Chapter 1, above, and Chapter 10, below. See generally, Crawford, *The Creation of States in International Law* and Roth, *Governmental Illegitimacy* (dealing with recognition).

28 See Chapter 9, below. See generally, Cassese, *Self-Determination of Peoples* and Buchheit, *Secession*.

29 Saward, in *The Terms of Democracy*, ch. 7, suggests the notion of overlapping jurisdiction (units within units) encompassed by the concept of “nesting.” Nino, in *The Constitution of Deliberative Democracy*, ch. 6, suggests the creation of small political units that would enable face-to-face discussion and collective decision, at the same time restricting some areas of decision that are more global in nature from the competence of these small units. The European Community’s notion of subsidiarity allows localised areas of decision and implementation where the Community does not have superior competence. See Art. 5 of the *Treaty Establishing the European Community, Consolidated Version*. See also, Chapter 8, below.
1. Globalisation’s Challenges to the Democratic Polis

In Chapter 2 we examined the various ways in which globalisation challenges aspects of state power and authority, most noticeably, its claim to be the sole authority for international interaction. Globalisation also challenges democracy. It does so because most models of democracy, including the one developed in this work, assume that the people affected by democratic choices largely should be the same ones who make those choices (the demos). As put by Susan Marks, “a symmetrical or congruent relationship has been presumed to exist between those experiencing outcomes and those taking decisions.” Increasingly, however, the various processes of globalisation prevent this from happening. The electorate in a particular state, for example, cannot prevent general global warming. Transnational and international actors, from corporations and to criminal organisations, clearly may impact upon national democratic processes in negative ways. Individuals and groups are also developing transnational interests and ties. As a result, the myth of a “national ‘community of fate’” is increasingly difficult to maintain.

Of course not all of the factors of globalisation have negative impacts upon democracy. Some, such as the ease of global communication, clearly assist democracy. Even though such developments may have negative implications in terms of culture and language protection, the availability of global communication allows the citizens of states to rapidly access information from around the globe. This helps to enable informed participation in democratic processes and discourages attempts to manipulate and censor information. In fact, by performing such a role, new information technology has been described as being not only beneficial to democracy, but in the striking phrase of one Special Rapporteur the internet is said to be “inherently democratic.”

30 Marks, The Riddle of All Constitutions, p. 82.
31 See generally, ibid., ch. 4. Such a dynamic also must have a significant impact upon any prognosis for international democratisation, for the simple reason that the existence of powerful influences outside of the national borders of a state makes state-focused plans to increase democratisation underinclusive. Marks, in ibid., at p. 77 argues that, “more far-reachingl, globalization also puts into question the assumption that democracy can be achieved through the democratisation of national politics.” See generally, Chapter 2, above.
32 Ibid., p. 82 (attributing the phrase to David Held).
324. As regards the impact of new information technology on the right to freedom of opinion and expression, the Special Rapporteur would like to recall that new technologies, and in particular the Internet, are inherently democratic, provide the public and individuals with access to information sources and enable all to participate actively in the communication process. He remains concerned at information received regarding the efforts of some Governments either to control or shut down access to the Internet. The Special Rapporteur would, to the contrary, encourage Governments to increase the capacities in
Nevertheless, other challenges posed by globalisation remain significant. Increased access to information cannot outweigh the problem of being powerless to use that information at the international level. In hopes of correcting this problem of differential access to power, greater efforts are being made to promote democratic processes at the international level. As the state-centred view of democracy is threatened, we become less likely to tolerate non-democratic forms of international relations. Although in the past few questions were raised about the impact of a Hobbesian international environment upon the domestic democratic politics of states, this is changing today.\textsuperscript{34} Since domestic forms of democracy may be affected by the international, non-democratic relations of various actors, these international relations are coming under scrutiny. Calls are being made to increase democracy in international relations.

Three models for doing so have been suggested. At one end of the spectrum, the first model calls for a reproduction national democracy at the global level. The national democratic system should be 'writ large' through the creation of a kind of 'global government.' At the other extreme, the second model suggests that we should simply promote greater democracy nationally—hoping that a gradual increase in the number and quality of democratic states will produce more democracy in inter-state relations.\textsuperscript{35} The third, middle model, rejects either extreme. This model is identified with the work of David Held and the "cosmopolitan democracy" school (briefly discussed in Chapter 1, above).\textsuperscript{36} The cosmopolitan model, it may be recalled, assumes that the state will remain a central and useful feature of the international system for the foreseeable future. It thus rejects global government as unattainable and undesirable. But this model also rejects as insufficient our focus solely on national democratisation. This is because transnational non-democratic influences will continually check and hinder such national processes, which in any event may not necessarily change the external, non-democratic environment. Held and others therefore suggest a double focus upon deepening and increasing democracy within states, while at the same time making international relations and international decisions more democratic. Democracy according to these writers must be encouraged at all levels, including the local, national, transnational, and international. Rather than rooting democratic processes to the

\textsuperscript{34} Cf., Marks, The Riddle of All Constitutions, p. 82 (pointing out the lack of questions about such matters).

\textsuperscript{35} See, e.g., ibid., at pp. 83-4. Marks calls the first model "world government" and the second "pan-national democracy" (referring generally to the work of David Held).

\textsuperscript{36} E.g., Marks, ibid., ch. 4. See generally, David Held, "Democracy: From City-states to a Cosmopolitan Order?", Daniele Archibugi and David Held, eds., Cosmopolitan Democracy, Daniele Archibugi, David Held and Martin Kohler, eds., Re-Imagining Political Community.
national state, they must become non-territorial, with the democratic political community being “untied from the whole ‘idea of locality and place.’”37 Although such an idea may seem quixotic, as pointed out by Susan Marks and others current territorial forms of democracy are in many ways equally fanciful and unreal.38

In sum, although the state remains the most effective democratic polis at the international level today, recent developments necessitate our thinking about both the creation of flexible, overlapping democratic units, as well as about how to democratise international relations generally.39

D. THE POLITY: FORMS OF GOVERNANCE AND THEIR CONSEQUENCES FOR DEMOCRACY

The next question is on regarding the forms of governance that are permissible under democratic theory. The two central questions here are firstly, whether a simple or supra-majority voting system is superior, and secondly, whether direct or representative forms of democratic governance are preferable. The first question is one that must arise in any democratic process. The second question is important because of the development of the polis, which has changed in nature from smaller, participatory units (the city-states), to vast, heterogeneous states.

1. Simple Versus Supra-Majority Systems

Democratic processes tend to use either simple majority voting systems, in which the will of the smallest majority sways the decision (i.e., 50% plus one vote), or supra-majority systems, which require a pre-determined percentage of affirmative votes (i.e., a 2/3rd majority). Which is superior? Because supra-majority systems ensure that the preferences of the greatest number of individuals are followed, it may be supposed that such systems should be preferred. When 100 individuals vote, for example, under the simple majority system only 51 of them are guaranteed to have their preferences respected, whereas under a two-thirds majority system 67 individuals will have their preferences respected. Supra-majority systems also produce other benefits. They have a greater likelihood of overcoming problems associated with entrenched minorities and the anti-democratic potential of the majority rule system, and produce much higher levels of agreement in their populations, thereby increasing

39 See generally the writings in the ‘cosmopolitan democracy’ school for development of such ideas (cited in footnote 36, above).
the legitimacy of the decisions made under these processes. But some caution is necessary here. If we follow this line of reasoning then the best voting rule is not a supra-majority one, but rather that of unanimity. After all, if we require 100% approval before taking a decision then we will be certain to respect the preferences of every single individual, and also can avoid the possibility of entrenched minorities and ensure the legitimacy of the decision-making process. Most would readily recognise the problems with this line of reasoning. Unanimous voting systems give every participant an effective veto and have a tendency to block decision-making.

I would go further, however, and argue that simple majority systems produce better results than, and in fact are superior to, unanimity or supra-majority systems (in democracies without entrenched minority populations). In support of such an argument Carlos Nino has offered four reasons for the superiority of simple majority systems. Firstly, the other systems (unanimity or supra-majority), give minorities effective veto rights, and thus are worse, generally considered, because they can allow, say, one-third of the population to hold two-thirds to its will. The preferences of a larger group are held hostage to any adverse preferences of a smaller group. A more positive way of putting this is to say that simple majority systems maximise self-determination, since the greatest number of persons will be able to have their preferences reflected in the decision-making process. Secondly, any

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40 For the potentially anti-democratic nature of simple majority rules see generally, Massimo La Torre, Democracy and Tensions: Representation, Majority Principle, Fundamental Rights (Florence: European University Institute, 1994). For a similar viewpoint, relying upon the irrationality of voting, see Robert Paul Wolff, Defence of Anarchism (New York: Harper and Row, 1970). Wolff argues that the individual’s vote is meaningless because a single vote could never rationally be supposed to determine the outcome of a democratic process (whether in a representative, or even a ‘direct’ form of democracy, such as through a referendum). See also, Barry, Democracy and Power, p. 44 (majority principle not working with entrenched minorities), and ch. 2 generally (offering a clear analysis of failings of the majority principle in democratic theory). For a counter-argument in the context of an analysis of social choice theory criticisms of majority voting systems (tested on case studies of recent Finnish presidential elections), see Lagerspetz, “Democracy and Paradox,” pp. 181-190. Although these social theory criticisms support the inability of persons to actually influence democratic decisions (leading Lagerspetz to examine and reject supra-majoritarian voting systems), the author nevertheless concludes that normal simple majority systems best implement the clear will of a people if it exists. Further, if no such will exists, such systems at least will not unfairly bias any alternatives (being arbitrary rather than internally biased): ibid., p. 189.

41 Lagerspetz, in ibid., at p. 188, notes the popularity of the requirement for unanimity among theorists: “It is easy to understand why unanimity or near-unanimity, is taken as the starting point in many theories. It has a central place in the whole social-contract tradition, in the theories of such conservative economists as James Buchanan, and in the radical critiques of contemporary institutions presented by Jurgen Habermas, R.P. Wolff and others.”


44 Dahl, in Democracy and Its Critics, makes this argument at p. 138: [Majority rule maximizes the number of persons who can exercise self-determination in collective decisions. […] Likewise, if more than a majority were required in order for a law to be adopted—let’s say 60 percent—then a minority of 40 percent (plus one vote) could prevent a majority of 60 percent
system except that of majority rule increases the tendency for indecisiveness or paralysis in political decision-making. The smaller number of negative votes need to block a decision, the greater the likelihood that such a block will occur and no decision will be possible. Because minority vetoes tend to lead democratic governments to the point of paralysis, supra-majority and unanimity systems actually tend to support the status quo, whatever that may be.\(^{45}\)

Thirdly, simple majority systems are better because if a democratic process determines no clear will for one option over another, simple majority systems will not unfairly prejudice either alternative.\(^{46}\) Finally, as long as a minority is not entrenched,\(^{47}\) the simple majority system compels all actors (even clear majorities) to attempt to gain the greatest numbers of supporters to prevent the chance of defeat at the last moment by a surprise splinter group.\(^{48}\)

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\(^{45}\) Lagerspetz, "Democracy and Paradox," p. 189. Robert Dahl argues against an over weighting in favour of the status quo, in part because of the in-built advantages such a position has in decision-making. It also offends against the four reasonable requirements for a decision-making system: (1) decisiveness, (2) anonymity (i.e., identity is irrelevant with respect to the weight of one’s vote), (3) neutrality with respect to alternatives, and (4) positive responsiveness. The latter requirement checks any attempt to prioritise the status quo for the simple reason that it is better to have a decision-making process that can reflect the smallest preference. For example, if no one cared about either of two positions, one could flip a coin to decide. But if one voter prefers a position and no one else cares then that person’s response should be positively reflected in the outcome. Also, from a utilitarian position, a decision-making process that satisfies more preferences is superior. See Dahl, ibid., pp. 139-44 (for the four requirements Dahl makes reference to mathematician Kenneth May’s piece, “A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision” (1952) 10 Econometrica 680-84).

\(^{46}\) Lagerspetz, ibid., at p. 189, states: “When a clear will of the people exists, it is normally implemented in majoritarian systems. When no such will exists, the results may be more or less arbitrary, but they are not unfairly biased against any alternative.”

\(^{47}\) The existence of an entrenched minority shows a lack of one of the fundamental preconditions of democracy, namely, equal consideration of interests: Dahl, Democracy and Its Critics, p. 151. Note, however, that entrenched minorities do not challenge the validity of democratic decision-making per se, since such processes still protect the interests of a greater number of persons than any other process. Rather, they challenge the legitimacy of the bounded decision-making unit, the polis. ibid., pp. 135-6. This raises the difficult issues related to changing the polis, such as those of secession or independence. Dahl argues that secession, or lesser options like decentralisation, are fully compatible with democratic theory because they optimise self-determination. However he acknowledges that there will be significant difficulties with such options: ibid., p. 184. For the international legal aspects of such problems, see Buchheijl, Secession; for a moral analysis of secession, see Allen Buchanan, Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec (Boulder, Colorado: Westview Press, 1991). In general countries have tended to prefer models that combine simple majority processes with supra-majority or consensus-oriented ones. See generally Lijphart, Patterns of Democracy. In discussing this phenomenon, Dahl, in ibid., at p. 161, argues that the existence of certain political realities will make a simple majority system feasible (relative homogeneity, lack of an entrenched minority, low likelihood that decisions will harm a minority’s fundamental values and way of life), whereas their lack will make minorities push for a supra-majority or consensus system.

\(^{48}\) Nino, in “The Epistemological Moral Relevance of Democracy,” at pp. 44-5, argues that the simple majority system brings us closest to the ideal of a unanimous consensus without holding us to the mercy of minority vetoes (which would occur in a qualified majority system). This is because simple majority systems force strong majorities to try to attract as much support as possible in order to prevent counter-majorities from being formed in opposition:

The great merit of a procedure of decision by simple majority is that, unlike that by a single person or by a minoritarian group, those who are interested in a certain decision try to get the adhesion of as many people as possible even with the simple majority is apparently surpassed. This is so because as a minority is left aside, its offers to some groups forming the majoritarian coalition increases and this coalition may break at the last moment. This is also the reason why, except for irrational motives like
Ideally, all parties should try to attract as many minority votes as possible to their position and permanent minorities should become rare. Simple majority democratic processes are also superior because they are more likely to produce correct decisions. In addition, as pointed out by David Held, they support diversity. This is because even though simple majority democratic systems must pre-suppose a consensus about the value of democracy, nevertheless they leave all other values undisturbed. This is because the democratic process refuses “to accept in principle any conception of the political good other than that generated by the people themselves.” For these reasons, the democratic polity should utilise a simple majority voting system in preference to either of the supra-majority or unanimity alternatives.

2. Direct and Representative Democracy

The second question related to the democratic polity is whether it should operate directly, through representatives, or use a combination of both. At the international level representative forms of government are preponderant. Individual ‘participation’ is nearly always through representatives—often unelected ones such as diplomats or legal advisers. Even non-governmental organisations (NGOs) tend to be hierarchical rather than democratic and there is no democratic global international body. The closest thing to such a ‘global international democracy’ may be the United Nations General Assembly, with its wide representation and equal voting rules for Member States. But even the General Assembly is not democratic in any real sense. Each state gets to vote, not each person. This creates a significant comparative disadvantage for more heavily populated states (e.g., compare the relative weight accorded to votes of citizens of India and Barbados). Also, citizens generally are not given the chance to know about, let alone to have an impact upon, their state’s position in General Assembly and other United Nations deliberations. Further, even if states

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were given weighted votes in international bodies based upon the size of their populations, state representatives would still be the ones acting on behalf of their citizens, not the citizens acting directly. What then are the implications of this kind of representative model of democracy, firstly at the national, and then at the international level?

At the national level representative government has interesting but potentially negative implications for democracy. Although justifiable in the face of the practical constraints of modern life—where one may not wish to become informed about, and vote upon, every issue or law—it conflicts with several basic premises underlying democracy. Firstly, to the extent that representatives make decisions without the participation or guidance of the entire demos, these decisions become those of only a subgroup rather than the people as a whole. Thus, prima facie, representation reduces the number of participants in a democratic decision-making process. Secondly, it disturbs the equality of impact of each citizen upon the decision being made. The preferences of representatives count to a greater extent than those of ordinary citizens. Thirdly, representation may encourage a kind of creeping elitism. This may seem paradoxical, since at present (at least in the media), there appears to be very little popular respect for politicians. But older justifications of representation in part may have been based upon the elitist perception that some persons either were, or could become, better at governing. Such understandings may continue to underlie representation today. To the

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52 Various examples exist of weighted voting systems. The European Community’s Council, for instance, under Art. 205(2) of the Treaty Establishing the European Community, Consolidated Version, has an elaborate, weighted voting system whereby states are given from two to ten votes depending upon size and power and a qualified majority (62 out of 87 votes, or a little over 2/3rds) is required. Note that the European system is not weighted in terms of population.

53 Dahl, Democracy and Its Critics, at pp. 28-33, sets out the history of representative government and contrasts the logic of representation and that of democracy. Nino, in The Constitution of Deliberative Democracy, at pp. 146-54, considers representation a “necessary evil” and recommends a combination of direct democracy with decentralized, smaller decision-making bodies as means of avoiding it.

54 But cf. Nino, ibid., pp. 146-7 (respect for personal autonomy may justify delegation because it frees up time for citizens to pursue personal interests).

55 Both of these criticisms assume that representatives do not, as Nino recommends, “continue the discussion the citizens have begun.” Rather, I assume that representatives will pursue their own agendas within the wide ambit of previous electoral platforms and the possible limitations of public opinion or opinion polls. Thus they are not greatly constrained to follow any kind of deliberative consensus on the part of the people. For Nino’s suggestion see ibid., pp. 146-7 and 171.

56 This involves a partial re-reading of Norberto Bobbio’s explanation of ancient and modern ideas of democracy, in Liberalism and Democracy, at pp. 25-29. Bobbio explains that the authors of The Federalist preferred representative, rather than direct, democracy because of the tendency of the latter for factionalism as well as because of the difficulties involved in creating direct democracy in anything other than a tiny state: ibid., pp. 26-7. Representative government for these early authors also was meant to express the popular sovereignty of the people as a whole, and this is how it took on elitist tones: “[r]epresentative democracy was fostered ... by the conviction that the citizens’ elected representatives would be better able to judge the common interest than the citizens themselves, whose vision would be too narrowly focused on their particular interests” (pp. 27-8). Representatives were considered superior to the masses because they were isolated from them, and therefore they were expressly required to lose all sense of direct agency. Cf. ibid., p. 28. It was impermissible for the representative to be bound by the will of the electorate.
extent that representation creates or encourages an elitist perception, it creates a fundamental inequality in the demos, and thus challenges perhaps the most basic principle underlying democracy, the fundamental egalitarianism that Robert Dahl calls its “Strong Principle of Equality.” In Dahl’s formulation this principle provides that “[t]he members [of the democratic polity] believe that no single member, and no minority of members, is so definitely better qualified to rule that the one or the few should be permitted to rule over the entire association.”

Let me briefly digress to counter the fundamental challenge that elitism poses to democracy, relying upon Robert Dahl’s influential work, Democracy and Its Critics.

a. Equality as Opposed to Elite ‘Guardianship’

It is ironic that the opposite of elitism—the fundamental equality of capacity of persons to govern—may seem counterintuitive, even shocking, to many. Perhaps this reaction arises because in many other areas of life it is readily acknowledged that some persons have superior and others inferior abilities. Great athletes, great thinkers and great leaders have qualities not possessed by everyone. Therefore it may seem logical to suppose that in the same way that we select and train individuals for certain pursuits and professions, so too should we select and train our best citizens to govern, rather than leave such an important task to the varied talents of the masses. To paraphrase one writer, why should we

If democracy was to be representative in the proper sense of the term, the elected representative could no longer be bound by the will of the electorare—a form of dependency characteristic, in fact, of the old society of rank and caste, in which various groups, corporations and collective bodies had used their delegates as a means of transmission to the sovereign of their own particular demands.

Ibid. (emphasis added). The French Constituent Assemblies carried this kind of logic to the extreme of adding a provision in the 1791 Constitution prescribing binding mandates: “the nominated representatives in the départements shall not be representatives of a particular département, but of the whole nation, and cannot be mandated by it” (tit. III, ch. I, sect. III, art. 7, as reproduced in ibid., p. 29). Cf. Wood, who in Democracy Against Capitalism, at pp. 213-17, argues that for the American Federalists “representation [was] not a way of implementing but of avoiding or at least partially circumventing democracy.” According to Wood representation, along with requirements for property, acted as filters upon popular participation. In this sense it was in many ways antithetical to democracy:

We have become so accustomed to the formula, ‘representative democracy’, that we tend to forget the novelty of the American idea. In its Federalist form, at any rate, it meant that something hitherto perceived as the antithesis of democratic self-government was not only compatible with but constitutive of democracy: not the exercise of political power but its relinquishment, its transfer to others, its alienation.

Ibid., p. 216.

57 Dahl, Democracy and Its Critics, p. 31. See also, ibid., chs. 6 and 7.

58 Dahl, ibid., at p. 53, when discussing Plato’s philosophy, explains some of the motivations behind allowing ‘those most qualified’ to rule: “Just as all men are not of equal excellence as physicians or pilots, so some are superior in their knowledge of the political art. And just as excellence as a physician or pilot requires training, so too men and women must be carefully selected and rigorously trained in order to achieve excellence in the art and science of politics.” See also: ibid., pp. 61-3 (need for specialisation).
give the same weight to the opinions of the ignorant as to those of the knowledgeable? An elitist approach to political rule would agree with such sentiments and argue that only the best should govern. Dahl categorises such approaches under the name “Guardianship.” He points out that political rule of this form has been embraced by such diverse writers as Confucius, Plato, and Lenin. Government by ‘guardians’ should involve rule by those with superior qualifications for such a task. Dahl identifies such qualifications as including: (1) “an adequate understanding of the proper ends, goals, or objectives that the government should strive to reach” (a “moral understanding or moral capacity”), (2) a “strong disposition actually to seek [the] good ends [of governance]” (“virtue”), and (3) knowledge of “the best, most efficient, and most appropriate means to achieve [these] desirable ends” (“technical or instrumental knowledge”). Guardianship theories also support the position that those that have such superior qualities (“political competence”) must not be accountable to the democratic process—since such accountability would allow their expertise to be outvoted by the preferences of the ignorant masses. It should be noted that every political system incorporates one of the basic assumptions of guardianship, namely, that not everyone is qualified to make competent political decisions (in Dahl’s terminology, not ‘morally competent’). Children and those with severe mental incapacity fall in this category. Also, day-to-day life reveals that some are simply incapable of governing themselves, and therefore should be excluded from participating in the processes that determine the lives of an entire society.

What does the egalitarianism of democracy have to offer against such arguments? There are both negative and positive responses to the challenges posed by elitism for


60 Dahl, Democracy and Its Critics, p. 53. See generally, ibid., chs. 4 and 5 (elaboration and critique of guardianship).

61 Ibid., pp. 57-8 (as espoused by the guardianship advocate). Note, however, that the elitist form of governance must be differentiated from the lesser reliance upon specialisations found in modern bureaucracies (optimistically discussed under the label ‘meritocracies’ in Dahl’s work). Specialisation allows the importation of expert knowledge into governance but does not require a change to its overall democratic accountability. Ibid., pp. 56-7.

62 Ibid., pp. 57-8 (not subject to democratic process). At p. 59 of the same work, Dahl summarises the views of a fictional advocate of guardianship (contrasted to democracy) as follows:

My reasons for contending that guardianship is superior to democracy are both negative and positive. My negative argument is that ordinary people lack the necessary qualifications for ruling. My positive argument is that a minority who possess superior knowledge and virtue—an elite, a ‘vanguard,’ an aristocracy in the original and etymological meaning—can be discovered and created. Unlike the great majority of people, this qualified minority would possess both the moral and the instrumental competence needed to justify a claim to govern.

63 Ibid., pp. 57-9.

64 Summary of the views of the ‘Guardian’ critic in Dahl, ibid., p. 61.
democracy. On the negative side, several of the assumptions of noble, ‘scientific’ rule are problematic. The first is that political competence can only be possessed by an elite few.65 For this to be true such competence would require special qualities. If these are not innate, they would have to be learnt and taught. Since aside from a few religious groups no society regularly chooses its leadership based upon innate superiority, this innate elitist justification is not convincing.66 As a result, the more plausible justification would rely upon the argument that political competence is a skill that can be learnt and passed on. However, this argument raises the second difficulty with guardianship, namely, it presupposes some form of objective science of rule, one that can be learnt and taught.67 Such a science has never existed and is unlikely to ever exist. This is for the simple reason that governance requires many forms of unrelated knowledge, some scientifically acquired and others that cannot be so acquired (e.g., the value choices and moral questions involved in governance).68 Instrumental knowledge of governance (a “correct understanding of the means for achieving widely or universally accepted ends like human happiness or well being”), also cannot be empirically demonstrated because empirical determinations cannot settle questions involving moral choices or public policies.69 Moreover, the attempt to acquire the kind of expertise required for Plato’s ‘royal science’ of rulership is self-defeating. Specialisation ipso facto requires a limited focus. Yet there is no single science of governance, and many technical judgements require a certain amount of non-scientific knowledge (common-sense, or “ontological view[s] about the nature of the world”).70 In addition, political or policy judgements involve assessments of risks or uncertainties, as well as trade-offs when there are competing values at stake.71 These kinds of difficult and unique choices make such ‘expertise’ difficult if not impossible to acquire.72

65 Ibid., pp. 65-6.
66 The Dalai Lama in Tibet is an example of a leader selected because of innate skills (based upon reincarnation). Max Weber’s “charismatic” type of authority (in his terms “domination”) requires a leader with superior abilities, and such abilities also might be innate. But because Weber recognises that such leadership is personal in nature, depending upon the unique characteristics of the leader, it cannot be passed on to a chosen follower and tends to be short-lived. In order to attain stability it must be transformed into one of Weber’s other ideal-types of authority (traditional or formal-legal). For discussions of the three types of authority, see, e.g., Kronman, Max Weber, 37-71; David M. Trubek, “Max Weber on Law and the Rise of Capitalism” (1972) 3 Wisconsin L. Rev. 720-53, pp. 732-5; Weber, Sociological Writings, pp. 28-46; Julien Freund, The Sociology of Max Weber, trans. M. Ilford (New York: Pantheon Books, 1968), pp. 229-34.
67 Dahl, Democracy and Its Critics, pp. 65-6. Notice that a consequence of this ‘objective science’ would be an end to popular accountability: those selected and prepared for leadership would become superior, and thus would not need guidance from the general public.
68 Ibid., pp. 66-7 (impossibility of arriving at absolute, inter-subjectively valid, objectively true moral judgements).
69 Ibid., pp. 65-9.
70 Ibid., pp. 69-70.
71 As summarised by Dahl, ibid., at p. 75:
Finally, the nature of the ‘general good’—the scientific goal towards which ‘guardians’ will strive—raises its own difficulties. Should the ‘general good’ be viewed as a kind of ‘greatest good’ for all members of the polity, or should it be viewed as something larger such as the good of the community as an organic whole? Let us look at the first view, where the general good is an aggregate of individual interests. If we concede that each “adult person is more likely, as a general rule, to understand his or her personal interests better than another person” (a point I shall return to in a moment), and the ‘general good’ is no more than an aggregate of individual interests, then as long as there is an appropriate mechanism to aggregate such interests, such as the democratic procedure, there is no need for guardians.73

If, on the other hand, the ‘general good’ is to be viewed as more than such an aggregate—greater than the values such system might have for all of its members—then the question arises as to why we should value a human system above and beyond the values it has for us.74 Guardianship founders in both cases.

On the positive side, arguments in favour of democracy can be made stronger with the help of Dahl’s ‘Strong Principle of Equality.’ This principle is based upon several premises, including at the most basic level the idea that human beings are, for the purposes of government, in some sense intrinsically equal. The sense in which individuals may be said to be intrinsically equal has varied over time and in the opinions of different thinkers:

To Locke intrinsic equality evidently means that no one is naturally entitled to subject another to his (or, certainly, to her), will or authority. [...] To some, however, intrinsic equality means that all human beings are of equal intrinsic worth, or, put the other way around, that no person is intrinsically superior to another. To John Rawls, who finds the idea that human beings are

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72 We could, of course, try to avoid this problem by increasing the numbers of ‘guardians’ so as to bring a broader range of expertise to decisions. Nevertheless, we would be defeated because at some point the guardians themselves would have competing viewpoints on any issue. At that point we would have to decide how to choose between these competing viewpoints. To do so we could either find some form of ‘super-Guardian’ or fall back upon a decision-making process like democracy. The first solution leads us back to a single guardian model. The second solution utilises a non-elitist form of decision making. If democracy is the method chosen here, then how can we be certain in dismissing its value for broader decisions? See, e.g., ibid., p. 74-5.

73 Ibid., pp. 70-71. Notice that the flip side of the proposition that ‘one is most often the best judge of one’s own interests’, is the proposition that others are less likely to protect your interest. This is aggravated in a system of guardianship, which by definition remains unaccountable to, and unchecked by, the general public. Moreover it is likely to be disdainful of their views. The experiences of totalitarian regimes and their significant failures (moral as well as in the ‘science of effective rule), should serve as a warning here. Ibid., pp. 76-7.

74 Summary of Dahl’s points, ibid., pp. 70-74.
of equal intrinsic worth excessively vague and elastic, their intrinsic equality consists rather of the capacity of having a conception of their good and acquiring a sense of justice. To others, intrinsic equality means that the good or interests of each person must be given equal consideration; this is the well-known Principle of Equal Consideration of Interests.\textsuperscript{75}

Although a formal justification of the intrinsic equality of individuals may be difficult to achieve, its pervasive influence upon human thought can be seen in the way it serves as a basic religious tenet in such religions as Judaism, Christianity and Islam (i.e., that we are equally God’s children).\textsuperscript{76} Further, proving its opposite—“that some people ought to be regarded and treated as intrinsically privileged quite independent of any social contribution they may make”—has yet to be done.\textsuperscript{77} As a result, I would argue that the lack of a ‘science of government,’ when combined with the value of the fundamental idea of intrinsic equality, must push us away from the strong forms of ‘representation’ encompassed in the term ‘guardianship.’ In sum, a democratic polity must not include the extreme forms of ‘representation’ envisaged in guardianship.

\textbf{b. ‘Democratic’ Representation?}

But what does this tell us about the weaker forms of representation that we see in modern democratic states, where leaders are popularly elected and subject to recall? These forms of temporary representation also suffer from the two above-mentioned problems of being a form of decision-making by a subgroup of the people (not the entire \textit{demos}), which distances persons from decisions made on their behalf. However, representation of this form benefits democracy by allowing it to function on a much larger scale. It allows citizens more time to pursue the other goods of life. Do the flaws of representation outweigh its clear advantages?\textsuperscript{78}

Before answering this question, let us consider a partial solution to the first problem facing representation, that of the distancing of decisions from the full \textit{demos}. This solution is the check available through ‘final control over the agenda.’ This check arises as Dahl’s fourth

\textsuperscript{75} Ibid., p. 85 (citations omitted).
\textsuperscript{76} Ibid., p. 85-6.
\textsuperscript{77} Ibid., p. 86.
\textsuperscript{78} One of the paradoxes of democracy is that, on the one hand, it promotes personal autonomy (moral and political) and self-determination, and yet on the other, can restrict that same autonomy if it becomes all-encompassing. In other words, if decisions in all spheres of life become subject to democratic processes then the scope for personal choice becomes non-existent. See generally Nino, \textit{The Constitution of Deliberative Democracy}.  

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criterion for a democratic process.  

Dahl argues that final control over the agenda requires
the “demos [to] have the exclusive opportunity to decide how matters are to be placed on the
agenda of matters that are to be decided by means of the democratic process.”

In other words, “the people must have the final say, or must be sovereign.”

This criterion allows the
people to delegate (not alienate, which is impermissible), decision-making to others and still retain control over the process because they (not the delegates), retain final control over the
agenda and are able to retrieve any matter for general democratic decision.

Of course this
power of final control must be actual and practicable, not merely theoretical. If successful,
even though delegation does entail a kind of distancing of decisions from the dems, the dems nevertheless retains full control over which matters are delegated and which matters are decided democratically. In this sense, delegation itself becomes a subject for democratic decision in which the dems as a whole temporarily decides not to decide certain issues by means of the democratic process.

This solution still suffers from three weaknesses. Firstly, it only imposes the weakest
restraint upon representatives. Final control is a blunt tool, one that merely removes items
from the hands of representative rather than requires any real public consultation. Secondly,

it appears to endorse the antidemocratic view that there are some decisions that cannot or should not be decided by the dems democratically. This hearkens back to the kind of elitism inherent in ‘guardianship,’ outlined above.

Such an erosion of the generality of the matters subject to the democratic process is problematic. Although some issues may not be suitable for democratic decision, such as matters related to personal morality (which do not have an inter-subjective effect), I would argue that almost any political decision can and should be made democratically.

This is because each such decision invariably will involve competing

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79 These five criteria are set out in Dahl, Democracy and Its Critics, at pp. 108-14 and 129, as including: (1) effective participation, (2) voting equality at the decisive stage, (3) enlightened understanding, (4) control of the agenda and (5) inclusiveness.

80 Ibid., p. 113.

81 Ibid.

82 Ibid., pp. 113-14. Alienation is incompatible with this principle because if a matter is struck permanently from the agenda then it can no longer be subject to final control by the dems. Ibid., p. 114.

83 Note that the decision about delegation itself must be made democratically in order for delegation to fit within the democratic process: Ibid., p. 114.

84 Dahl himself, in ibid., at p. 114, accepts such a problem when explaining the presuppositions of the principle of final control:

[T]he criterion of final control does not presuppose a judgment that the dems is qualified to decide every question requiring a binding decision. It does presuppose a judgment that the dems is qualified to decide (1) which matters do or do not require binding decisions, (2) of those that do, which matters the dems is qualified to decide for itself, and (3) the terms on which the dems delegates authority.

85 Nino, in The Constitution of Deliberative Democracy, at pp. 203-5, excludes matters of personal morality from the proper sphere of democratic decision-making because they do not require the kind of impartiality that the
values, moral choices or assessment of risk, all matters that are best decided democratically. Even the most highly technical and scientific decisions could benefit from democratic control, as seen in the area of decisions related to nuclear weapons, where common sense views about the implications of weapons technology may be more reliable than those of nuclear specialists. Thirdly, delegation poses problems in terms of its implications for one of the important 'goods' of the democratic process, namely, its epistemological quality in relation to moral decisions. Carlos Santiago Nino endorses the view that the merit of democracy lies in its ability to allow the kind of face-to-face discussion and deliberation that carries epistemological moral value. By this he means that conditions of the democratic process allow us to achieve a kind of knowledge of, or way of knowing, moral decisions ('moral' in the broad sense of encompassing issues of 'value' and 'the good'). To the extent that delegation removes the potential for discussion and interaction, we lose this good associated with democracy. Thus, even though Nino himself is forced to concede that representation is necessary today (a "necessary evil"), he is right to caution us to avoid it where possible. He also raises concerns about such current direct forms of democracy as referenda, since they do not allow any genuine discussion or public deliberation. As a result, instead of delegation Nino suggests that we should substitute direct democracy in the form of decentralisation of the polis into small face-to-face decision-making groups.

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86 See e.g., Dahl, Democracy and Its Critics, pp. 67-70. Dahl, at the latter page, discusses the example of scientific and non-scientific disagreement about the implications of multiple, independently targeted entry vehicles for nuclear warheads in relation to the arms race. The non-technocrats predicted the result, whereas the technocrats did not, and instead had to reverse their strategy.


89 Ibid., pp. 152-4. Note, however, that at pp. 152-3, Nino restricts the types of matters which could be subject to decentralised decisions, specifically excluding many of the issues central to international law:

Today we are witnessing a globalization of many issues, including trade, basic human rights, defense, and the fight against terrorism and organized crime. As these important subjects are transferred up to supranational bodies, such as the European Council of Ministers, the remaining concerns are issues of social morality dealing with unending conflicts of rights and resource distribution. Once a priori rights are secured by supranational organizations and highly contested political issues like defense or foreign relations become greatly constrained by the emergence of continental if not universal organizations, it is possible to allow nationalists and localists to have their way in defining the scope of the demos in which conflicts of interest can be decided.

This greatly problematises Nino's position since it requires us to either wait for solutions to international issues before democratising locally, or acknowledges the inapplicability of democracy internationally. Another issue, highlighted by Dahl, in Democracy and Its Critics, at pp. 301-2, is that if these smaller groups are given concrete political form (for example, by re-constituting the state into city-states), then they face two dangers. Firstly, very small groups will not have enough power or scope for decisions about issues of importance. Secondly, since the world is made up of larger entities, these small communities would require protection and support from large states or face redundancy and even extinction. Such difficulties inevitably will push small entities to expand in size. See also, Dahl, ibid., chs. 15-16.
Dahl, who also recognises the inevitability of delegation for large states, makes a similar suggestion in the form of creating a ‘minipopulus’ which would be made up of a representative sample of the entire demos selected for a designated period to make decisions.90 This kind of suggestion, when combined with the models proposed by the ‘cosmopolitan democracy’ school could lead the way towards bringing more direct and participatory democracy to the international level. Forums, such as the new United Nations Permanent Forum on Indigenous Issues, are being created at the international level to bring together state and non-state representatives.91 We should encourage such developments, as well as push for more far-reaching ones. For example, we could experiment with directly electing representatives to international bodies, or creating small ‘focus group’ bodies made up of randomly selected individuals to help deliberate upon, and make decisions about, international issues. Exploring all of these provocative suggestions, however, would take us outside the more limited scope of this work.92 For present purposes, it is important to understand that representative democracy does have limitations, ones that must be assessed when thinking about the meanings of democracy and the democratic process. Importantly, such limitations also must be kept in mind when constructing international models of democracy as well as when conceptualising democracy’s relation to sovereignty. Sovereignty, after all, traditionally fixes international legal representation at the level of the sovereign state, a level that may be far removed from the deliberative decisions of individual citizens.

90 Dahl, ibid., p. 340.


1. Decides to establish as a subsidiary organ of the Council a permanent forum on indigenous issues, consisting of sixteen members, eight members to be nominated by Governments and elected by the Council, and eight members to be appointed by the President of the Council following formal consultation with the Bureau and the regional groups through their coordinators, on the basis of broad consultations with indigenous organizations, taking into account the diversity and geographical distribution of the indigenous people of the world as well as the principles of transparency, representativity and equal opportunity for all indigenous people, including internal processes, when appropriate, and local indigenous consultation processes, with all members serving in their personal capacity as independent experts on indigenous issues for a period of three years with the possibility of re-election or reappointment for one further period; States, United Nations bodies and organs, intergovernmental organizations and non-governmental organizations in consultative status with the Council may participate as observers; organizations of indigenous people may equally participate as observers in accordance with the procedures which have been applied in the Working Group on Indigenous Populations of the Subcommission on the Promotion and Protection of Human Rights....


92 For further discussion of similar possibilities, see Chapter 8, below.
Let us return to the task of fleshing out the content of democracy. We have looked at the fundamental assumption of equality, and its implications in terms of elitism and representation. In doing so, we have explored the broader question of the acceptable form of democratic polity or form of governance. We have answered this question by concluding firstly, that simple majority voting systems are preferable, and secondly, that even though representative forms of democracy are unavoidable for large, modern states, that nonetheless direct and participatory versions of democracy should be used whenever possible (alongside representative institutions, for example). Let us scrutinise the next component of democracy, thereby moving from the equality of individuals to the equality of individual interests. The latter is important to help us understand who should be able to participate in democratic decisions (the demos).

E. **The Demos**

Because we can say that in some sense every individual has intrinsically equal moral worth, we can also go on to say that the good or interests of each person must be given equal consideration. But if we stop at this point we cannot entirely justify democracy. There may be some among us who, simply speaking, are superior at deciding how to equally benefit the good, or interests, of each person. At this point we again have to face squarely the question of whether “ordinary people are, in general, qualified to govern themselves.” Another way of posing this question is to ask who is best able to judge the good or interests of each person? Or more directly, who is best able to judge our own interests? Most of us would assume a personal capability for such matters: I am best able to determine my own good. Such a presumption may also be extended more generally: “what holds for [me] holds, generally speaking, for other adults.” This can only be a presumption, however, as it is more a rule of prudence than an epistemological principle. It is clear that sometimes people may not act in their own best interest. But we can presume, unless there is compelling reason to the contrary, that each person is best qualified to make such a decision. The only major

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93 Dahl calls the latter the “Principle of Equal Consideration”: *Democracy and Its Critics*, p. 85.

94 Ibid., p. 97.

95 Dahl, in *ibid.*, at pp. 99-100, calls this the “Presumption of Personal Autonomy”:

This is the assumption that no person is, in general, more likely than yourself to be a better judge of your own good or interest or to act to bring it about. Consequently, you should have the right to judge whether a policy is, or is not, in your best interest. The assumption is, further, that what holds for you holds, generally speaking, for other adults.

At the latter page the presumption is defined as follows: “in the absence of a compelling showing to the contrary everyone should be assumed to be the best judge of his or her own good or interests.”

96 Ibid., p. 100.
automatic exception to this presumption today is children. For adults, there are those exceptional cases of individuals who are so severely handicapped "that they are judged incapable of making the elementary decisions required for their own survival or minimal well-being." But even for these cases, the legal burden of proof must rest upon those who would remove their autonomy.

To bolster the argument that each should be presumed capable of judging her or his own interests three further points must be made. The first is that each of us will have the most direct appreciation of our own preferences or interests. No other person will have such immediate contact with the combination of knowledge and values that make up each of us. Secondly, even if someone else did have a close appreciation of one's preferences and interests, when it comes to judging matters of conflicts of interest—i.e., those involving trade-offs—there is no overarching or supreme value system with which to solve these problems. Any solution will merely involve the imposition of one value system, which may or may not be the one that the individual would have chosen. Finally, when it comes to judging interests, experience tells us that the incentive for others to further our own interests are weaker than our own incentive to do so. This does not mean that democracies will always protect the interests of all who are subject to their laws, but democratic systems are more likely to do so than the alternatives. In this sense, democracies are the necessary, but not sufficient condition, for the achievement of the protection and advancement of the good and interests of individuals in society. Let us add up these basic premises to determine their consequences for any system of governance:

If the good or interests of everyone should be weighed equally, and if each adult person is in general the best judge of his or her own good or interests, then every adult member of an association is sufficiently well qualified, taken all around, to participate in making binding collective decisions that affect his or her good or interests, that is, to be a full citizen of the demos. More specifically, when binding decisions are made, the claims of each citizen as to the laws, rules, policies, etc. to be adopted must be counted as valid and equally valid. Moreover, no adult members are so definitively better

97 Ibid., pp. 100-101.
98 Ibid., p. 101.
100 Dahl, in ibid., at p. 103, explains that this is because "the self is privileged in its access to the particularities, even the uniqueness of the self." Further, since value conflicts may involve different systems of value, "the claim of another to superior knowledge of what is good for me reflects nothing more than a particular value system, and not at all what would be best in the perspective of my own system of values."
101 Ibid., pp. 103-104. Dahl provides the examples of disenfranchised groups in the past, such as women, slaves, and the working class, none of whom could be said to have had their interests better protected under paternalist rule.
102 Ibid., p. 104.
qualified than the others that they should be entrusted with making binding collective decisions. More specifically, when binding decisions are made, no citizen's claims as to the laws, rules, and policies to be adopted are to be counted as superior to the claims of any other citizen.\textsuperscript{103}

This, again, is what Dahl calls the "Strong Principle of Equality."

Our discussion of such ideas as 'guardianship,' the principle of equal consideration of interests and the strong principle of equality, helps us to establish parameters for the make-up of the \textit{demos} (the sub-group of persons subject to democratic decisions that participates in making those decisions). The \textit{demos} can and should be nearly universal. The only two categories of persons that can be excluded from participation on the basis of lack of personal autonomy, or lack of political competence, are children and the severely mentally handicapped. This is because neither category has the requisite moral understanding or moral capacity to participate fully in the democratic decision-making process.\textsuperscript{104} Other persons that can be excluded on the basis of \textit{insufficient connection} to the \textit{polis} are foreigners—persons who are either temporarily resident or merely passing through the territory. These foreigners would not be \textit{morally} qualified to participate in the decision because they would not be subject to the \textit{effects} of their decisions, such as the consequent laws or policies.\textsuperscript{105} However foreigners more permanently resident in the \textit{polis} should be entitled to participate in its democratic processes. As a result, following Dahl, we may say that the "demos must include all adult members of the association except transients and persons proved to be mentally defective."\textsuperscript{106}

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We can now answer the original four questions posed at the start of this Chapter as follows. The question of who may be the "people" is unanswerable from within democratic

\textsuperscript{103} \textit{Ibid.}, p. 105. At p. 98 he summarises this "Strong Principle of Equality" more briefly:

All members are sufficiently well qualified, taken all around, to participate in making the collective decisions binding on the association that significantly affects their good or interests. In any case, none are so definitely better qualified than the others that they should be entrusted with making the collective and binding decisions.

\textsuperscript{104} See \textit{ibid.}, chs. 4 and 7. In the latter chapter, at p. 101, Dahl sets out these categories as follows:

Today, however, children are the only large group of people subject to comprehensive paternalistic authority; thus they constitute the only major exception to the Presumption of Personal Autonomy. [...] For adults, on the other hand, paternalistic authority with respect to individual decisions is thought to be justified in only a small percentage of exceptional cases—persons so severely handicapped because of birth defects, brain damage, acute psychosis, senility, and so on that they are judged incapable of making the elementary decisions required for their own survival or minimal well-being. Even in these cases, the burden of proof is always legally placed on those who would propose to replace personal autonomy with paternalism.

\textsuperscript{105} \textit{Ibid.}, pp. 128-9.
theory, strictly speaking, since it pre-supposes the existence of such a unit. However, such a question must be subjected to other relevant criteria, such as the requirements of equality and non-discrimination. A strong respect for equality, as we have seen, underlies the meaning of democracy. The subgroup of the people that is entitled to participate in democratic decision-making—the demos—should be made up of all adult members except transients and persons proved mentally defective. The size of the democratic unit, or polis, when considered as a discrete geographical entity, should for the present remain close to that of the state. However even with such a restriction considerable leeway is still possible. As seen in Chapter 1, the requirements for statehood may be flexibly interpreted. The size of the polis, if connected to the state, can range considerably. Contrast the territorial size of states such as Barbados and Canada, for example, which have areas of 430 and 9,976,140 square kilometres, respectively.\textsuperscript{107} Also, due to the effects of globalisation, alternative and overlapping forms of polis should be encouraged. The acceptable forms of democratic governance (types of polity), are only partially restricted. We need to balance the flexibility offered by representative forms of government (including elected officials or randomly selected representative deliberative groups), with the democratic deficit experienced in anything but a direct, participatory decision-making process. The middle position accepted here is that representative democratic governance must be accepted as a “necessary evil,” but at the same time that we should constantly seek to inject participatory, face-to-face deliberative elements into our model of democracy.

Let us now round out this model by isolating the particular rights and freedoms required for democracy to function. Such rights and freedoms are essential for checking negative tendencies of majority voting systems, which may work to the detriment of both individuals and entrenched minorities.\textsuperscript{108}

\textsuperscript{106} Ibid., p. 129 (emphasis omitted). Dahl, ibid., deals with the difficulty of defining who is to be considered an “adult” by suggesting a practical test such as “to treat every member as an adult who does not suffer from a severe mental disability or who is considered an adult in criminal law.”

\textsuperscript{107} Statistics taken from the Central Intelligence Agency (US), World Factbook 2000 (based on information available as of 1 January 2000). Canada’s territorial size is made up of 9,220,970 sq. km of land territory and 755,170 sq. km of water; Barbados has no significant body of fresh water inside its territorial boundaries.

\textsuperscript{108} E.g., H.L.A. Hart, in Law, Liberty and Morality (London: Oxford University Press, 1963), at pp. 79-80, clearly explains why democracies need checks against continuous domination by a majority:

It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live. This is a misunderstanding of democracy which still menaces individual liberty....

The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted. No one can be a democrat who does not accept the first of these, but no democrat need accept the second. Mill and many others have combined a belief in a democracy as the best—or least harmful—form of rule with the passionate conviction that there are
F. REQUISITE RIGHTS AND FREEDOMS

Our ability to describe the minimum set of rights required for democracy depends upon the conception of human rights used. International legal scholarship, for example, tends to divide rights into three generations, based primarily upon the conceptual framework established by the two International Covenants: starting with civil and political rights, followed by economic, social, and cultural rights, and ending with environmental and other ‘third generation’ rights.\(^\text{109}\) Most of the obvious pre-requisites for democracy—freedom of speech, freedom of information, the right to vote, etc.—would fall within the first set of civil and political rights, and thus commentators frequently restrict their analysis to those rights.\(^\text{110}\)

However, if we require meaningful democratic participation, each of these civil and political rights will depend upon rights from the other spheres. For example, in order to participate in an election one must have access to information. But a right of freedom of information in turn assumes a basic education, so as to be able to comprehend the information, and minimum living standards, amongst other things. As formulated by David Beetham, “the ‘right to life’ entails the right to the means to life, and […] the right to liberty entails the right to the means of exercising liberty; and that our duties to others cannot therefore be exhausted by the negative duty of refraining from harming or obstructing them.”\(^\text{111}\) If this kind of deep and


\(^{108}\) Gregory Fox, for example, in “The Right to Political Participation in International Law,” narrows his focus to the particular sub-set of human rights related to electoral processes. Fox clarifies his position when he explains that he does not mean to imply that other political and social rights are nonessential for the democratic process. Rather, his narrow focus is dictated by international law’s view of democracy—as process-oriented, with a focus on popular consent, and therefore elections: ibid., p. 49.


Admittedly, there may be sound practical and political reasons for preserving a narrow focus, and a mutual division of labour, in human rights campaigning (Amnesty here, Oxfam there, etc.). But writers on human rights have a responsibility to insist on an inclusive conception of these rights. Otherwise they invite the justifiable charge of endorsing a narrowly liberal and Western preoccupation with civil and political rights alone. [Citations omitted.]
holistic view of human rights is used, then the three generations of rights become nearly inseparable.\textsuperscript{112} The result is that a vast number of rights will be required for democracy. Michael Saward adopts a position along these lines, as he includes in his list of democratic rights the freedoms of expression and association, as well as the rights to adequate education, adequate healthcare and to have a basic income.\textsuperscript{113}

Yet even if we recognise the ultimate interdependence of human rights, we should narrow our focus for the analytical purposes of describing the \textit{minimum set} of human rights necessary for democratic governance. Such a limitation is also important because the scope of human rights selected will determine the range of democratic choice, as highlighted by Saward and discussed in depth by Carlos Nino.\textsuperscript{114} This is because human rights and democratic choices exist in a relation of reciprocal limitation. In other words, the breadth of choices available to the \textit{demos} is directly related to the breadth of human rights being protected. If, for example, the full range of human rights were to be protected (all three generations), then the range of democratic choices available would become almost non-existent. Almost any choice made through democratic processes would violate some human right.\textsuperscript{115}

In light of these considerations and the above discussion of democracy, I argue that the minimum basic \textit{rights} required for democracy include the rights of equality, non-discrimination and peaceful assembly, as well as the rights to vote, to hold public office, to take part in government and public affairs and to have access to public service. The requisite basic \textit{freedoms} include those related to thought, conscience, opinion, expression and association.\textsuperscript{116} Provision of a minimum standard of education is also necessary, as advocated

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\item[\textsuperscript{112}] For a statement of this `interdependent and indivisibility' position see, e.g., Jack Donnelly, \textit{Universal Human Rights in Theory and Practice} (London: Cornell University Press, 1989), ch. 2.
\item[\textsuperscript{113}] Saward, \textit{The Terms of Democracy}, pp. 87-103. Saward's list is more extensive when we include his `procedural rights,' such as the rights to vote, to be elected, etc. See his complete list of rules and rights, \textit{ibid.}, pp. 108 (reproduced in the footnotes in Chapter 1, above). Saward recognises that it will be difficult to establish a `dividing line' between his specified rights and the rest, including environmental rights. However he argues that such a distinction is possible, and perhaps necessary when we consider the limitations such a vast body of rights would put upon democratic choice: \textit{ibid.}, p. 102.
\item[\textsuperscript{114}] Saward, \textit{The Terms of Democracy}, p. 102; Nino, \textit{The Constitution of Deliberative Democracy}, chs. 3 and 4.
\item[\textsuperscript{115}] Of course not every democratic choice will involve a human right, as there are technical or practical matters that do not implicate human rights. However, if rights are viewed as being both positive and negative, then rights may be violated by seemingly `rights-neutral' decisions simply because they involve resource allocation and therefore will impact upon related rights (e.g., transferring funding from education to national defence). See e.g., Nino, \textit{ibid.}, pp. 64-5.
\item[\textsuperscript{116}] The various rights and freedoms in this list represent a minimum set. They are culled from the two \textit{International Covenants}, the Universal Declaration of Human Rights, and the various treaties discussed later in Chapter 11 in relation to the treaty-based and customary practice supporting a right to democratic governance. For a similar, albeit broader list of requirements for democracy see Crawford, \textit{Democracy}, pp. 4-5 (referring to the norms elaborated in the \textit{International Covenant on Civil and Political Rights}, the \textit{European Convention on Human Rights}, and the \textit{International Covenant on Economic, Social and Cultural Rights}).
\end{enumerate}
by Saward, as is respect for the principles of personal autonomy, inviolability and dignity of the person, as articulated by Nino. Dahl has revealed the fundamental importance of equality and autonomy for democratic theory (in his principles of equal consideration of interests, personal autonomy and strong principle of equality). Finally, these rights and freedoms must be strong enough to ensure that the government is elected in free and fair elections, by secret ballot or free vote, at reasonable intervals, and on the basis of universal suffrage.

I explicitly exclude from this list Saward’s two requirements of rights to adequate health care and basic income because these appear to be less closely connected to democracy, per se, and rather more to general conceptions of human dignity. This is a difficult distinction, and I cannot defend it in full here. But I would suggest that it is meaningful to separate those rights that are fundamentally linked to democracy, at least at an analytical level, from the broader category of rights necessary for a complete and dignified human existence. I avoid the latter path of perfectionism for two reasons, one pragmatic and the other theoretical. It is pragmatic to specify a minimal rather than maximal set of democratic prerequisites because, as suggested by Robert Dahl, no democracy today or anytime in the near future could hope to fulfil the maximalist definition. If, for example, we accept Saward’s right to basic income as a prerequisite for democracy on the understanding that citizens must be able to feed and cloth themselves then we start to descend down the slippery slope towards specification of other fundamental rights, such as the rights to life, liberty, et cetera. These latter rights are obviously valuable and important, both for a satisfactory human existence and for a functional democracy. One cannot participate in a democratic

Rights, the American Convention on Human Rights, the African Charter on Human Rights, and the Universal Declaration on Human Rights).

See generally, Saward, The Terms of Democracy, chs. 5 and 6.

See generally, Nino, The Constitution of Deliberative Democracy, chs. 3 and 4. Nino’s conception of personal autonomy stems from the moral autonomy of each individual and proscribes interference with the free choice of ideals of personal excellence. The principle of inviolability of the person limits the principle of personal autonomy by asserting the independence and separability of persons. It proscribes the diminishment of one person’s autonomy for the sole purpose of increasing the autonomy enjoyed by others. The principle of dignity of the person checks the other two principles by allowing restrictions on the autonomy of individuals when consented to by the individuals concerned. Ibid., pp. 48-52. This principle of dignity allows one to take into account “deliberate decisions or acts of individuals as a valid sufficient basis for obligations, liabilities, and loss of rights.” Ibid., p. 52. Nino further clarifies the principle of inviolability of the person as proscribing “only those restrictions which diminish a person’s autonomy to a level inferior to that enjoyed by others.” Thus, he continues, in ibid., at p. 61, the principle of inviolability allows for some inequality in order to increase personal autonomy:

The principle does not impose a strict equality among individuals: differences in autonomy may be justified if the greater autonomy of some serves to increase the autonomy of lesser autonomous people or has no effect on the latter’s autonomy. This is an idea of equality not as levelling but as nonexploitation: greater autonomy is illegitimate when achieved at the expense of a lesser autonomy of other people. [Citations omitted.]

Dahl, Democracy and Its Critics, chs. 6-9.
process, for example, if one is being tortured or held in slavery. But if we move too far along this slope the list starts to become comprehensive—addressing all aspects of human dignity—and moves away from the narrower task of setting out a basic list of democratic pre-requisites. The theoretical reason to avoid this kind of perfectionism is the one referred to earlier, namely, the zero-sum relation between the scope of human rights and the scope of democratic choice. The closer we come to a maximalist account of human rights, the further we move from a meaningful scope for democratic decisions.

Let me comment briefly on the two requirements of a minimum standard of education and freedom of information, which together allow a demos both to become properly informed about and understand the issues it is asked to decide. The first of these requirements may seem to fall prey to the kind of 'slippery slope' argument made a moment ago to exclude the full range of human rights from our list. But without a minimum level of education, democratic choice and democratic deliberation would become anaemic in nature. There is no point in engaging in a democratic debate if the demos does not possess the basic level of knowledge required to understand the issues or to participate in any real sense. Such a standard, however, need only remain minimal, since one of the benefits of proper democratic deliberation is the creation of knowledge and understanding (including, for Nino, moral knowledge). The second requirement, freedom of information, is a self-evident and accepted feature of democracies. But what may not be appreciated is how revolutionary a freedom it is. It is astonishing for the simple reason that it makes power visible. As summarised by Norberto Bobbio, "[o]nly when a record becomes public are citizens in a position to judge it, and hence to exercise one of the most fundamental prerogatives of any citizen in a democracy: the control of his rulers." Visibility is revolutionary because it goes against the natural tendency of power, which is to hide itself—secrecy being essential to

120 Ibid., chs. 15 and 16.
121 See further Chapter 4, below.
power.\textsuperscript{123} For this reason, the one aspect of globalisation that we have identified as beneficial to democracy—the speed and breadth of global communication—is an important one.\textsuperscript{124}

III. THE DEMOCRATIC STATE

Let me conclude by turning from an elaboration, to a brief application, of our understanding of democracy. Specifically, what is the impact of this conception of democracy upon the notion of the state? After all, even if democracy is the dominant contemporary requirement for legitimate government (as suggested in the following Chapter), it is not one of the formal legal or political requirements for statehood. I have defined the state as the recognised international entity that claims to exert a monopoly of legitimate force over a defined territory, with a permanent population and effective government, and which possesses the capacity to enter into relations with other states. The state need not be, and traditionally was not, democratic. However three parts of this definition of statehood could yield a democratic content: legitimate force, effective government and the capacity to enter into international relations. This is because in order for the state’s force to be legitimate, or for its government to be effective, the authorities of a state must possess the general respect and support of the populace (or at minimum its acquiescence). Today democracy may be said to be the most stable and effective form of governance that ensures legitimacy. Democracy may be vital to ensure that a state successfully achieves and maintains two of its internal criteria. The third criterion, the state’s capacity to enter into international relations, increasingly requires democratic structures and processes. As further explored in Chapters 10 and 11, below, the international community is increasingly requiring evidence of respect for democratic institutions and processes before according recognition to a state as well as before allowing existing states and their governments to enter into full international relations with other states. As a result, even if democracy is not an explicit criterion for statehood, it may increasingly become an implicit one.

However, since many different models of democracy exist globally, it is difficult to specify any meaningful, exacting requirements for the democratic state.\textsuperscript{125} Perhaps a few

\textsuperscript{123} Bobbio, \textit{ibid.}, pp. 36-7. As summarised by Bobbio, in \textit{ibid.}, on the latter page, when discussing Elias Canetti’s work:

> By not being seen \[power\] has a better view of what others are doing: ‘Power is impenetrable. The man who has it sees through other men, but does not allow them to see through him. He must be more reticent than anyone; no one must know his opinions or intentions.’

tentative conclusions can be drawn. Firstly, as indicated earlier when discussing the practical implications of democracy for modern states, the present trend appears to be one of representative rather than direct forms of democracy. However, we have identified several significant problems associated with representation. As a result, even though we may conclude that the democratic state today can involve a representative component, we may also argue that this must not be seen to be a formal requirement. In fact, it is precisely because of the problems inherent in representation that Dahl characterises the modern state as being only partially democratic—being instead more accurately described as a form of “polyarchy.”126 Despite its clear limitations when contrasted to ideal forms of democracy, Dahl nonetheless argues that the structure of the modern state (with its increased scale, greater citizen diversity and increased political conflict), makes polyarchy the best form of democracy currently available.127 He argues that it should be encouraged as a way of increasing democracy at the level of the state.

Let us examine Dahl’s pre-requisites for polyarchy in order to indicate the general criteria for the democratic state at present (not democracy more generally, in its non-statal forms). Dahl sets out seven institutions that are required for a polyarchy, institutions which must provide actual, not merely nominal rights: (1) elected officials (who have control over government decisions about policy), (2) free and fair elections, (3) inclusive suffrage, (4) the right to run for office (for “practically all adults”), (5) freedom of expression, (6) alternative information (the right to seek, as well as the actual existence of, sources of information), and (7) associational autonomy (on the part of individuals, in order to form associations).128 These polyarchic institutions can be analysed in terms of Dahl’s criteria for the democratic process. Let me represent them with the following grid:129

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124 See also the focus of the Third Summit of the Americas upon increasing and supporting the regional telecommunications infrastructure, as discussed in Chapter 2 (in the section discussing culture and communication), above.

125 For an analysis of the multiplicity of forms of democracy available globally see, e.g., Lijphart, Patterns of Democracy.

126 See Dahl, Democracy and Its Critics, chs. 15-18. “Polyarchy” is defined in the Oxford English Dictionary Online as: “1. The government of a state or city by many: contrasted with monarchy.” The key distinction for our purposes is that polyarchy is the term used to describe the best, albeit still imperfect, form of democratic statehood existing today.

127 Dahl, Democracy and Its Critics, p. 223. In ibid., at p. 177, Dahl summarises: “As a system of real world large-scale democracy, polyarchy is the best so far, but by ideal standards it is second best.”

128 Summary of Dahl, ibid., p. 221.

129 Dahl, in ibid., at p. 222, conveys this information in simple tabular form (Table 15.1), which I reproduce here in a slightly different format for easier interpretation.
The following institutions are necessary to satisfy the following criteria:

<table>
<thead>
<tr>
<th>Institutions</th>
<th>I. Voting equality</th>
<th>II. Effective participation</th>
<th>III. Enlightened understanding</th>
<th>IV. Control of the agenda</th>
<th>V. Inclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Elected officials</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>2. Free and fair elections</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Inclusive suffrage</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>4. Right to run for office</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Freedom of expression</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>6. Alternative information</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>7. Associational autonomy</td>
<td></td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

Figure 3.2 shows us that the combination of Dahl’s seven institutions satisfy all of the criteria for democratic government. These institutions can be developed and sustained in a state, according to Dahl, under the following conditions:

- if the means of violent coercion are dispersed or neutralized;
- if it possesses a [modern dynamic pluralist] society;
- if it is culturally homogeneous,
  or, if it is heterogeneous, is not segmented into strong and distinctive subcultures,
  or, if it is so segmented, its leaders have succeeded in creating a consociational arrangement for managing subcultural conflicts;
- if it possesses a political culture and beliefs, particularly among political activists, that support the institutions of polyarchy;
- and if it is not subject to intervention by a foreign power hostile to polyarchy.130

These conditions allow countries to sustain the institutions required for polyarchy, and thereby encourage the general criteria for democracy in the modern state. Further, as Dahl argues, democracy can be self-strengthening and self-correcting, working in the long run to deepen and maintain underlying democratic values.131 In sum, polyarchy represents our best hope for implementing democracy at the level of the sovereign state under present conditions.

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130 Ibid., p. 264.

131
It also may be the basis for further increases in democratisation (towards what Dahl considers the next transition in democratic form). I will adopt his model as descriptive of the current democratic state, which must take the general form of polyarchy because of the constraints imposed by size, complexity and specialisation. However I have suggested that non-state forms of democracy should be encouraged at the international level, as well as have argued that there are ways in which states and sub-state groups could encourage more substantive, participatory visions of democracy than those allowed under polyarchy. I will return to these themes later, particularly in Chapter 8 when setting out a democratic conception of sovereignty.

Let us now turn from the task of describing democracy and the democratic state, to the task of justifying it. Much of this latter task has already been accomplished, since as mentioned earlier, democracy is a term that is both descriptive and normative. It is important to look explicitly at its justifications because, as will be seen in Chapter 11 when discussing the possibility of a right of democratic governance under international law, many of the justifications that support democracy actually cripple some of the suggested forms of an international legal right to democratic governance.

131 Ibid., pp. 179-80 and 187.
Chapter 4: Justifications of Democracy

In order to argue that democracy should be an element in international relations and international law we must first look at the justifications supporting it. To some this may seem unnecessary. Democracy is widely accepted and possesses a normative status. But justifications of democracy must be examined for two important reasons. Firstly, they help us better understand the strengths of democracy. They help flesh out the concept and provide compelling reasons for us to promote it, both nationally and internationally. Secondly, justifications help us understand the limitations of democracy. This point is rarely made. Democracy often seems to be all things to all persons, no doubt in part because it is a normative, 'essentially contested' concept, one that cannot be defined in a value-free manner. But it does have its limitations, both at the practical and theoretical levels. Understanding the nature and implications of the limitations of democracy is crucial if we are to build strong democratic structures and processes. As a result, by closely examining the justifications of democracy—the grounds for its acceptance—we also set high standards for the concept.

I will divide the justifications of democracy into two general categories: instrumental and non-instrumental. The former set of justifications values democracy because it achieves useful ends; the latter values democracy as being a good in itself. As will be seen, these two categories cannot be entirely separated, and thus reveal some analytic deficiencies. Nevertheless, the simple explanatory power of an instrumental/non-instrumental distinction largely makes up for such weaknesses. Let me begin by discussing the instrumental reasons in support democracy, dealing with them in ascending order of abstraction.

I. Instrumental

A. The Democratic Process as Producing Tolerance, Adaptability, Knowledge and Truth

Although we have looked at the ideas and principles underlying democracy in some detail, we have not focused upon its by-products, which themselves provide compelling grounds for favouring democratic processes. Because democracy respects the interests and fundamental equality of its participants and uses open and public decision-making, it produces several important benefits. Participation in a democratic debate, for example,
exposes one to opposing viewpoints and allows for competition of ideas. This tends to produce tolerance in stable democracies without entrenched minorities, because those in the majority today must not permanently alienate those who can help form an alternate majority tomorrow.1 Democracies, at least long-standing and stable ones, are associated with such noble values as “pluralism, tolerance ... broadmindedness,” and the free-exchange of ideas.2 Interestingly, tolerant democracies may do more to promote cultural pluralism and variety than systems which segregate and isolate cultures.3 By fostering such diversity and pluralism democracies also may be able to change and adapt more quickly than non-democratic systems.4 The oft-heard economic analogy is that democracies promote a kind of ‘free market of ideas.’5 If so, they are more likely to produce innovative solutions to crises than the kinds of closed systems that do not encourage free exchange of ideas.

Further, by providing a forum for open discussion of ideas, democracies may help us to discover truths about our world, including moral truths. Carlos Nino, for example, argues that democracy has epistemological value in helping us arrive at moral truths because its two components—open discussion and majoritarian agreement—closely mirror the rules for the

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1 Tolerance in democracies may be context dependent. Internally, states that have recently made a transition from authoritarian systems to democratic ones may not have developed the necessary cultural norms of tolerance. This leads Bruce Russett, in “Why Democratic Peace?,” at p. 109, to point out that “[a]n irony is that the initial creation of democratic institutions may contribute to the explosion of ethnic conflicts, by providing the means of free expression, including expression of hatred and feelings of oppression.” Externally, democratic states have been notoriously intolerant of non-democratic regimes. See generally, Russett, “Why Democratic Peace?,” Doyle, “Kant, Liberal Legacies and Foreign Affairs.”

2 Crawford, Democracy, p. 30 (quoting from the case of Open Door v. Ireland, ECHR).

3 Jean Bethke Elshtain, in Democracy on Trial (New York, NY: Basic Books, 1995), at pp. xiii-xiv, criticises the movement towards cultural segregation under the guise of multiculturalism. She comments: “If we continue to move toward the creation of ‘separate’ institutions and pedagogies and ‘cultures,’ we will invite not more variety and pluralism but less.” In stronger terms, in ibid., at p. 74, she states:

Difference becomes more and more exclusive. If you are black and I am white, by definition I do not and cannot, in principle, ‘get it.’ There is no way that we can negotiate the space between our given differences. We are just stuck with them, stuck in what political thinkers used to call ‘ascriptive characteristics’—things we cannot change about ourselves. Mired in the cement of our own identities, we need never deal with one another. Not really. One of us will win and one of us will lose the cultural war or political struggle. That’s what it’s all about: power of the most reductive, impositional sort.


5 The Supreme Court of Canada, in Re Reference by the Governor in Council Concerning Certain Questions Related to the Secession of Quebec from Canada (1998) 161 D.L.R. (4th) 385 (S.C.C.); at p. 417 (para. 68), expressly endorses the ‘marketplace of ideas analogy’ as being fundamental to the meaning of a deliberative democracy:

Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.
practice of moral discussion. Even if democratic processes cannot guarantee morally correct outcomes in every case, the fact that they are in general a more reliable guide to moral truths gives us a reason to follow their outcomes (subject to human rights limitations). As a result democracy can be justified as a mechanism that supports tolerance, adaptability, knowledge and the pursuit of moral truth.

B. AUTONOMY AND SELF-DETERMINATION

Democracy can be instrumentally justified for its ability to encourage, rather than hinder, the development of moral autonomy in the individuals in a democratic society. As noted by Dahl, “[t]o live under laws of one’s own choosing and thus to participate in the process of choosing those laws, facilitates the personal development of citizens as moral and social beings and enables citizens to protect and advance their most fundamental rights, interests and concerns.” Further, democracies are a necessary, if not sufficient, condition for the development of such moral and political qualities as moral autonomy, responsible decision-making, and tolerance for free and open discussion. Perhaps even a kind of ‘society-wide’ autonomy may be promoted through the democratic process, since discussion and deliberation provide more than a simple aggregation of autonomous interests. These processes encourage the demos as a whole to come to a decision—a kind of group

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6 Nino, “Epistemological,” p. 47. Nino builds his argument by rejecting the idea that moral reasons can be constituted through moral discussion (as the latter assumes the former’s existence), and thereby accepts that morals must in some way be a priori: ibid., pp. 40-42. But because we have no independent and isolated access to this moral order, we depend upon moral discussion as the best means of arriving at moral decisions, as “the practice of discussion favours the access to moral truth”: ibid., p. 43. Since a moral decision made by way of a unanimous consensus enjoys a greater presumption of validity (if arrived at under certain conditions, such as broad and heterogeneous debate, rational argumentation, full information, etc.), we should seek a procedure that is more likely to produce such a consensus. Democratic processes, including simple rather than qualified majorities (the latter being problematic as it grants a veto to a minority), are most likely to produce moral consensus: ibid., pp. 43-8. See also, Nino, The Constitution of Deliberative Democracy [placing this discussion in the broader context of constitutionalism, human rights and judicial review].

7 Nino, in “Epistemological,” at p. 47, argues that democratic processes provide a reason for obedience to majority decisions, even if we believe that they are wrong:

Even if in a particular case we are sure that the solution reached through individual reflection is right and the one democratically decided is wrong, we have reasons for following the latter since, otherwise, our last court of appeal of moral judgement would be individual reflection, contradicting our assumption that the democratic procedure of discussion and decision is, in general, a more reliable guide to moral truth. Because democratic processes are the most reliable guide to moral truth, Nino argues that even though individuals might decide not to follow a democratic decision in some cases, generally they would “seldom be justified in adopting any course of action other than pressing for the continuation of public discussion and the revision of the former collective decision.” Ibid., p. 50. Nino’s argument also includes the general premise that democratic decision-making must be restricted by certain human rights conditions because they are necessary conditions for moral discussion and democratic procedure (e.g., freedom of expression): ibid., p. 49.

8 But cf. Nino, The Constitution of Deliberative Democracy, ch. 5 [establishing limits for democratic decisions in areas where personal reflection will provide superior access to moral truth].

9 Dahl, Democracy and Its Critics, p. 91.

10 Ibid., pp. 91-3.
autonomy.\textsuperscript{11} Democracy therefore provides a strong mechanism for self-determination. It “expands to maximum feasible limits the opportunity for persons to live under laws of their own choosing.”\textsuperscript{12} At another level, it can be argued that systems that provide both democratic structures and follow the rule of law may not only allow these values to exist, but even help to instil and strengthen them in their societies.\textsuperscript{13} Democracy therefore has the potential to be self-reinforcing.

C. SELF-INTEREST

Democracy can be instrumentally justified because it best ensures the protection of individual interests.\textsuperscript{14} Not only do democracies value individual interests equally (as we saw with Dahl’s principle of equal consideration of interests), but they also protect those interests better than other systems. As noted by John Stuart Mill, an individual’s interests are best protected if that person is both willing and able to stand up for them.\textsuperscript{15} By allowing citizens to debate and vote upon the issues that most affect them, democracies are more likely to allow individuals to protect their interests than other forms of government. More positively, since democracies allow this kind of voter-input in the decisions that affect them, a majority of citizens of democratic countries have the ability to make the government do as they wish. Thus although democracies may not be able to satisfy all of the wants of each citizen, they are more likely to satisfy the “urgent political concerns” of most of them.\textsuperscript{16}

\textsuperscript{11} Dahl, in \textit{ibid.}, at pp. 78-9, makes a similar point: “Just as we reject paternalism in individual decisions, because it prevents the development of our moral capacities, so too we should reject guardianship in public affairs, because it will stunt the development of the moral capacities of an entire people.”

\textsuperscript{12} \textit{Ibid.}, p. 89 (see generally pp. 89-91). On the same page Dahl states this point strongly as follows:

The justification for democracy as maximizing the freedom of self-determination has also been endorsed by all those, from Locke onward, who have believed that governments ought to be based on the consent of the governed. For no other form of government can go so far, at least in principle, to ensure that the structure and processes of government itself and the laws it enacts and enforces depend in a significant way on the genuine consent of the governed. For in a democracy, and only in a democracy, are decisions as to the constitution and laws decided by a majority. By contrast all the feasible alternatives to democracy would permit a minority to decide these vital issues.

\textsuperscript{13} Cf. Lon Fuller, \textit{The Morality of Law}, rev’d ed. (New Haven: Yale University Press, 1969), pp. 223-4. Although not discussing democracy, Fuller makes a similar point in relation to his conception of the rule of law. He argues that a substantive, or external, morality of law is produced by respect for the eight principles that he sets out in his work. In other words, Fuller argues that through following his framework for a rule of law system we will internalise its values and produce a substantive morality in our legal system. See also: Neil MacCormick, “Natural Law and the Separation of Law and Morals,” pp. 123-5 [legality as itself having a moral value].

\textsuperscript{14} Dahl, \textit{Democracy and Its Critics}, pp. 93-5.

\textsuperscript{15} Dahl, in \textit{ibid.}, at p. 93, quotes John Stuart Mill’s argument that “the rights and interests of every or any person are only secure from being disregarded when the person is himself able, and habitually disposed, to stand up for them... Human beings are only secure from evil in the hands of others in proportion as they have the power of being, and are, self-protecting.” [Citing: Mill, \textit{Considerations on Representative Government} [1861], ed. C.V. Shields (Indianapolis, Bobbs-Merrill, 1958), p. 43].

\textsuperscript{16} Dahl, in \textit{ibid.}, puts this point clearly at p. 95:
D. HUMAN RIGHTS SPILL-OVER

A related, but weaker, instrumental argument can be made that because a functioning democracy requires certain human rights standards, it can become an indirect means of ensuring and protecting them. As we have seen, democratic governance requires a range of human rights to be in place in order for it to survive. These rights include those allowing participation in public life, effective freedom of speech and organisation of political parties. Although it is difficult to ascribe a strict causal connection between democracy and protection of human rights, it is rare for civil and political rights to exist outside of a democracy. In this way, human rights may be both preconditions and limitations upon democracy, as well as may provide an instrumental reason in support of it. At a minimum, democratisation will ensure respect for certain core human rights. At a more advanced level, democratisation may help develop a culture of respect for human rights within the state, perhaps even bringing about the entrenchment of new or additional human rights.

E. DECREASED TRANSACTION COSTS

Another argument suggests that democracy should be encouraged because it will reduce transaction costs. This argument is a numerical one, based upon similarity of systems. It posits that since the majority of the countries in the world are at least nominally democratic, and therefore share similar political systems, they will face reduced transaction costs when engaging in political and other exchanges with each other. In other words, democratic similarities will allow states to relate more efficiently.

Although such an argument is attractive, we should be wary of pushing its implications too far. ‘Free market and democracy’ adherents, for example, have promoted an

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A more reasonable justification for democracy, then, is that to a substantially greater degree than any alternative to it, a democratic government provides an orderly and peaceful process by means of which a majority of citizens can induce the government to do what they most want it to do and to avoid doing what they most want it not to do. Instead of a claim that democratic governments respond by maximizing the satisfaction of wants, we might claim instead that they tend to satisfy a minimal set of urgent political concerns.

17 Crawford, Democracy, p. 7; Nino, “Epistemological,” pp. 48-9. Dahl, in Democracy and Its Critics, at p. 89, lists rights to free expression, political organisation, opposition, and fair and free elections as being essential to a functioning democracy, as well as argues that the political culture of democracies per se will tend to emphasise the value of these rights. He summarises, in ibid.: “As a result of the rights inherently required for the democratic process, together with a political culture and a broader domain of personal freedom associated with that process, democracy tends to provide a more extensive domain of personal freedom than any other kind of regime can promise.”

18 Russett, in “The Fact of Democratic Peace,” at 73 states:

The exercise of such civil rights [political organization and political expression] tends to be highly correlated with the existence of democratic institutions [...], but not perfectly so. The institutions may be found without the regular widespread exercise of the rights; the opposite (civil liberties assured, but not democratic institutions) is rarer.

extreme form of this argument when favouring intervention in order to forcibly promote things like capitalism, human rights and democracy. Their position is supported by an underlying assumption that international relations would work better on the basis of uniformity—i.e., that things would be much better if states were more homogenous and united in their ways of doing things. This is, and should be, an unacceptable position, and I will come back to this point in a moment. But notice here that this argument falls down on its own terms. It provides no compelling reason to choose democracy over any other kind of political system, such as a dictatorship or communist-style system. As long as all countries follow the same system, regardless of what it is, there should be minimal transaction costs. It also may overvalue the role of similarity in decreasing transaction costs in various spheres. Western capitalists from democratic countries, for example, were perfectly capable of carrying on economic relations with dictators throughout the Cold War period, and some continue to do so today. Perhaps most fatal to this argument, however, is that fact that it contradicts one of the more important instrumental reasons for preferring democracy, namely, that it promotes, or at least in liberal democracies tolerates, pluralism.

F. PEACE

Liberal-style democracies have been argued for on the instrumental basis that they are more likely to encourage peace, a view tracing its roots to Kant’s moral theory. Recent studies strengthen these arguments considerably. There is significant evidence, for example,


21 See also the arguments against uniformity in Chapter 11, below.

22 But note that democracies appear to be different from other political systems with respect to peacefulness, rarely (or never) going to war with one another. Statistics reveal that this pattern is not followed by identical non-democratic regimes, which have in fact gone to war with one another. E.g., Russett, “Why Democratic Peace?,” p. 83, Doyle, “Kant, Liberal Legacies and Foreign Affairs,” p. 18.

23 Note, however, that democracies have not been tolerant of non-democratic regimes. See, e.g., Russett, ibid., Doyle, ibid.

24 A collection of the key political science studies in this area are found in Brown, Lynn-Jones and Miller, eds., Debating the Democratic Peace. See especially Michael Doyle’s seminal piece in that work, “Kant, Liberal Legacies and Foreign Affairs.” See also, Simpson, “Imagined Consent,” 116-18 [summarising Teson’s work in trying to extend Kant’s moral philosophy, notably “Perpetual Peace,” to promote liberal democracies as a means of achieving world peace]. See also Marks, The Riddle of All Constitutions, pp. 42-44 [summarising related “democratic peace” arguments]. The debate surrounding the “democratic peace” thesis is ongoing, with a lively cross-section of the ‘pros’ and ‘cons’ being reproduced in Part III of Debating the Democratic Peace. See also Roth, Governmental Legitimacy in International Law. Note, however, that Roth, in ibid., at p. 427, offers several criticisms of the “democratic peace” thesis.
that democracies rarely, if ever, engage in major violent conflicts against one another. 25 If we define “wars” as conflicts involving one thousand or more battle fatalities, and exclude civil wars and covert operations from our calculations, then studies show that in fact no wars have occurred between democratic states since 1815. 26 This is remarkable in light of the fact that during that period roughly 71 interstate wars occurred, with nearly 270 participants. 27

This does not mean that democratic countries do not wage war, but rather that amongst themselves conflicts have been resolved through other means. 28 Various non-democratic factors have been offered to explain this phenomenon, including the pacific influence of (1) transnational and (2) international institutions, the effect of (3) physical distance between democratic states (at least in earlier periods), and the effects of (4) alliances,

As an empirical proposition, the “democratic peace” thesis has substantial weaknesses: questionable definitions of “democracy” and “war”; the lack of a persuasive account of the causal link; the absence of factors that might plausibly have given rise to war had the states in question not been democracies; the presence of other commonalities among states that remained at peace despite provocation to war; the relative shortness of the period within which large numbers of states have had liberal-democratic systems; and worst of all, the embarrassing finding that autocracies in the process of democratization actually become more likely to go to war. [Citations omitted.]

25 It would be inaccurate to categorically state that “democracies never fight against each other” without clarifying what one meant by terms such as “fight,” “war” and “democracy.” Unrestricted and general assertions of this kind lead Russett, in “The Fact of Democratic Peace,” at p. 68, to warn:

[S]ome variants of the proposition took the form of statements like “democracies never go to war with each other,” or even “democracies never fight each other.” The latter statement, applied to relatively low-level lethal violence, is demonstrably wrong as a law-like “never” statement even for the modern international system.

See also, Russett, “The Democratic Peace—And Yet It Moves,” p. 343.

26 Russett, “The Fact of Democratic Peace,” p. 74. Russett defines “democracies” for this purpose as states in which a substantial fraction of citizens may vote in contested elections with two or more recognised parties, and that have been democratic for over a year (i.e., the requirement for a period of minimal stability or longevity). 27 Russet, pp. 72–4. In setting out this definition, Russett excludes consideration of civil liberties and free market economic liberties, thereby widening the statistical sample. 28 Ibid., p. 73. See also, Russett, “The Democratic Peace—And Yet It Moves,” p. 348–9 [re-calculating the figures using identical regime dyads over the 1946–86 period, and ending with the same zero war result for democracies]; Archibugi and Held, “Editors’ Introduction,” pp. 10–12 [arguing at the first page that “[h]istorical and statistical analyses have in fact shown that wars between democracies are extremely rare and, when they do occur, are the result of extenuating circumstances” (emphasis omitted); Doyle, “Kant, Liberal Legacies and Foreign Affairs,” p. 10 (“Even though liberal states have become involved in numerous wars with nonliberal states, constitutionally secure liberal states have yet to engage in war with one another”) (emphasis omitted; note: published in 1983)); Francis Fukuyama, “Second Thoughts: The Last Man in a Bottle” (Summer 1999) No. 56, The National Interest 16, pp. 17–18. Note that Marks and others have criticised the definition of “war” as excluding civil wars, since “civil strife is today the most prevalent form of armed conflict”: Marks, The Riddle of All Constitutions, p. 47–8. See also, Mary Kaldor, “Reconceptualizing Organized Violence,” pp. 91–110 [discussing non-traditional, non-statal forms of organised violence].

27 Russett, “The Fact of Democratic Peace,” p. 74 (note that his study was published in 1993).

28 See, e.g., Crawford, Democracy in International Law, pp. 3–4 and n. 10; Archibugi and Held, “Editors’ Introduction,” pp. 10–11 [at the latter page referring to quantitative studies regarding the occurrence of war and concluding that “historically, democracies have not been more peaceful than autocracies at all”]. Norberto Bobbio, in “Democracy and the International System,” in Cosmopolitan Democracy: An Agenda for a New World Order, ed. D. Archibugi and D. Held, 17–41 (Cambridge: Polity Press, 1995), at p. 20, describes the differences between democracies and monarchies as follows: “Whereas the political art of princes had been compared to the strength of the lion and the cunning of the fox (in one of the most famous chapters in Machiavelli’s The Prince), de Witt compared the art of republics to the stealth of the cat, which has to be both ‘agile and prudent” [Citing Jan de Witt, “Memoirs,” in F. Venturi, Utopia e riforma nell’illuminismo 35–6 (1970)].
(5) wealth, (6) political stability, (7) hegemony, and (8) equilibrium (i.e., the balance produced by the Cold War détente). But none of these factors can satisfactorily explain the 'democratic peace' phenomenon. Rather, several factors that are unique to democracies offer stronger support. These include the idea that democracies have more peaceful political cultures (favouring dispute settlement rather than conflict), as well as that they have structural and institutional constraints (voting processes, mobilisation of electoral support, the influence of the media), that prevent or lessen the likelihood of warfare. Also, the combination of these normative and structural components of democracies may be particularly important.

Notice at this point that an instrumental argument in favour of democracies based on the above analysis could be simply that they are desirable because they are more peaceful in their relations with one another. In other words, democracies are instrumentally justifiable because they produce peace. From this premise we could go on to argue that if the world were made up entirely of liberal democracies, global peace would be more easily achieved. This is an argument for democratic uniformity. Let me explain why we must be cautious about accepting such an argument.

1. A Caution Against Democratic Uniformity

There are several cogent reasons against adopting arguments in favour of democratic uniformity. Firstly, there are two difficulties with the process by which one is to achieve

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29 Russett, "Why Democratic Peace?", pp. 84-90 (setting out and critiquing each of the first six alternative explanations); Doyle, "Kant, Liberal Legacies and Foreign Affairs," pp. 19-20 (setting out and critiquing the seventh and eighth explanations). Other explanatory factors have been advanced and the debate is ongoing, but the eight mentioned here are representative.

30 Each factor can be dismissed on the following bases: (1) international institutions have not created peace between non-democratic states, (2) transnationalism is itself too closely tied to democracy to be considered an independent variable, (3) physical distance separated democratic states earlier and may explain pre-1945 lack of conflict, but cannot explain current lack of conflict, (4) alliance partners are statistically more likely to come into conflict with one another, even while formally allied, (5) equal trading relations will prevent conflict, but unequal ones aggravate it, and economic development may tempt states to engage in international conflict so as to divert attention from domestic problems, (6) although political stability will be more likely to reduce conflict, counterexamples of politically stable, but militarily aggressive, states can be found. [Summary of points made by Russett, in “Why Democratic Peace?,” at pp. 84-90.] Doyle, in “Kant, Liberal Legacies and Foreign Affairs,” at pp. 19-20, refutes the effects of hegemony and equilibrium: (7) hegemons have not historically been peace-enforcing ‘police’ (17th Century France), nor have they had the capacity to prevent armed conflicts between all liberal [democratic] regimes, and (8) equilibrium may prevent bi-polar conflicts (in the case of the Cold War), but will not prevent proxy wars or strategic territorial seizures.


32 See Owen, “How Liberalism Produces Democratic Peace,” pp. 119-22 [arguing that both are necessary, with neither being sufficient alone].

33 Such a global development may even be inevitable, if one takes seriously the data showing that even though democratic states tend to be less war-prone, that when they do fight, they tend to win (i.e., they are more successful on average). Luigi Bonanate, in “Peace or Democracy?,” in Cosmopolitan Democracy: An Agenda for a New World Order, ed. D. Archibugi and D. Held, 42-67 (Cambridge: Polity Press, 1995), at p. 62, summarises that “[i]n the period 1816 to 1982, statistics reveal that democratic countries won 21 wars and lost only five” [Citing: D.A. Lake, “Powerful Pacifists: Democratic States and War,” 86 Am. Pol. Sc. Rev. 1 (1992)]. But cf.
'global democracy.' I will discuss, and reject, arguments for forceful implementation of democracy in Chapter 11 as being counterproductive, amongst other things. But notice at this point that even if gradual, non-forceful democratization is preferred, some obstacles remain. For example, there is evidence that the critical transition from non-democratic to democratic regimes is especially difficult. The sudden lifting of barriers to freedom of expression allows radical fringe elements to invoke ethnic or nationalist biases to further their political agendas, thereby potentially destabilising new democratic states.\(^3^4\) Even if these elements do not emerge, statistics show that new democracies will prove problematic for the 'democratic peace' equation simply because of the inherent difficulties in making the transition to democracy.\(^3^5\) This is why Michael Doyle limits the democracies in his study to those in existence for three years, and Bruce Russett limits them to those with some form of "minimal stability or longevity" (indicating a rough one year barrier).\(^3^6\) According to Russett, "[d]emocratic governments in which democratic norms are not yet fully developed are likely to be unstable, or to be perceived by other states as unstable, so they may be unable to practice norms of democratic conflict resolution internationally."\(^3^7\) This instability cuts across several of the factors that encourage democracies to solve their differences peacefully, such as predictability, trust, and the ability to rely upon the inevitable institutional delays faced by a democratic adversary to allow further time for negotiation. Examples of such instability can be seen in the recent transitions to democracy in Eastern Europe, the former USSR and South and Central America.\(^3^8\)

Secondly, questions arise about the outcome of promoting uniform global democratization. The 'democratic peace' argument, after all, is founded upon statistics involving the simultaneous existence of democratic and non-democratic states. What will happen when there are only democracies? Will war and conflict disappear, or simply be

Archibugi and Held, "Editors' Introduction," pp. 11-12 [cautioning against too hasty an adoption of the premise that 'if all states were democracies, war would disappear'].

\(^{3^4}\) E.g., Russett, "Why Democratic Peace?," p. 109.

\(^{3^5}\) Edward D. Mansfield and Jack Snyder, in "Democratization and the Danger of War," in Debating the Democratic Peace, ed. M.E. Brown, S.M. Lynn-Jones and S.E. Miller, 301-34 (Cambridge, Mass.: MIT Press, 1996), at p. 302, explain why there is "considerable statistical evidence that democratizing states are more likely to fight wars than are mature democracies or stable autocracies." Although they note that other types of regime changes are also likely to provoke wars (i.e., autocratizing regimes), nonetheless democratization is still the most volatile process: ibid., 314-15. The causes of such behaviour identified by Mansfield and Snyder, in ibid., at pp. 322-27, include: social change, institutional weakness, threatened (and sometimes inflexible) interests, a widening of the political spectrum, competitive mass mobilisation and the weakening of central authority.


\(^{3^7}\) Russett, "Why Democratic Peace?," p. 95.
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Redirected? The optimistic result is unlikely to occur immediately, if at all. As we have seen, democracies are not intrinsically peaceful. The ‘democratic peace’ statistics only apply to inter-democracy relations; democracies have not been ‘dovish’ in their relations with non-democratic states. They have waged war against non-democratic countries, and even though they have not gone to war with democracies (following Russett’s definition of both terms), they have been hostile towards one another as well as engaged in lesser, covert military actions. Such factors should inspire us to be cautious before speculating about universal peace in an entirely democratic world. We cannot be certain what will happen to the remaining war-like and hostile energies of democratic states. Such energies may be subsumed into forms of economic competition. But even then, unless the economic divide between rich and poor states lessens, economic conflict itself may escalate into political or military conflict. A more sombre future scenario is one in which the war-like tendencies of democratic states are simply re-directed towards one another. There are two bases for such a pessimistic possibility. Firstly, the ‘democratic peace’ is in part premised on the mutual ‘similarity’ of democratic states in comparison to non-democratic ones. Once the distinguishing ‘other’ is removed, the similarities between democratic states may not be sufficient to suppress war-like tendencies. Put another way, pre-existent dissimilarities may become more evident between democratic states when there is no non-democratic comparator. This is not to say that democratic attributes are entirely the product of political rhetoric, a point refuted by Owen’s study. Yet the perception of a foreign state as being a democracy is crucial to one’s peaceful relations with it. Since those perceptions can change dramatically

38 See, e.g., Nino’s brief discussion of the problems related to Argentina’s democratic transition in The Constitution of Deliberative Democracy, at pp. 156-60. See also the discussion of the dissolution of Yugoslavia in Chapter 10, below.


40 Russett excludes conflicts that do not result in 1000 or more battle fatalities as well as all covert military actions from his study: “The Fact of Democratic Peace,” pp. 69 and 71, respectively.

41 Owen, in “How Liberalism Produces Democratic Peace,” at p. 131, states: “A liberal democracy will only avoid war with a state that it believes to be liberal.”

42 See, e.g., Marks, The Riddle of All Constitutions, p. 47 (summarising arguments about peace being connected to the existence of an ‘other’).

43 Owen, “How Liberalism Produces Democratic Peace,” pp. 125-27. Contra: Ido Oren, “The Subjectivity of the ‘Democratic’ Peace: Changing U.S. Perceptions of Imperial Germany,” in Debating the Democratic Peace, ed. M.E. Brown, S.M. Lynn-Jones and S.E. Miller, 263-300 (Cambridge, Mass.: MIT Press, 1996) [arguing that the determination of whether a state is “democratic” is not based upon “objective coding rules” but rather upon whether it is “‘America-like’ or of ‘our kind,’” and that such perceptions change over time as we re-define our image so as to be “consistent with our friends’ attributes.”].
over time, perhaps the nuances in the spectrum of liberal (or other), forms of democracy may become more significant and break down the ‘democratic peace’ formula.

Such a bleak result is not inevitable. Factors supporting the democratic peace may triumph over war-like tendencies. Also, democracies in many ways appear to be unique. Statistics show, for example, that no other type of political system is peaceful in its relations with an identical political system. Nonetheless, the kinds of short-term instabilities arising from ethnic and nationalistic claims seen in recent democratic transitions and the long-term instability created by unequal distribution of global resources both should urge caution.

2. A Justification of Pluralism

As a result I would invoke some of the norms and principles underlying democracy to discourage hasty imposition of uniformity upon the political systems of the world. At the national level, one of the main underpinnings of democratic governance is its respect for pluralism. Individuals in a democratic society understand that they will have fundamental and sometimes irreconcilable disagreements, but they allow the democratic process to help them make choices related to these matters. An assumption of those engaged in the democratic process is that even if one disagrees with a particular outcome, the process itself allows later corrections and new outcomes. Also, democracies allow others to make the incorrect decisions that may be necessary for the development of their moral autonomy. All of these factors encourage respect for pluralism in democratic theory.

Now whether these normative underpinnings of democratic theory can be transposed to the international level in order to justify a kind of international pluralism is open to debate. Some evidence that would seem to dissuade such an option can be found in explanations for the antagonism between liberal-democratic and non-liberal-democratic states. These arguments reveal that liberal democracies remain intolerant of non-liberal systems due to features internal to liberalism itself. Liberal democracies respect other liberal democracies because they represent the free political choices of their citizens. But such respect for individual choices does not carry over to non-liberal regimes, which are felt to be incapable of

44 Owen, in ibid., at p. 127 points out that war-like ancient Greek democracies were not liberal, and observes at p. 149 that “[w]hat a scholar in 1994 considers democratic is not always what a statesman in 1894 considered democratic.”

45 Doyle, “Kant, Liberal Legacies and Foreign Affairs,” p. 18.

46 Roth, in Governmental Illegitimacy, at p. 428, supports this kind of pluralist vision:

International law has heretofore sought to provide for respectful relations among states that radically differ on fundamental matters. It would be a great step backward if international law could be invoked as a justification for imposing homogeneity, by economic coercion or force, in the name of some grander vision of global harmony.
representing the choices of their citizens, and hence do not deserve respect.47 In fact, liberal states have tended to react in a crusade-like manner against non-liberal systems.48 All of these features would seem to make international pluralism incompatible with the ‘democratic peace’ thesis.

An interesting question that is raised by this intolerant liberal-democratic behaviour, however, is whether it is intrinsic to democracy, per se. Other factors, such as liberalism or the nature of the anarchic system of international relations that currently exists between states, may be more relevant. Michael Doyle’s arguments are based upon the latter features and do not implicate democracy itself. In his view, conflicts and wars are products of the ‘international state of war’ existing between all independent states.49 The features of liberalism that create a pacific union between liberal states, also aggravate liberal/non-liberal conflicts: “[t]he very constitutional restraint, shared commercial interests, and international respect for individual rights that promote peace among liberal societies can exacerbate conflicts in relations between liberal and non-liberal societies.”50

Even if they do not implicate democracy, per se, such intolerant tendencies would seem to be powerful, pessimistic arguments about the nature of liberalism. But such tendencies may weaken, however, when we consider that to a large extent they depend upon the subjective judgements of governments as to which foreign regimes are “liberal” or “non-

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47 Both Russett and Doyle explain this phenomenon by linking democratic states’ tolerance for the choices of individuals to the level of authenticity of those choices. Since non-democratic regimes do not allow authentic choices of their citizens they do not deserve democratic tolerance. In other words, as summarised by Doyle, in “Kant, Liberal Legacies and Foreign Affairs,” at p. 37: “Respecting a nonliberal state’s state rights to noninterference requires ignoring the violations of rights they inflict on their own populations.” See also, Russett, “Why Democratic Peace,” p. 93 [explaining the same phenomenon in the context of the US Cold War policy, which assumed that non-democratic states were hostile and aggressive based upon the mistreatment of their own citizens]. Immanuel Kant appears to take a different position, as explained by Doyle, in ibid., at p. 49: “Important among these principles, Kant argued, are some of the ‘preliminary articles’ from his treaty of perpetual peace: extending nonintervention by force in internal affairs of other states to nonliberal governments and maintaining scrupulous respect for the laws of war.” [Citing, inter alia: Kant, “Preliminary Articles (1795)” in The Philosophy of Kant (Carl J. Friedrich, ed., 1949), pp. 431-36].

48 Sean Lynn-Jones, for example, summarises this point in his “Preface” to Debating the Democratic Peace, ed. M.E. Brown, S.M. Lynn-Jones and S.E. Miller, ix-xxxiii (Cambridge, Mass.: MIT Press, 1996), at p. xvi:

Liberal principles may create a separate peace among liberal states, but Doyle recognizes that these same principles also cause liberal aggression against nonliberal states. Liberal states often fail to resolve their differences with autocracies peacefully; if war erupts, it often is waged as a crusade to spread liberal values. Liberal interventions in the internal affairs of weak states, however well intentioned, often fail to achieve their objectives and actually make matters worse.

See generally, Doyle, “Kant, Liberal Legacies and Foreign Affairs,” pp. 30-43.

49 Doyle, ibid., p. 31.

50 Ibid. (emphasis removed).
liberal," "democratic" or "non-democratic." Also, even if objective criteria are established, recent behaviour suggests that not all liberal democratic states may wish to relate to non-liberal states in an antagonistic manner. There are more subtle ways of persuading a non-democratic state to become more democratic. This can be seen, for example, in the differing attitudes and policies advanced by Canada and the EU on the one hand, and the US on the other, towards Cuba. Finally, the crusade-like features associated with liberal democracies may not be as relevant if the anarchical nature of the international system changes as a result of the increase in democratic states. As a result, even if such arguments do not positively support a kind of international pluralism, they should at least force us to question the inevitability or desirability of democratic uniformity.

Perhaps a stronger case for pluralism arises out of democratic theory itself, which may be seen to support a form of non-interventionism, or—in the vocabulary used earlier—to require external as well as internal tolerance. Such tolerance of course, must be limited by the human rights considerations mentioned in Chapter 3. But it can be supported by one of democracy's founding principles, namely, that of the basic equality of individuals. Since each individual is fundamentally equal in the ability to make choices about her own destiny (or more conservatively, since no other group is consistently able to make superior choices regarding such matters), her choices deserve equal respect and tolerance. If a number of such individuals chose a particular form of political system, then that choice must merit a certain amount of respect. Sovereignty and the doctrine of non-interference are the two mechanisms currently used to support the political choices of a populace. The doctrine of sovereign equality thus shares certain similarities with democracy's requirement of respect for fundamental human equality.


Liberal intellectuals and leaders, moreover, have interpreted political regimes in a biased fashion, as do Oren's examples of Burgess and Wilson. Double standards abound. Left-wing liberals have found democratic mandates in revolutionary dictatorships; Stalin became, briefly, "Uncle Joe." Right-wing liberals have found liberal potential in anti-communist, capitalist dictatorships. [Citations omitted.]

52 See the brief discussion of the Helms-Burton Act in Chapter 11, below.

53 See Russett, "Why Democratic Peace?", pp. 113-115 [adding together variables to indicate an evolution towards increasing numbers of democracies at the international level, which in turn may allow a change from an international system of anarchy to one more closely aligned to democratic values].

54 Roth, in Governmental Legitimacy, at p. 428, supports such a position:

International law has heretofore sought to provide for respectful relations among states that radically differ on fundamental matters. It would be a great step backward if international law could be invoked as a justification for imposing homogeneity, by economic coercion or force, in the name of some grander vision of global harmony.
Let me push this point further. I believe that the fundamental equality of individuals should encourage us to tolerate some non-democratic political experiments. Not on the basis of moral relativism, but rather on the understanding that moral autonomy must develop within a person or society, and that choices, whether correct or incorrect, are part of the democratic process.\(^{55}\) As discussed further below, this does not entail absolute neutrality on the part of the international democratic community. But it requires restraint and should prohibit coercive, external imposition of democracy. Let me offer a final, explicit justification for pluralism (because support for pluralism is such a difficult and counter-intuitive position when one considers the many reasons in favour of promoting only democratic governance). Pluralism must be respected for the simple reason that it allows what might be called romantically “experiments in living.” It allows groups to experiment with different styles of governance in the hopes of finding the elusive ideal—the political system that best respects human dignity. Since current versions of democracy have not yet been able to fully implement the democratic ideal, let alone any higher ideal of human dignity, I submit that we should make space for new and innovative alternatives to emerge and develop. Pluralism accomplishes this better than any argument in favour of uniformity, even one of ‘democratic uniformity.’

G. **EFFICIENCY**

The next instrumental argument is that suggesting that democracy should be preferred because it is a more efficient and rational ruling structure. Democracies are more efficient than other systems because, as a practical matter, rule with the consent of the ruled is much easier to maintain and enforce than rule without such consent.\(^{56}\) Efficiency reveals more about the ‘internal’ benefits of democracies for their own peoples. But it also could apply ‘externally’ or internationally. This is because efficiently ruled states are more likely to be prosperous since they will not have to dedicate as many resources to maintaining stability. Also, since economically strong states have been shown to be less likely to go to war, democratic efficiency may bring global benefits.\(^{57}\) The United Nations has adopted this position by linking democracy to development (in the broadest sense).\(^{58}\)


\(^{56}\) E.g., Franck, “Democratic Governance,” at p. 48, states: “That governments themselves now argue for the [democratic] entitlement merely indicates their long-overdue recognition of an immutable fact of life: government cannot govern by force alone.”

\(^{57}\) See the sources in footnote 29, above, and the related ‘democratic peace’ arguments.

Nevertheless, such an argument would have to be further substantiated to be truly persuasive. Many of its central points could be debated. Effectiveness, for example, is challenged by the existence of other, non-democratic models of efficiency, such as the familiar hierarchies existing in modern corporate culture.\(^{59}\) It is also challenged by the cumbersome nature of decision-making processes within modern democracies, which may involve participation by pressure groups and non-governmental bodies.\(^{60}\) Also, with respect to the link between efficiency and peace, it should be noted that although several successful democracies have had the ability to channel funds to non-military matters, they have not done so. In fact, some democratic states have become significant military spenders and suppliers. Thus the efficiency argument potentially ignores such basic realities as the arms race (pre-and post-Cold War), and the power and influence of military lobbying groups in most modern states.

### H. Legitimacy

Arguments related to efficiency do, however, bring us to what I would call the ‘second tier’ of instrumental justifications for democracy, namely, those involving legitimacy. Justifications based upon legitimacy may be instrumental in nature—viewing democracy as a useful means to the end of legitimate governance—or non-instrumental—viewing democracy as a form, or even the form, of legitimate governance. Let us first examine the instrumental variant. This argument can be made in the form of a simple syllogism: (1) government with the consent of the people attracts the greatest legitimacy, (2) democracy enables government with the consent of the people, therefore (3) democratic governance attracts the greatest legitimacy.\(^{61}\) Such an argument is tied to efficiency arguments because the possession of legitimacy will increase the stability and effectiveness of a ruling structure. Carlos Nino calls this “subjective legitimacy” because it involves the beliefs of the community about what makes a regime justified.\(^{62}\) As a result, even if the democratic decision-making process may

\(^{59}\) E.g., Fiss, “Capitalism and Democracy,” pp. 916-17.

\(^{60}\) E.g., Bobbio, Liberalism and Democracy, pp. 85-90 (on “Democracy and Ungovernability”). Notice, however, that this structurally determined slowness of democratic decision-making has been argued to be a strength in the democratic peace arguments, where lengthy deliberation processes are seen as beneficial in that they allow time for tension to dissipate or for negotiations to end a crisis. See, e.g., Russett, “Why Democratic Peace?”, pp. 100-103.

\(^{61}\) The first premise of this argument is of course the most difficult. I can only hope to justify it by referring to the earlier discussion of nature and content of democracy, and the rejection of ‘guardianship’ models of rule. The question regarding whose legitimacy such a consent-based system would attract can be answered both internally and externally. Internally, the people living in the democratic polis are more likely to grant it legitimacy; externally, the international community is moving towards a normative expectation for this form of government. See the non-instrumental arguments related to the normative expectations of the international community, starting below, at p. 132.

\(^{62}\) Nino, in The Constitution of Deliberative Democracy, at p. 8, states:
be cumbersome, the fact the people themselves ultimately have a say in the decisions will provide a substantial basis for the legitimacy of the system. Interestingly, this in turn is likely to entail greater compliance with the result. Legitimacy arguments therefore dovetail with efficiency ones: democracies are more efficient in ensuring long-term compliance with decisions.

The non-instrumental argument for legitimacy is more complex. This argument sees democracy as an end or goal because it produces a particular form of the good life—legitimate governance. Although democracy alone may not achieve this, democratic processes are an essential component of the kind of political system that has been argued to do so, namely, modern liberal democracy. This type of democracy produces an egalitarian political decision-making process, linked to a set of fundamental human rights, operating within the rule of law. The non-instrumental argument thus may be succinctly stated as follows: liberal democratic government is a human good.

1. Weber and Legitimation

In order to make such an argument, however, we must understand that there are various possible bases for legitimate governance, each with its own form of legitimation. Only if democracy is essential to the liberal state—necessary for its legitimation—can we pursue this argument for its intrinsic desirability. The work of German sociologist Max Weber provides particularly useful insights here. For Weber, each kind of authority

Subjective legitimacy consists of the generalized belief of the population in the moral justifiability of the government and its directives. Democracy is therefore seen ultimately as an instrument to the end-goal of stability.

Note, however, that the focus of Nino’s work is upon objective legitimacy, “what really makes [a democracy] morally justified.” Ibid.

63 Note that the idea of the rule of law itself is a legitimising force, as illustrated by Roger Cotterrell, in the Sociology of Law: An Introduction, 2nd ed. (London: Butterworths, 1992), at p. 139:

Law—in the sense of state-monopolised, comprehensive, society-wide, dominant normative order—has provided the foundation and the instrument of the modern power of the state in Western societies. In this sense, modern Western states have typically depended upon an appeal to the ideology of the ‘rule of law’—the conception of government as bounded by known legal rules and exercising its power over the citizens solely through the medium of such rules, which it is considered to have the authority to create through publicly recognised formal procedures. In this way law has been central to the Western state as both instrument of power and legitimation of power.

("legitimate domination")\textsuperscript{65} has its own form of legitimisation that determines the modalities of its exercise:

[E]ach system [of authority] attempts to establish and maintain belief in its legitimacy. All differ fundamentally, however, in respect to the nature of the legitimacy claim, the type of obedience, the specific administrative staff guaranteeing it and the character of the authority being exercised. The effect, too, differs markedly. For this reason it is useful to distinguish types of authority according to their typical claim to legitimacy.\textsuperscript{66}

Legitimacy is central to authority structures precisely because of our uniquely human requirement for justification. Weber explains this when he argues that authority must include both the (1) external fact of an order being obeyed, and (2) the acceptance of the command as a valid norm.\textsuperscript{67} It is this second aspect that requires justification, as commands are supported by appeals, whether implicit or explicit, to justificatory principles.\textsuperscript{68} Justification, for Weber, is uniquely human: animals do not justify use of power.\textsuperscript{69} Humans need to justify power as part of their belief system about the coherence of the world, as well as in order to fill our need to see suffering as having some meaning.\textsuperscript{70} Because of this underlying requirement for justification, legitimate authority is the most durable form of power, being more stable, for example, than power through expediency or custom.\textsuperscript{71}

When categorising the different forms of authority, Weber argues that there are three ideal types, each of which supports ongoing social and legal authority: (1) traditional, (2) legal-rational, and (3) charismatic.\textsuperscript{72} These forms are considered "ideal types" (or in his later writings "pure types"), because Weber expressly abstracts and refines their core aspects for

\textsuperscript{65} Kronman, in Max Weber, at p. 38, uses the term "authority" as a synonym for Weber's more technical term "legitimate domination." I will follow this practice, along with others, such as the translators of Weber, Sociological Writings. Some commentators, such as Wolfgang Mommsen, in his The Political and Social Theory of Max Weber, avoid the term "authority" because of its different connotations: "Even now the English translation of key terms in Max Weber's sociology—such as 'authority' for Herrschaft—results in massive distortions of the original meaning." Ibid., p. 182.

\textsuperscript{66} Weber, Sociological Writings, p. 29.

\textsuperscript{67} Kronman, Max Weber, p. 39, Weber, Sociological Writings, pp. 9-11. This second requirement for acceptance of validity is similar to Hart's idea of the internal aspect of rules: Hart, The Concept of Law, ch. 4.

\textsuperscript{68} Kronman, ibid., p. 39.

\textsuperscript{69} Ibid., pp. 40-41.

\textsuperscript{70} Ibid., pp. 40-42.

\textsuperscript{71} Ibid., p. 39.

\textsuperscript{72} Kronman, ibid., pp. 40-49, Weber, Sociological Writings, pp. 28-46, Weber, Political Writings, pp. 311-13. It is interesting to note that although Weber appears to consider these three forms of authority as covering "all conceivable forms of legitimating the exercise of power," according to Mommsen, his description of the bases of legitimacy includes four variables: (a) tradition, (b) "affectual attitudes, especially emotional," (c) rational belief in an absolute value and (d) legality: Mommsen, The Political and Social Theory of Max Weber, p. 130, Weber, Sociological Writings, p. 11. It would appear that Weber has collapsed the two analytically distinct ideas of affectual attitude and belief in absolute value into the charismatic form of legitimate domination.
analytic purposes. As such they are neither normative nor represent any complete aspect of reality. Rather, they highlight discrete aspects of reality, in order to provide theoretically coherent, but limited perspectives. The traditional ideal type of authority is based upon the sanctity of age-old rules and powers, whereas the charismatic ideal type is based upon the personal characteristics of the leader. The legal-rational ideal type of authority is premised upon the rational character of the legal order itself—i.e., a formally, and intentionally created 'gapless' system of abstract rules that can apply to any social act. The formal rationality of the legal-rational ideal type makes it particularly appropriate to the modern state, which requires rule-based legal and economic regulation in combination with bureaucratic administration.

Because democracy plays a role in Weber's modern state, it helps to sustain this social end or form of human good. In fact Weber believed that the modern state could only be successful if it balanced several essential components against one another: its bureaucratic administration, its capitalist economy, its legal-rational authority system, and its demagogic

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72 Wolf Heydebrand, in his "Introduction" to Weber, Sociological Writings, at p. xiii, succinctly defines Weber's concept of the ideal type: "Ideal-types are conceptual or analytical models that are always constructed for comparative purposes by selecting a series of culturally significant facets of a complex socio-historical formation, relating them to each other as parts of a meaningful whole, and contrasting it with a different (often opposed) type of formation." Mommesen develops Weber's distinction between 'ideal' and 'pure' types, in The Political and Social Theory of Max Weber, ch. 8. Briefly, 'pure' types are more rigorously constructed, functionally-rational 'ideal' types, which isolate different principles and push them to the extreme:

These 'pure types' differ from the usage of ideal types which we find in Weber's writings before 1918 in that as a rule they are arranged in groups which are linked with one another in a complementary, dichotomic or hierarchical relationship, each representing an ideally altogether different principle. Accordingly, these pure types are deliberately constructed in such a manner as to conform to the extreme pole within a wide spectrum of alternative forms of social action, social conduct or social institutionalization.

Ibid., p. 129. Weberian pure types also tend to be "connected with one another to form an integrated system ... informed by specific value-attitudes which, in turn, are in constant conflict with one another": ibid., p. 132.


[Nowhere in Weber's sociology is there any claim that the concepts he uses describe or generalise from actual conditions of social life. Weber continually stresses the infinite complexity and variety of actual motivations and situations. Ideal types merely provide tools to aid in understanding such unique circumstances.

74 E.g., Mommesen, in ibid., at p. 124, explains:

[Ideal types are considered no more than instrumental in achieving the clearest possible conceptual understanding of given circumstances in the light of 'ultimate' viewpoints. They are intended to measure the discrepancy between a particular segment of empirical reality and the constructed norm, not to provide a direct representation of reality. In other words, ideal-typical constructs are always perspectival. This means that they cannot be used to attain a 'holistic' understanding of the world; rather, their theme is a theoretically unlimited number of segments of reality.

75 Kronman, Max Weber, pp. 44-5 and 47-9, respectively.

76 Cf. ibid., pp. 45-6.
democratic leadership. Bureaucracy and legal-rationality are necessary because they bring the stability, predictability, and capacity for specialisation required for modern, large-scale states. But bureaucracy has an inherent tendency towards stagnation, which will leech the value out of our social order, suffocating qualities such as leadership and innovation. This tendency must be countered by capitalism which, according to Weber, rewards innovation. Demagogic democracy is important because it encourages strong forms of leadership. Although Weber was deeply disturbed by the conditions modernity, and in fact expressed reservations similar to those of Marx about some of the effects of capitalism, he argued that by balancing these four components we may be able to create the best form of modern state—one that can respect human autonomy, equality and rationality. The ideal Weberian state is

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78 This idea of balancing contradictory tendencies is a general theme throughout Weber’s work. For example, as highlighted by Mommsen, in The Political and Social Theory of Max Weber, at pp. 130-31, each of Weber’s three forms of legitimate authority—traditional, charismatic and legal—stands in a dialectical relation to the other two, either collapsing into, or begetting one or the other. Traditional authority gradually becomes routinized and loses its substantive value, thus taking on the bureaucratic characteristics that lead to legal authority. In a similar manner, through a process of regulation legal authority tends to remove the value-rational principles that underlie it, and thus either becomes petrified or provokes a replacing, charismatic upheaval. Mommsen, in ibid., at pp. 130-31, summarises:

Each of the three ‘pure’ types of legitimate domination has its own immanent dynamic which tends towards the full unfolding of itself and, in the course of doing so, eventually effects its own cancellation. Charismatic domination is typically unstable and attains permanence only through routinization and appropriation of the ruler’s original charisma by a ruling class. Traditional domination is constantly exposed to erosion by routinization of the substantive principles from which it draws its legitimacy, and ultimately routinization lays the foundation for the emergence of a system of purely legal domination. Legal domination tends gradually to eliminate all those value-rational principles which initially justified it, by purely pragmatic regulations; if this goes on for a long time the system eventually will stagnate and ultimately becomes petrified; thus it is ripe for a ‘charismatic revolution’, a charismatic ‘breakthrough’ which will wipe out the network of formalized patterns of social interaction and bureaucratic institutions and install a new, value-oriented social system.

See also, Weber, Sociological Writings, pp. 37-46 [on the routinisation of charismatic authority].

79 For Weber’s views on bureaucratic authority, see e.g., Weber, Sociological Writings, pp. 59-107, and Mommsen, The Political and Social Theory of Max Weber, ch. 7.

80 See generally, Kronman, Max Weber, ch. 8. Mommsen, in ibid., at p. 72, explains Weber’s complex view of capitalism, seeing it as the best available—yet still deeply problematic—alternative:

It should be evident [from the preceding analysis] why Weber never idealized capitalism, although he decided unequivocally in its favour. On the one hand, he was an enthusiastic partisan of capitalism as an economic system sustained by bourgeois values and as a source of rational social conduct largely experienced as binding; furthermore, he supported it as a system with a maximum of economic dynamism and social mobility. On the other hand, he was deeply concerned about the ultimate socio-political consequences of capitalism, which, in the long run, would inevitably undermine dignified human life founded on the principle of the free, autonomous personality. The cool and matter-of-fact analysis of modern industrial capitalism in Economy and Society corresponds to this perspective. Indeed, Weber did not hide the defects of capitalism, yet in his view there was no workable alternative. Despite the high regard he had for the motives of sincere socialists, he did not believe that Marxist prescription could solve the real problems of modern Western society. [...] Compared to any form of socialism, capitalism appeared to offer far better conditions for the survival of free societies in the age of bureaucracy.

Weber felt that Marx’s reductive view of class conflict, determinative view of the role of property ownership and exclusive focus on economic, rather than social phenomena, were insufficient. Ibid., pp. 57-65. Weber suggested that class was not always dominant and that there were more variations in class, as well as divergent interests within each class, than accepted by Marx. Ibid. According to Mommsen, in ibid., at p. 60, Weber saw the
therefore a democratic one; democracy (of a limited form) is a vital component of the modern state.

I will come back to this Weberian vision in Chapter 7 when discussing the relation of democracy to the state, and show why his view is neither adequate, nor truly democratic. But the point to emphasise here is that his argument at a more general level reveals why democracy may be a crucial component of what some consider to be the only legitimate form of state today. If we think of democracy as being part of the unique core of the modern state then it takes on certain non-instrumental values. Democracy may be a tool for achieving legitimacy, but also may be seen as a good in itself, as having intrinsic values beyond legitimacy. In this sense legitimacy bridges the two sets of arguments, being both an instrumental and non-instrumental justification for democracy.

II. NON-INSTRUMENTAL (DEMOCRACY AS A GOOD)

This brings us to the fully non-instrumental justifications of democracy. These arguments fall under two main categories, one based on the nature of international society, and the other upon the nature of the democratic process.

A. NORMATIVE EXPECTATION OF INTERNATIONAL COMMUNITY

Part of Thomas Franck’s work falls, perhaps uneasily, within the first category.81 Franck argues that democratic governance is valuable in itself because it has certain characteristics that best match the norms and demands of modern international society. The overwhelming prevalence of democracies in international society—with the vast majority of states either being or becoming democratic—has, according to Franck, given rise to a normative expectation in the international community regarding the desirability of democracies. A trend towards the increase in, and self-perpetuation of, democratic states has been observed in empirical studies, both at the level of the mathematical increases in the number of individual states, as well as regional increases in democracy.82 Franck argues that

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81 See Franck, “Democratic Governance.” See also Thomas M. Franck, Fairness in International Law and Institutions (Oxford: Clarendon, 1995), ch. 4. For a critical, yet sympathetic, analysis of this kind of ‘democratic norm thesis’ (that “international law should be seen to require democratic government”), see Marks, The Riddle of All Constitutions, pp. 37-49.

this trend legitimates democratic states at the international level because they meet the normative expectations of the community of states. Franck does not make clear the causal progression of this trend—i.e., whether, on the one hand, international law has been transformed by the large number of new democracies, or whether, on the other, the spread of democracies was encouraged by pre-existing norms in international law.


Ibid. Clearly such a statement may be contested, as many states that have been accepted as ‘democratic’ have only been nominally so, and have not in fact ‘patently’ governed by consent. See, e.g., the more cautious views of Brad Roth in “Democratic Intolerance: Observations on Fox and Nolte,” in Democratic Governance and International Law, ed. G.H. Fox and B. Roth, 441-44 (Cambridge: Cambridge University Press, 2000), at pp. 441-44. For criticisms of such overly formal conceptions of democracy, ones that do not require real consent or real participation, see e.g., Otto, “Challenging the ‘New World Order,’” Grossman, “Remarks,” Simpson, “Imagined Consent,” Carothers, “Empirical Perspectives,” and Roth, Governmental Illegitimacy.

E.g., Franck, in “Legitimacy and the Democratic Entitlement,” states at p. 28:

The almost-complete triumph of Humeian, Lockean, Jeffersonian, Montesquieuan, or Madisonian notions of democracy (in Latin American, Africa, Eastern Europe, and to a lesser extent in Asia) may well prove to be the most profound event of the twentieth century, and will in all likelihood create the fulcrum on which the future development of global society will turn. […] The question is not whether democracy has swept the boards, but whether global society is ready for an era in which only democracy and the rule of law will be capable of validating governance.

But cf. Nino, The Constitution of Deliberative Democracy, at p. 2: “Although almost no thinker today denies that democracy is the only legitimate system for governing a society, there is very little agreement about the source of that legitimacy.”

Franck, “Democratic Governance,” pp. 50-51 (arguing that “governments whose legitimacy is questioned are turning to the international system for that validation which their national polis is unable to give”).
to protecting citizens from government abuses. Examples of such processes include recent electoral assistance requests on the part of states facing difficulties (civil strife, terrorism, or anarchy), as well as those without such difficulties.\textsuperscript{88} Electoral requests are being seen with increasing frequency in stable but small states, such as those of the Commonwealth Caribbean.\textsuperscript{89} In such cases election monitoring helps assuage domestic tensions and provides

\textsuperscript{88} It is difficult to gauge the extent to which requests for electoral assistance were driven by the desire for external, as opposed to internal, legitimisation. Countries which recently requested assistance, both those suffering from civil strife and those at peace, include Nicaragua, Haiti, Eritrea, Cambodia, Mozambique and South Africa (UN); Surinam, El Salvador, Paraguay, Panama, Peru (OAS); Bulgaria (CSCE); Zambia, Bangladesh, Benin, Latvia (NGOs) [examples taken from: Thomas M. Franck, Fairness in International Law and Institutions (Oxford: Clarendon, 1995), pp. 105-109]. Extensive data regarding international election monitoring is available through several of the internet sites of the international organisations that engage in such activities. See, for example, the UN Electoral Assistance Division of the Department of Political Affairs (home page at http://www.un.org/Depts/dpa/ead/eadhome.htm), “Member States’ Requests For Electoral Assistance to the United Nations System: In Alphabetical Order, Since 1989 (as of June 1999)” at http://www.un.org/Depts/dpa/ead/website9.htm providing charts of countries that have been provided with electoral assistance (roughly 84), as well as links to documents such as the Secretary-General’s Report, “Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies” (21 Oct. 1997), 52\textsuperscript{nd} session, A/52/513. The Unit for Promotion of Democracy of the Organisation of American States includes election monitoring statistics in a series of charts available through their site at http://www.oas.org (or http://www.upd.oas.org/calendar/caltex.htm), revealing roughly 79 instances of electoral assistance from 1996-2000 (the years for which statistics are available). The OSCE Office for Democratic Institutions and Human Rights (home page at http://www.osce.org/odihr/elecrep.html), provides a list ODHIR Election Observation Reports from 1995 to 2006, covering 50 elections in 24 states, as located at http://www.osce.org/odihr/elecrep/website9.htm. The ODHIR has even placed The ODHIR Election Observation Handbook, 4\textsuperscript{th} ed. (April 1999), on-line at http://www.osce.org/odihr/election/handbook/index.htm (accessed 14 November, 2000). For a recent European Union report on election monitoring since 1993, see: European Commission, “Appendix I: Overview of EU Experience,” in Communication from the Commission on EU Election Assistance and Observation, Brussels 11.4.2000, COM (2000) 191 final, as available at http://europa.eu.int/eur-lex/en/com/pdf/2000/com2000_0191en01.pdf. Non-governmental and inter-governmental organisations also play a significant role here, as indicated by the UN Department of Political Affairs, in “United Nations Electoral Assistance,” an on-line document located at http://www.un.org/Depts/dpa/ead/website7.htm, which lists the following non-UN bodies as having engaged in election monitoring or assistance:

[The Commonwealth Secretariat, European Union (EU), Organization of African Unity (OAU), Organization of American States (OAS), the Organization for Security and Co-operation in Europe (OSCE), the Inter-Parliamentary Union (IPU), the Centre for Electoral Promotion and Advice (CAPEL), the International Institute for Democracy and Electoral Assistance (International IDEA), the International Foundation for Electoral Systems (IFES), and the National Democratic Institute for International Affairs (NDI), and the Carter Centre, among others.

Unless otherwise indicated, the above internet sites were accessed on 25 September 2000.

the newly elected government with legitimacy in the eyes of the world as well as their own people. In Franck's vision, this democratic norm will progress beyond election monitoring, to the point where all domestic governments will need to be legitimated by international rules and processes on criteria including possession of a democratic government.

Franck's model does not fit perfectly within our instrumental/non-instrumental typology, however. This is because, on the one hand, from the state's perspective democracy is still an instrumental value (helping to produce legitimacy); but on the other hand, from the international community's perspective it is a non-instrumental value. Also, even from the non-instrumental perspective Franck's model has a significant weakness, namely, the lack of proof of a strong causal connection between democracy and the legitimisation offered by the international community. In other words, no evidence is offered for a deep causal link between democracy, per se, and international legitimacy. Perhaps by assuming that the value of democracy is self-evident, Franck does not fully develop his argument along these lines. He does not push his normative argument towards examining the underlying, or intrinsic, value of democracy as a criterion for legitimacy.

B. DEMOCRACY AS A GOOD: PROCESS

The second category of non-instrumental arguments relies upon the nature of the democratic process in order to show why democracy is intrinsically desirable. There are two versions of this argument. The simpler version asserts that democratic process is not merely instrumental but is also a good in itself. The more complex version sees the combination of democratic process and theory as producing an intrinsically desirable form of governance,


91 Franck, in “Democratic Governance,” at p. 50, states: "We are witnessing a sea change in international law, as a result of which the legitimacy of each government someday will be measured definitively by international rules and processes.”
one that can become an end in itself. Avner De-Shalit provides the clearest example of the first version and Robert Dahl and Carlos Nino two variations of the second. De-Shalit argues that democracy is valuable because of the deliberative process that it produces and requires. In contrast to arguments about the desirability of democratic processes for the instrumental reasons associated with the kinds of substantive decisions they produce (i.e., more balanced, more rational and more tolerant outcomes), De-Shalit urges us to see that at least part of the value of democracies lies in the process of deliberation itself. Deliberation, according to De-Shalit, has certain aesthetic values that are not related to its ability to reach a particular decision. Using the analogy of a sporting event, deliberation is not just about who ‘wins’ the game, but about how it is played. This is not to say that decisions are unimportant, or that democratic processes are not serious and meaningful, but rather that because decisions themselves become inputs in later deliberations, we must “see the discourse itself as the main component and significance of democratic politics, and so reshape our expectations of politics.” In fact, rather than seeing democratic deliberations as valuable for their decisions, De-Shalit argues that we can turn this around and see the decisions as helpful to the process:

My aim is not to dismiss the importance of decisions, but rather to reinterpret the relationships between decisions and deliberation. In contrast to the position that discourse and debate are nothing but means of achieving better decisions, I hold that decisions and decision-making are also a means of achieving a much better discourse. Without an eventual decision, the discourse itself would be less intensive, less beautiful, less serious. ... Politics as participation is politics as an ongoing debate inspired and stimulated by the idea of decision-making: the need to decide and sometimes to legislate intensifies and concentrates the debate, making it much better (though not in instrumental terms) than it would have been without a decision.


93 De-Shalit, “On Behalf of ‘The Participation of the People,’” p. 69. In ibid., at pp. 63-5, De-Shalit distinguishes this argument from models that prioritise decisions rather than processes, including those that justify democracy because it allows actors to trade (pre-formed) interests, or to engage in discussions that shape and change opinions, which thereby produce more rational decisions as well as promote mutual tolerance and agreement.

94 Ibid., pp. 72 and 75. De-Shalit makes a similar point, in ibid., at pp. 70-71, with the analogy of a musical performance—deliberations having a similar aesthetic dimension through their ability to resolve disharmonies and relieve tensions.

95 Ibid., p. 71. In ibid., at pp. 70-71, De-Shalit describes how these earlier decisions become new data for later deliberations, adding a higher level of scrutiny. At the first of these pages, De-Shalit summarises: “[M]y point is that this value is not a matter of the debate’s producing a more rational decision, but rather one of subordinating the decision to the debate, considering decisions and politics as new inputs, and thereby subjecting them to a new critical scrutiny...”

96 Ibid., pp. 74-5.
Better democratic debate may not always produce the best results, but it remains superior overall because the democratic process allows every decision to be subject to critical scrutiny at some point, being “uniquely, able to correct itself, just because it demands critical scrutiny by the public: in other words, deliberation.”97 Also, democratic debate, by being free, open and egalitarian (i.e., in the sense of equal ability to participate), not only leads to instrumental gains but can be seen as instantiating the more fundamental values of participation and self-government.98

As carefully illustrated by David Miller, such deliberative processes even change the form and content of the debate, as well as narrow the number of choices (thereby bringing more determinacy).99 Precisely because debate is open and public, participants are forced to abandon certain positions (e.g., overtly racist), and generally must tailor their arguments to attract the support of others, such as by arguing in terms that other participants can accept and by appealing to general principles.100 This leads to one of the more interesting effects of participatory democracy. It can express and change interest.101 The expression of ideas and viewpoints through democratic processes encourages further development, both intellectual and personal. Furthermore, democratic processes even allow re-opening of debate about non-

97 Ibid., p. 75.
98 Ibid., pp. 76 (participation and self-government), and 77-8 (positing the three conditions of freedom, openness and egalitarianism necessary for a democratic debate).
100 Ibid., pp. 82-3. In ibid., at pp. 83-4, Miller goes on to illustrate how discussions not only activate previously-held norms but create them as well. To illustrate the first point he summarises evidence from psychological experiments about juries, in which individuals are shown the same evidence, asked to give a private guilty/not guilty verdict, and then divided into groups that are exactly divided between the two views. Instead of producing some hung juries and then an equal proportion of guilty and not-guilty verdicts (as might be expected), the experiment actually revealed a “marked tilt towards the not-guilty side.” Miller argues that this is because the jury discussions activated a “leniency norm” which although always present to some degree became more active during discussions. To illustrate the way that norms can be created, Miller uses experimental evidence from a classic “Prisoner’s Dilemma” situation (where trust and co-operation were required before individuals could make profits). The evidence revealed that debate and discussion could create the relevant norms: “the effect of debate was to generate a norm of cooperation with the group strong enough in the great majority of cases to override individual self-interest.” Ibid.
101 Hoffman, in Beyond the State, states at pp. 206-7:

Putting democracy into a wider social context means reconceptualizing the nature of voting. In classical liberal theory the vote is seen as having a purely ‘protective’ function in which individuals express interests which have been fixed in advance. For the vulnerable, the poor and the dependent, the problem is that interests need to be developed rather than protected. Special efforts (along with deliberate resource provision) are necessary to establish, as in the feminist practice of ‘consciousness raising’, an identity that had not existed before. In this sense democracy requires participation—the development of capacities and identities (and in this sense ‘interests’) hitherto silenced by oppression and disadvantage.
democratic decisions (i.e., when a delegated, bureaucratic decision made at a local level has ramifications that lead to its criticism before the democratic organs of the state).\textsuperscript{102}

C. DEMOCRACY AS A GOOD: SUBSTANCE

Two final non-instrumental rationales for democratic governance are offered by Carlos Santiago Nino and Robert Dahl in their works, The Constitution of Deliberative Democracy and Democracy and Its Critics, respectively. Neither speaks in terms of instrumental/non-instrumental justifications, but I believe that both works can fall within our non-instrumental or 'intrinsic' category.

1. Epistemological Moral Reasoning

The focus of Nino's book is upon establishing a theory of democratic constitutionalism that best supports a deliberative model of democracy. This is crucial to Nino because in his view deliberative democracy represents more than a process for decision-making. It constitutes an epistemological form of moral reasoning. In other words, democracy is a mechanism that allows us to discover and understand moral truths. Nino's theory is complex so it may be helpful to trace the outlines of his argument.

Nino links democracy to moral, rather than political, reasoning because in his view moral reasoning must underpin the justification of any decision, including one made within a constitutional democracy. According to Nino, "actions and decisions, such as those taken in constitutional matters, cannot be justified on the basis of positive laws, as in the historical constitution, but only on the basis of autonomous reasons, which are in the end moral principles."\textsuperscript{103}

Because Nino works within the specific context of a constitutional framework he focuses upon the complex interaction between various elements of democracy and constitutionalism. His model envisages a constructive relationship between two forms of constitution, the "real/historical constitution" and an "ideal constitution." The historical constitution is the written one with which we are most familiar, the one that sets out positive

\textsuperscript{102} Cf., De-Shalit, "On Behalf of 'The Participation of the People,'" pp. 79-80 (democratic discourse preceding and following non-democratic decisions as checking and correcting them). See also the comments about Dahl's solution of leaving "final control over the agenda" in the hands of the demos in order to check the weaknesses representative democracy, in Chapter 3, above (in the section describing the polity and the question of 'democratic' representation).

\textsuperscript{103} Nino, The Constitution of Deliberative Democracy, p. 43. Nino explains the basis for this conclusion at p. 32:

... I argue that all judicial justificatory propositions must in the end be derived from moral propositions that legitimize certain authorities. This is due to my assumption that, in practical discourse, ultimate reasons are autonomous in the Kantian sense. They are acknowledged because of their intrinsic merit, not because they originate from some legislative authority, divine or conventional. [Notes and references omitted.]
laws and provides stability in a constitutional system. But this form of constitution is insufficient by itself. It suffers from the twin perils of indeterminacy (related to meaning and text), and superfluousness (due to its ultimate basis upon moral principles, which once known, obviate the need for a constitution). As a result Nino postulates a second, “ideal constitution.” This is a theoretical construct used to describe certain ideal aspects of the historical constitution, namely, its human rights and democratic components. The historical constitution can never embody either of these latter components completely. Instead the ideal constitution is needed to bring out deep conceptions of human rights and democracy, and thereby dialectically push the historical closer to the ideal.

The ideal constitution entails its own complexities, however, because it must balance the conflicting claims of human rights and democracy. Nino thus analyses it in two parts: “the constitution of rights and the constitution of democracy.” The ideal constitution of rights is founded upon the presuppositions of the practice of moral discussion, which help us establish and evaluate rights. Three of these presuppositions are expressed in the principles of

104 Nino, in ibid., in ch. 2, deals with the difficulties posed by the radical indeterminacy and superfluousness of the real, or historical constitution. Indeterminacy is caused by problems related to the criteria for ascription of meaning to the text (subjective, objective), difficulties in applying such criteria to a text (including vagueness and ambiguity), and the related semantic and syntactical indeterminacy revealed in attempting to preserve the binding quality of legal material over practical reasoning. Ibid., pp. 16-22. Other factors leading to indeterminacy include problems involved in inferring logical consequences from the interpreted text, which cannot be solved by rules of construction, and in actually applying the norm to the individual case. Ibid., pp. 22-4. Nino concludes that these problems of indeterminacy can be solved through resort to moral judgements, or by envisioning the constitutional text “not as a mere document but as the practice generated by it”: ibid., p. 25. The superfluousness of the historical constitution arises because of its role in ascribing validity to other rules, which role requires an external source for its own validity: “Since the constitution cannot ascribe validity to other rules if it is not valid itself, and since it cannot ascribe validity to itself, the constitution cannot on its own grant validity to other rules. It is thus necessary to resort to considerations external to constitutional practice to justify the obligatory character of legal rules.” Ibid., pp. 26-7. These external considerations must be moral ones, because only the latter do not require justification with further reasons. Ibid., p. 27 (and see my immediately preceding footnote). Once we recognise that moral principles are required to allow a constitution to be relevant for practical justificatory reasoning, then we must also acknowledge that the constitution itself must satisfy the rights and other content needed by its underlying moral principles. If it does not do so, it is irrelevant; if it does, it is superfluous because “such rights can be inferred from the moral principles themselves.” Ibid., p. 28. Nino argues that the historical constitution can only escape the problem of superfluousness if we conceive of it as a form of convention, or social practice. Ibid., pp. 29-30. Such a practice must encompass both the external and internal points of view, which enable participants to both identify a norm and to decide whether it should be applied to justify an action. Ibid., pp. 31-2. It must also be viewed as a collective enterprise of long duration, one in which no participant will be able to determine the final outcome, but must work within pre-established practice, knowing that her involvement will represent one part of an ongoing project. Ibid., pp. 32-5. Nino distinguishes his approach from Dworkin’s theory, since Dworkin does not recognise the real inability of each participant to control the outcome, nor the way in which the actions of each participant may not be justifiable on the basis of the identical principles. Ibid., pp. 36-7 and 41. In fact, Nino’s view of the historical constitution as a form of convention checked by an ideal constitution, admits the possibility that participants may revolt or destroy the historical constitution, when it becomes “so bad in comparison with the ideal constitution that it is necessary to take advantage of that [constitutionally-provided] authority in order to destroy it.” Ibid., pp. 37-8. In sum, the historical constitution is rendered determinate and relevant when it is viewed as an evolving convention or social practice, one that provides a kind of “second best” framework (as compared to that of the ideal constitution), within which actions and decisions can be justified. Ibid., p. 41.

105 Nino, The Constitution of Deliberative Democracy, p. 12. See also, ibid., ch. 3 (examining the ideal constitution of rights). Note that Nino uses the phrases “constitution of democracy” and “constitution of power” synonymously: ibid., p. 219.
personal autonomy, inviolability of the person, and dignity. These principles balance the need for strong respect of the autonomy of the individual with her need to be able to self-limit that autonomy. The rights established under these principles provide both the framework for, and a check upon, democratic deliberation. The ideal constitution of democracy, on the other hand, is for Nino a dialogic, deliberative one that intertwines politics and morality to produce knowledge on intersubjective matters.

Before examining the ideal constitution of democracy, it is helpful to understand why Nino specifically limits the epistemic value of democracy to intersubjective moral standards. On the one hand, Nino does so because in his view autonomous reflection simply is not as reliable for such matters, since it suffers from the problems of partiality and mistake. On the other hand, restricting democracy to intersubjective moral standards helps us to avoid the difficulties of two extremes of either monologic or co-operative/collective moral reasoning. The former extreme assumes that all moral knowledge can be accessed by the individual alone; the latter assumes that only collective discussion—a kind of “co-operative search for truth”—can produce moral knowledge. Both extremes are problematic. The monologic view makes deliberative democracy irrelevant because it sees each of us as able to access moral knowledge by ourselves (i.e., without need for deliberation with others). The strong collective view, on the other hand, makes the individual redundant to democratic reasoning since she or he is seen to be incapable of independently accessing moral knowledge. The strong collective view thereby removes any possibility for the individual to check or correct the democratic reasoning process. In contrast, Nino’s ‘middle’ position assumes that there are areas of moral knowledge which are personal in nature (having no intersubjective moral content), and therefore require deliberation by the individual, as well as areas that would best

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106 Ibid., pp. 46-53. At the latter page Nino summarises that “[t]hese three principles define a liberal conception of society, a conception which rejects the implications of perfectionism, holism and normative determinism.”

107 Ibid., pp. 63-6. See also the discussion of the zero-sum relation between rights and democracy in Chapter 3 (in the context of a description of democracy’s requisite rights and freedoms).

108 Nino, in ibid., at p. 106, states: [T]he value of democracy is of an epistemic nature with regard to social morality. I claim that if certain structures are met, democracy is the most reliable procedure for obtaining access to the knowledge of moral principles. Yet, this position does not fall into perfectionism, since it presumes a differentiation among moral standards and limits the epistemic value of democracy to those standards that are of an intersubjective nature.

109 Ibid., ch. 5.

benefit from collective deliberation (areas of intersubjective morality). The latter would benefit most from intersubjective discussion and decision. In fact a justificatory deliberative process for deciding intersubjective questions has the potential to produce substantial benefits. It can broaden the knowledge base, help to reveal defects in reasoning and help to prevent partiality. However, even in this area, in Nino’s view the individual must continues to play a role by providing the possibility of access to knowledge of correct solutions.\[111\]

Nino’s ideal constitution of democracy also accepts a majority rule system. Although such an ideal constitution would more closely approximate moral discourse if it required a system of unanimity (thereby satisfying the condition of impartiality), Nino accepts a majority rule system suitable because of pragmatic considerations.\[112\] Majority rule overcomes the impossibility of unanimity and also satisfies the need to take a decision at a certain time.\[113\] Deliberative majority rule democracy offers the best surrogate for ideal moral discussion because it helps provide knowledge of the interests of others (partiality being caused not only be selfishness, but also ignorance), requires justification, helps to detect factual and logical mistakes, allows productive emotional input, allows bargaining (which can encourage satisfaction of as many interests as possible in hopes of attracting a majority), and provides access to what Nino describes as the collective tendency towards impartiality.\[114\] The epistemic value of democracy is not absolute, however, and depends upon the prior fulfilment of a variety of underlying conditions:

The epistemic capacity of collective discussion and majoritarian decision to detect morally correct solutions is not absolute but varies according to the degree of satisfaction of underlying conditions of the process. The conditions include that all interested parties participate in the discussion and decision; that they participate on a reasonably equal basis and without any coercion; that they are able to express their interests and to justify them on the basis of

\[111\] Nino, in The Constitution of Deliberative Democracy, at p. 113, sets out these general points as part of his epistemological thesis (falling under his general position of “epistemic constructivism”):

Intersubjective discussion and decision is the most reliable procedure for having access to moral truth, since the exchange of ideas and the need to justify oneself before others not only broaden one’s knowledge and reveal defects in reasoning but help satisfy the requirement of impartial attention to the interests of everybody concerned. This does not, however, exclude the possibility that through individual reflection somebody may have access to the knowledge of correct solutions, though it must be admitted that his method is far less reliable than the collective one, because of the difficulty of faithfully representing the interests of others and being impartial.

\[112\] Ibid., pp. 117-18.

\[113\] Because of the importance of time constraints, Nino states in ibid., at p. 118, that “democracy can be defined as a process of moral discussion with a time limit.”

\[114\] Ibid., pp. 118-28. Nino lists the kinds of statements that cannot fall within the realm of genuine argument at p. 122, and explains the benefits associated with emotional factors, including helping us to assess the interests of others, and to create social sanctions, at p. 125. Nino’s “collective tendency towards impartiality” is based upon the assumptions that (1) people have a tendency to make correct decisions, and (2) the greater the number of persons, the higher probability the decision will be correct. Ibid., pp. 127-8 (referring, inter alia, to Condorcet’s theorem).
genuine arguments; that the group has a proper size which maximizes the probability of a correct result; that there are no insular minorities, but the composition of majorities and minorities changes with the issues; and that people are not extraordinarily excited by emotions.\(^{115}\)

If these conditions are satisfied the value of democracy will be significant. It will be higher than that of other systems on a comparative basis—since it is better than any other for satisfying the conditions for moral decision making.\(^{116}\)

Nino ties all of these strands together by setting his three ideal constitutions in a state of permanent and reciprocal tension.\(^{117}\) Deliberative democracy prevents conflicts between democracy and human rights “since the value of the democratic process arises from its capacity to determine moral issues such as the content, scope, and hierarchy of rights.”\(^{118}\) It is considerably more likely to determine these moral issues than autonomous reflection, but remains checked by both \textit{a priori} rights and autonomous reflection. Since “democracy’s value consists in its reliability for discovering \textit{[a priori] rights},” if it proves epistemically unable to protect an \textit{a priori} right in comparison with autonomous individual reflection, then we remain entitled “to do what is necessary to fulfill that \textit{a priori} right even by nondemocratic means.”\(^ {119}\) Finally, because the historical constitution as convention approximates the ideal constitution, the practice and range of decisions made under it are imbued with epistemic value, providing a moral basis for the \textit{entire practice}:

This need to integrate into our practical reasoning different democratic results obtained at different times and different places is perfectly congruent with the need to preserve the legal practice founded by a certain successful constitutional event [i.e., the historic constitution]. The legal practice is continuously fed by democratic decisions imbued with epistemic value and moral principles. \textit{Thus, a moral basis may be inferred not just for a specific, present decision but also for those decision taken in times and places surrounding that specific decision. These principles should also be applied to evaluate the legitimacy of the whole practice constituted by successive democratic decisions.} If the present decision endorses a principle that completely disregards relevant past or future decisions, the person engaged in practical reasoning can try to construct a moral principle that takes into account not only the present decision but also the content of other decisions. By doing so, that person acknowledges that the epistemic value of democracy

\(^{115}\) Ibid., pp. 128-9.

\(^{116}\) Ibid., p. 129.

\(^{117}\) Ibid., p. 221.

\(^{118}\) Ibid., p. 137.

\(^{119}\) Ibid., p. 140.
requires consideration of interests expressed in adjacent times and spaces in preserving the constitutional convention.120

This passage highlights what I would describe as the intrinsic quality of Nino’s position: the epistemic value of democracy provides a moral basis for the entire democratic practice. Past and present decisions take on a value distinct from their substantive results. Democratic decisions are valuable because the epistemic quality of the democratic process provides “reasons for believing that there are reasons for action and decision.”121 In our terms, the democratic process is intrinsically valuable as the only one that can produce this unique combination of epistemic value and moral principles. It justifies our adherence to its results because it provides the best practical form of access to moral knowledge.

2. Unique Process as Constituting a Good

Robert Dahl’s work taken as a whole offers a final justification for democracy as intrinsically rather than instrumentally valuable. I have discussed much of Dahl’s theory earlier, in Chapter 3, when looking at the content of democracy. Let me review some of the principles that Dahl has demonstrated both underlie and justify democracy. These include such things as the “Principle of Equal Consideration of Interests,” the “Presumption of Personal Autonomy,” and the “Strong Principle of Equality.”122 The “Principle of Equal Consideration of Interests” requires us to ensure “that during a process of collective decision-making, the interest of every person who is subject to the decision must (within the limits of feasibility) be accurately interpreted and made known.”123 The “Presumption of Personal Autonomy” holds that “[i]n the absence of a compelling showing to the contrary everyone should be assumed to be the best judge of his or her own good or interests.”124 The “Strong Principle of Equality” is defined in a preliminary manner as meaning that “[a]ll members are sufficiently well qualified, taken all around, to participate in making the collective decisions binding on the association that significantly affect their good or interests. In any case, none are so definitely better qualified than the others that they should be entrusted with making collective and binding decisions.”125 These principles, when combined, require a political process that upholds the equality of interests of individuals, as well as respects and promotes

120 Ibid., p. 142 (emphasis added, notes omitted).
121 Ibid., pp. 135.
122 Dahl, Democracy and Its Critics, chs. 6-9.
123 Ibid., p. 86.
124 Ibid., p. 100.
125 Ibid., p. 98
individual autonomy. Such a combination is fundamental to democratic theory. It offers a startling vision of what the democratic process can really mean:

If the good or interests of everyone should be weighed equally, and if each adult person is in general the best judge of his or her good or interests, then every adult member of an association is sufficiently well qualified, taken all around, to participate in making binding collective decisions that affect his or her good or interests, that is, to be a full citizen of the demos. More specifically, when binding decisions are made, the claims of each citizen as to the laws, rules, policies, etc. to be adopted must be counted as valid and equally valid. Moreover, no adult members are so definitively better qualified than the others that they should be entrusted with making binding collective decisions. More specifically, when binding decisions are made, no citizen’s claims as to the laws, rules, and policies to be adopted are to be counted as superior to the claims of any other citizen.126

This kind of formulation reveals the deep vision of equality that is central to the meaning of democracy.

To this vision Dahl adds the five essential requirements for a fully democratic process that we saw at the end of Chapter 3: (1) effective participation, (2) voting equality (at the decisive stage), (3) “enlightenment” (meaning the need to ensure the citizen’s ability to become part of an informed demos), (4) ability to exert final control over the agenda, and (5) a broad criterion of “inclusiveness” (providing nearly universal citizen participation in the demos).127 Since these requirements are so difficult to achieve in practice, Dahl is forced to conclude that no state today is a real “democracy” according to his definition. He instead describes the most democratically-inclined states existing at present as being “polyarchies.”128

Nevertheless, even if we only may approximate democracy today, I would argue that a work such as Dahl’s offers us both instrumental and non-instrumental justifications of democracy. Dahl reveals a clear vision of the instrumental value of democracy for arriving at, and promoting, certain ideal political and ethical values. He also offers a non-instrumental justification of democracy in his arguments related to the notion of the ‘common good.’ The common good is, and has historically been, the telos of all valuable political systems. Yet it is also notoriously difficult to establish. In his work, Dahl reviews historical and current

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126 Ibid., p. 105. See also, ibid., pp. 311-12, for a thumbnail sketch of the values of democracy.
127 Ibid., pp. 108-14 (principles 1-4), and 129-30 (principle 5). Principle 3, enlightened understanding, is further defined at pp. 180-81. Dahl, in ibid., at p. 129, defines his fifth principle as holding that “[t]he demos must include all adult members of the association except transients and persons proved to be mentally defective.” Notice that this fifth principle contradicts the practice of most states of excluding resident aliens and non-nationals from decision-making processes. Political philosophers also have not been as inclusive. Rousseau and Locke, for example, excluded children, women, foreigners and many adult male residents from decision-making: ibid., pp. 123-4. Dahl’s theory thus represents a far more inclusive vision of democratic decision-making than available either historically or at present. See generally, ibid., ch. 9.
attempts to formulate a substantive definition of the common good, but criticises all of them on grounds of their being either too specific, or too general, or too limited in scope, or too 'pluralist.' In the end he argues that the common good must lie in the procedure, the process itself, and not in a substantive notion of what the end of the process should be. Dahl argues that it is "misguided to search for the good exclusively in the outcomes of collective decisions and ignore the good that pertains to the arrangements by which they are reached." He summarises about the common good:

Our common good, then—the good and interests we share with others—rarely consists of specific objects, activities, and relations; ordinarily it consists of the practices, arrangements, institutions, and processes that [...] promote the well-being of ourselves and others—not, to be sure, of "everyone" but of enough persons to make the practices, arrangements, etc. acceptable and perhaps even cherished.

By seeing the common good as a set of practices, institutions and processes, Dahl’s work parallels Nino’s in an interesting way. Democratic processes enable strong protection of personal autonomy and equality, and provide the key to political or moral knowledge, respectively. We may thus see the intrinsic value of democracy as largely lying within the democratic process itself. Dahl’s vision of democracy is so powerful as to allow us to describe it as an end or good.

The difference between the theories of De-Shalit on the one hand, and Dahl and Nino on the other, is that the latter emphasise the democratic nature of the process as being particularly valuable. Even though democracy may be broken down into its various component principles and processes (as carefully done by both Dahl and Nino), it is the unique mixture of these ingredients that makes the democratic process intrinsically valuable. By creating such deep and substantive understandings of democracy and the democratic

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128 Dahl, in *ibid.*, describes polyarchies at pp. 218-24, and at the last page writes that "so far no country has transcended polyarchy to a 'higher' stage of democracy." See generally, *ibid.*, chs. 15 and 16.

129 See *ibid.*, chs. 20-21. The substantive definitions of the good fail for being too specific, and hence not common or relevant—as would be the case if the common good of a small community was factored into the many communities that make up a large state. Such definitions are either too general, and therefore suffer from vagueness, or too limited in scope, and thus unable to maintain common good in the light of surrounding extrastatal forces. They are too 'pluralist' [my term], in the sense that, as with Walzer’s ‘spheres,’ each sphere of common good will contradict others by promoting different, at least partially incompatible notions of the good, or depend upon pre-established communities. Dahl also criticises Walzer’s theory for not resolving the question of process. *ibid.*


132 *Ibid.*, p. 307. The reference to the common good not including "everyone" is meant to highlight Dahl’s earlier discussion about the difficulties of including everyone who is affected by such a decision—i.e., those outside of the state’s borders. See generally, *ibid.*, ch. 20.
process, Dahl and Nino allow us to argue that democratic governance has a merit of its own, one that compliments, but at the same time goes far beyond its instrumental justifications.

In sum, in exploring instrumental and non-instrumental justifications of democracy this Chapter has further developed our understanding of democracy generally, as well as has demonstrated a variety of reasons supporting democracy’s present ascendance. Importantly, justifications related to democracy’s ability to promote peace have revealed its uniqueness as a political system. The ‘democratic peace’ thesis does not apply to any other form of political decision-making, and this seriously challenges the traditional, ‘billiard ball’ models of international relations that assume that all states can be treated in the same manner, regardless of their internal political makeup. The values that underpin democracy also have allowed us to challenge one of the central assumptions of some pro-democratic theorists, namely, that a world of uniform democratic states is desirable at present. I have argued, instead, that democratic theory can and should support a form of limited pluralism. Such ‘tolerance’ will remain necessary until states or other units can more closely embody and express the principles and values of democracy. Both Nino and Dahl have provided us with criteria by which to judge existing democracies and projected democratic models, including that of ‘cosmopolitan democracy.’ We now have a deeper understanding of what it means to be a democracy, and the justifications in this Chapter provide compelling reasons for pursuing the democratic ideal. Let us turn to examine a creature potentially at odds with democratic theory, namely, the sovereign state.

133 Dahl, in *ibid.*, at p. 131, states that even though most polities will “fall pretty far short of meeting the criteria,” that nonetheless, “the criteria serve as standards against which one may compare alternative processes and institutions in order to judge their relative merits.”
CHAPTER 5: ABSOLUTIST AND CONTRACTARIAN THEORIES OF SOVEREIGNTY

General theories of sovereignty may be said to fall under two main political-legal models, the absolutist and contractarian ones. The first uses perfectionist notions of unlimited and unaccountable power, and the second relies upon a form of ‘social contract’ to express notions of delegated power. In the two halves of this Chapter I will argue that each model is inadequate. The absolutist model, examined in the first section, fails because its perfectionist tendencies continually undermine its theoretical and practical coherence. It also reveals an impoverished vision of human nature, one not compatible with such core values as human rights, democracy and the rule of law. The contractarian model, examined in the second section, fails because it allows only the most limited participation by the people in the affairs of their state. To put it simply, absolutist models are deficient because they do not require any, and contractarian ones because they do not require enough, participation and accountability.

I. ABSOLUTIST MODELS OF SOVEREIGNTY

The term “absolutist” describes the unlimited nature of this sovereign power: the sovereign possesses absolute power derived from a non-consensual and non-delegated source.1 Absolutist sovereignty therefore may be said to entail the “power to the extent of human capacity to do all things on the earth without accountability.”2 The sovereign, under this model, wields ultimate power without (in extreme formulations), any hindrance—not even being bound by the dictates of morality, natural or positive law. Although there has never been a pure example of absolutist sovereignty, per se, the myth of absolutist power has been important in

1 In discussing this model I will use its more familiar historical appellation, “absolutist,” as well as a more descriptive name, “power-based.” Each term brings out different aspects of the theory. The phrase “power-based” describes the structure upon which this form of sovereignty is built (its ultimate source), as well as its primary mode of functioning. The phrase ‘power-based’ expresses the source of legitimacy of the theory (power), and does not focus solely upon its mode of expression (absolute, unchallengeable commands).

2 Lansing, Notes on Sovereignty, p. 3. The author uses the phrase “to do all things on earth” to contrast normal sovereignty (what he calls “human sovereignty or world sovereignty”), with “Divine Sovereignty”, or the sovereignty possessed by God.
developing theories of rule or legitimacy. Not only is an absolutist vision of sovereignty clear and concise, it also helps us to locate the actual sovereign of any given state—one simply need identify the person or body possessing the greatest power. It also has been appealing because psychologically and sociologically humans seek forms of perfection, and the absolutist sovereign fits within a perfectionist model of authority. As a result, to the extent that such perfectionism is basic human need or characteristic, the re-emergence of absolutism always remains a possibility.

Absolutist forms of sovereignty likely will re-appear whenever a society faces substantial instability. Let us briefly examine the secular version of absolutism before setting out and critiquing a modern form of the theory.

A. THE DEVELOPMENT OF SECULAR ABSOLUTISM

The earliest developments in absolutist theory likely involved religious models, ones relying upon ‘other-worldly’ sources for sovereign authority. Secular models, in contrast, locate the sovereign’s authority in an earthly context. Both models rely upon some form of overwhelming power, but cloak this power-basis with different sources of formal legitimacy. At its core, the secular view is based upon a line of reasoning that assumes that the state is a ‘good,’ that this good must be preserved, and that the best way of doing so is to elevate it to the level where only its values are important (i.e., exclude all other considerations). Since the secular one is most commonly relied upon at present I have chosen to focus upon its development. Nevertheless, it must be emphasised that the religious variant of absolutism remains superior to

3 Brownlie, in Principles of Public International Law, 5th ed., at p. 387, describes the idea of “[s]overeignty which is in principle unlimited, even by the existence of other states, [as] ridiculous....” Even the most extreme examples of dictatorial rule were always limited by potential challenges from within the ruler’s society (internal political struggles), or by powerful forces from outside of that society (neighbouring rulers or states). See, e.g., Hoffman, Beyond the State, p. 184. Karl Marx, in “The Poverty of Philosophy” [MECW VI, 147], in Marx and Engels on Law, ed. M. Cain and A. Hunt (London: Academic Press, 1979), at p. 59, states:

Truly, one must be destitute of all historical knowledge not to know that it is the sovereigns who in all ages have been subject to economic conditions, but they have never dictated laws to them. Legislation, whether political or civil, never does more than proclaim, express in words, the will of economic relations.

4 Machiavelli, Bodin and Hobbes all wrote their strong, power-centring tracts at least in part in reaction to the times of great instability in which they lived. See e.g., Machiavelli, The Prince, pp. 10-13, 21, 133-5; Bodin, On Sovereignty, pp. xxii-xxv; Briefly, Law of Nations, pp. 8 and 12-13 (discussing Bodin and Hobbes); Steinberger, “Sovereignty,” at p. 402 (discussing Hobbes). This search for perfection is similar to the problem diagnosed by Richard Bennett, in Authority, at pp. 28 and 36-9, as “idealised substitution.” Idealised substitution involves criticism of the current level of authority through the juxtaposition of an oppositional ideal (i.e., if we have a weak authority figure, we criticise it for not being like the strong authority figure we desire).

5 Bartelson, in A Genealogy of Sovereignty, at pp. 88-9, describes these two variants under the labels of ‘mytho-sovereignty’ and ‘proto-sovereignty’:

[With perhaps undue simplification — I will use the term mytho-sovereignty to cover the mimetic paradigm of rulership in the early and high Middle Ages, when the legitimacy of the ruler is founded on his resemblance with Christ or God, and the term proto-sovereignty to cover the polity-centred paradigm of rulership in the late Middle Ages, when the legitimacy of the ruler derives from more profane sources. [Citations omitted]
the secular one in terms of theoretical sophistication, because only it could posit a truly absolute and perfect source of power (the divine).7 Let us glance briefly at the works of Machiavelli, Bodin, Grotius and Hobbes to explore the development of the secular form of absolutism.

Niccolò Machiavelli, in The Prince, is perhaps most famous for trying to formulate a type of politics separate from religious and natural law influences. He did so by adopting some of the classical Roman values of state-craft and expounding a theory of rule outside of the values of the predominant Christian system.8 In doing so he escaped the latter system’s limitations of the prince’s power. Princes were simply above ordinary rules.9 In a double movement, Machiavelli shifted from medieval concerns with God to modern ones with the self-sufficient prince (state), and thus moved from nature (or the natural order of things), to the man-made or social.10

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6 E.g., Kelly, Short History, p. 172.
7 For a broad discussion of the development of absolutism in the context of the historical development of legal theory see generally, Kelly, ibid.
8 By recognising that there were two competing means to achieve his desired end of the stable and prosperous state, Machiavelli could be said to be one of the first pluralist thinkers. Each means would produce different results, but each also had its own merits. In weighing the merits of the Christian and pagan approaches, Machiavelli decided that the latter was preferable. Isaiah Berlin, in a series of interviews with the Iranian philosopher Ramin Jahanbegloo, succinctly argues this ‘dualist’ approach:

Machiavelli is to me one of the unintended fathers of anti-monism, because he is the first thinker in my opinion who made it clear that there are two kinds of morality in modern society: there is a pagan morality of virtù, of energy, vigorous self-assertion, pursuit of power and glory, Stoic resistance to pain and misfortune, republican boldness, civic patriotism, as in the Roman Republic and the early Empire. The other morality is that of the Christian virtues—humility, un-worldliness, preparation for the other world, and submission to secular power in this one, belief in the holiness of sacrifice, of being on the side of the victim not of the victors. Machiavelli does not, of course specifically say that one morality is preferable to the other; but it is plain which he prefers. He is simply not interested in a purely Christian life. He seems to me the first to make it clear that the very idea of a Christian commonwealth is a contradiction in terms: one cannot be a Christian and an heroic Roman citizen at the same time. Christians must remain humble, to be trampled on at times; Romans resist this successfully. This implies an irreconcilable dualism. One can choose one life or the other, but not both; and there is no over-arching criterion to determine the right choice; one chooses as one chooses, neither life can objectively be called superior to the other. This does open the door to more than two possibilities, indeed, to a pluralist outlook.


9 Knutsen, in History of International Relations, at p. 36, states about Machiavelli’s work: “Because princes must always act according to the best interests of the state, they do not answer to ordinary rules.”

10 Knutsen, in ibid., pp. 38-9, argues succinctly:

Unlike medieval philosophers who were concerned with the relationship between the state and God, Machiavelli focused on the state as self-sufficient entity, as ancient theorists had done. However, Machiavelli pushed the classical perspective one logical step further. He conceived of the state as a self-sufficient actor which continually interacted with other states, and he vested in it a legitimising authority for political acts. Because every state was part of an interstate context, it needed to concern itself with its own security, with armies and with leadership. For Machiavelli, the prince was the personification of the state. Like the state, the prince, too, became a self-sufficient, self-reliant actor who must seek to make himself as independent as possible of other actors, including God.

Where the medieval philosophers saw society as part of a great, God-given, natural order of things, Machiavelli saw society as man-made. He saw the state as an artificial, temporal creation which must be
Machiavelli’s prince was not only self-sufficient, but also transcended, or was external to, his principality. This externality was essential for the choice of the type of rule to be employed by the prince. Externality separated the prince from his territory (making his link weak and contestable), and yet at the same time created a simple relation of ownership over territory and subjects.11 It also justified absolute power. Because the prince lacked an intrinsic connection to the territory he needed complete (absolute) control over power within that territory: if sovereignty could be transferred so readily, there was greater reason for all sovereign power to rest in the prince’s hands.12

This externality, however, was also a significant weakness for Machiavelli’s prince, presenting four problems. Firstly, by characterising the prince as external and transcendent, his theory was forced to struggle with the problem of distinguishing the prince’s power from the other forms of power that could challenge him.13 Because Machiavelli’s form of absolutism was ceaselessly monitored and tended to by men. Thus, by replacing God with the State, Machiavelli also replaced nature with society. And again, Machiavelli pushed the argument as far as it would go: nothing, he reiterated, is superior to the state. No consideration of justice or cruelty, praise or shame is to interfere with the necessary task of maintaining the state and of preserving the prince’s freedom of action. By taking this last, extreme step, Machiavelli removed God from political consideration altogether. In God’s place he put the raison d’État.

11 Michel Foucault, in his lecture on “Governmentality,” at pp. 7-8, summarises the implications of the prince’s external position:

Machiavelli, regardless of the truth of this reading [by his critics], posited the Prince in a relation of externality and singularity and consequently of transcendence to his principality. The Prince acquires his principality by inheritance or conquest, but in any case he does not form part of it, he remains external to it. The link that binds him to his principality is one of violence, of tradition or of treaties established with the complicity or the alliance with other princes; it remains in any case a purely synthetic link and there is no fundamental, essential, natural and juridical connection between the Prince and his principality. Corollary: given that this link is external, it is fragile and will be constantly threatened—from without by the Prince’s enemies who seek to take over or take back his principality, and from within by the subjects who have no a priori reason to accept the Prince’s rule. Finally, this principle and its corollary lead to a conclusion, deduced as an imperative: that the objective of the exercise of power is to reinforce, strengthen and protect this principality which is not meant in its objective sense as the entity constituted by the subject and the territory, but rather in terms of the Prince’s relation with what he owns, with the territory he has inherited or acquired, and with his subjects. This fragile link is what the art of government, or of being Prince presented by Machiavelli is to take as its object.

Foucault, in ibid., at p. 11, also argues that this link between territory and sovereign, personal ownership is explicit in Machiavelli’s writings:

[1] If we consider what constitutes the ensemble of objects of the Prince’s power in Machiavelli, we will see that for Machiavelli the object and, in a sense, the target of power are two things, on the one hand the territory, and on the other its inhabitants. In this respect, Machiavelli simply adapted to his particular aims a juridical principle which throughout the Middle Ages down to the 16th century had defined sovereignty in public right: namely that sovereignty is not exercised on things, but above all on a territory and consequently on the subjects who inhabit it. In this sense we can say that the territory is the fundamental element both of Machiavellian principality and also of juridical sovereignty as defined by the theoreticians and the philosophers of right.

12 This is why Bodin, in On Sovereignty, at p. 71, specifically warns against the transfer of any part of sovereign power to another because of the ease with which the whole will be wrenched from the prince’s grasp, leaving the sovereign subject to another’s will.

13 Foucault, in his “Governmentality” at p. 9, comments that “the doctrine of [Machiavelli’s] Prince, as well as the juridical theory of sovereignty, are constantly attempting to draw the line between the power of the Prince
secular, the basis of sovereign power was not unique. Force has none of the mystical qualities that may be said to accrue to the divine, transcendent justifications of religious absolutist theories. In such a context maintaining the externality of the prince remained challenging. The second problem for the Machiavellian theory of rule was the circularity of its object. The purpose of rule became simply maintaining rule, the purpose of the state to preserve itself.14 The third problem was one of inflexibility. Because the Machiavellian prince transcended his territory and population and was related to both only in terms of ownership and control, he could not provide either the stability or flexibility required for the modern complex state. The modern state has an enormous population with a plurality of interests and needs. The secular absolutist model of singularity and transcendence thus collides with the multiplicity of modern life. As argued by Foucault in his piece on 'governmentality,' the consequence of such a collision was that the rule of the prince eventually was replaced with the forms of government that could take into account the diverse needs of the population.15 Only with these latter models could sovereignty break free of the circularity of the prince's rule and accommodate other interests. The final difficulty facing Machiavelli's form of the secular absolutist model was the way in which the externality of the

and any other form of power, because its task is to explain and justify this essential discontinuity between them...."  

14 This is a more subtle problem than may seem, as no theorist of this school, including Machiavelli himself, would say that the legitimate sovereign is simply entitled to exercise his power according to his whim. See, e.g., Foucault, ibid., p. 12. Instead, the sovereign must have an end or goal, for example, 'the common good' or 'welfare and salvation of all.' But, as argued by Foucault, in ibid., at pp. 12-13, these latter goals become the same as that of 'perpetuating rule' when formulated under a Machiavellian model:  

What do this common good or general salvation consist in which are so often spoken of by the jurist, and posited as the end of sovereignty itself? If we look closely at the real content that jurists and theologians give to it, we can see that 'the common good' refers to a state of affairs where all the subjects without exception obey the laws, accomplish the tasks expected of them, practice the trade to which they are assigned, and respect the established order so far as this order conforms to the laws imposed by God on nature and men; in other words 'the common good' means essentially obedience to the law, either that of the earthly sovereign or of God the absolute sovereign. In any case, what characterises the end of sovereignty, this common and general good, is in sum nothing other than submission to sovereignty. This means that the end of sovereignty is circular in that it comes down to the exercise of sovereignty itself. The good is obedience to the law, hence the good for sovereignty is that people should obey it. This is an essential circularity which, whatever its content in terms of theoretical structure, moral justification or practical effects, comes very close to what Machiavelli said when he stated that the primary aim of the Prince was to retain his sovereignty. We consequently come back to this circle of self-referring sovereignty or principality.  

15 Foucault, in ibid., at p. 13, argues this point by tracing the evolution of the theory of government from its earliest articulations in Machiavelli's Prince to its later association with 'things' and the population. These latter associations break the circularity of rule-justifying-rule, as they allow us to have a finality in the end of government: "Government is defined as a right manner of disposing things so as to lead, not to the form of the common good... but to an end which is 'convenient' for each of the things that are to be governed. Which implies a plurality of specific aims..." ibid. It is in part because of such things as the increases in size and complexity of the state (through the "development of the administrative apparatuses of the great territorial monarchies"), and our new ability to generate knowledge about it (the development of the "set of analyses and forms of knowledge... consisting essentially of the knowledge of the state, in all the different elements, dimensions and factors of its power, termed precisely 'statistics', meaning the science of the state"), that we have moved away from the earlier model. ibid., 14. Interestingly, this process was greatly assisted by the development of "statistics," which allowed us to begin to see that large populations have patterns of their own which cannot be reduced to a simple, single model of rule: ibid., 17 [referring specifically to the "family" model of rule].
sovereign removed any basis for the legitimisation of his rule. By remaining aloof, with no requirement for popular support, the sovereign remained disconnected from those subject to his rule. For a people to feel that their sovereign is legitimate they must feel that the sovereign has some connection to them and their territory. Without such legitimacy, the sovereign’s rule could only be perpetuated through force and coercion, neither of which is efficient or easily maintainable.16

After Machiavelli various other developments contributed to the growth of secular theories of absolutism. Interestingly, feudalism may have helped developed aspects of absolutist notions of sovereignty. Although the feudal system was fundamentally incompatible with the modern unified state (feudalism being based upon mutual obligation and service from the lowest to the highest levels of society), it left behind influential conceptions of absolute power that could be harnessed for other purposes.17 At the close of the Middle Ages absolutism garnered support because its values were particularly appealing to those reaching out for some form of stability or control.18 Notable proponents of absolutism, those endorsing theories about kings or emperors not being answerable to their subjects, arguably include John Wycliffe, Aeneas Silvius Piccolomini (1405-64, who was Pope Pius II from 1458), and Martin Luther (especially during his early years).19 But the most influential theorist writing in this area was Jean Bodin, who was arguably the first writer to formulate sovereignty in its modern sense.20

Jean Bodin, like Machiavelli, wrote on the edge of an era of deep turmoil, after his country had been “rent by faction and civil war.”21 Desiring an end to the divisiveness arising

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16 But cf. D’Entrèves, “The State,” at p. 316 [arguing that Machiavelli “should also be given a place among political philosophers, were it only because he was keenly aware that force is not enough and that however great the power of the State, it must, in order to last, be endowed with authority (i.e., be recognized as legitimate)”). My point is that this authority, by being aloof and disconnected, remained deficient.

17 Brierly, in Law of Nations, at pp. 3-4, raises this possibility when describing the development of the modern unified state:

[T]here were elements in the feudal conception of society capable of being pressed into the service of the united national states which were steadily being consolidated in western Europe from about the eleventh to the sixteenth centuries, and influential in determining the form that those states would take. Thus when its disintegrating effects on government had been eliminated, the duty of personal loyalty of vassal to lord which feudalism had made so prominent was capable of being transmuted into the duty of allegiance of subject to monarch in the national state; the intimate association of this personal relation with the tenure of land made the transition to territorial monarchy easy and natural; and the identification with rights of property of rights which we regard as properly political led to notions of the absolute character of government, of the realm as the ‘dominion’ or property of the monarch, and of the people as his ‘subjects’ rather than as citizens. Feudalism itself had been an obstacle to the growth of the national state, but it left to its victorious rival a legacy of ideas which emphasized the absolute character of government.


19 Ibid., pp. 174-5.


21 Ibid., 8.
from feudal and ecclesiastical power struggles Bodin saw the solution in strengthening government, as other nations around France had done. His chosen tool was a strong monarchy, believing it could quell both secular and religious challenges. Bodin favoured the monarchy because it allowed the greatest concentration of power to be anchored in a single, specific institution. To strengthen his sovereign, Bodin argued that its powers must be indivisible, perpetual, immune from the control of others, and exercisable without the consent of the subjects. This sovereignty, however, was not embodied or held in one individual per se (i.e., belonging to a specific King), but ultimately vested in the state or commonwealth. As such, sovereignty could be perpetual and be “in principle unaffected by the comings and goings of individual men.” There is some debate about whether Bodin meant his ruler to be bound by any laws at all, with the classic view being that he did not. The more moderate view is that Bodin’s sovereign was at least bound by a few limited laws, such as natural or divine law, the ‘laws of government,’ and certain covenants. The better view, it is submitted, is the latter.

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22 Ibid. See also: Bodin, On Sovereignty, pp. xxiii-xxv (discussing Bodin’s fear of anarchy, and his resulting decision to abandon almost all restraints on royal power).

23 Briefly, in Law of Nations, at pp. 8-9, summarises:

Bodin concluded therefore that the essence of statehood, the quality that makes an association of human beings a state, is the unity of its government; a state without a summa potestas, he says would be like a ship without a keel. He defined a state as ‘a multitude of families and the possessions that they have in common ruled by a supreme power and by reason’ (respublica est familiarum rerumque inter ipsas communium summa potestas ac raione moderata multitudo), and he dealt at length with the nature of this summa potestas or majestas, or, as we call it, sovereignty. But the idea underlying it is simple. Bodin was convinced that a confusion of uncoordinated independent authorities must be fatal to a state, and that there must be one final source and not more than one from which its laws proceed. The essential manifestation of sovereignty (primum ac praeclamum caput majestatis), he thought, is the power to make the laws (legem univercis ac singulis civibus dare posse), and since the sovereign makes the laws, he clearly cannot be bound by the laws that he makes (majestas est summa in cives ac subditos legibusque soluta potestas).

24 For Bodin’s various statements about sovereign power, see: Bodin, On Sovereignty, pp. 92 and 104-5 (arguments about indivisibility), pp. 1 and 6 (its perpetual nature), pp. 11-12 (immunity from control by others), and p. 23 (no need for consent from subjects). For criticisms of Bodin’s requirement for indivisibility of powers, see: ibid., pp. xvii-xviii.

25 Bodin, ibid., pp. 1-3. See also: Knutsen, History of International Relations Theory, p. 60.

26 Kelly, in Short History, takes this view at pp. 175 and 178-79, respectively, although at the same time illustrating how difficult it would be to support (even by its more concerned adherents):

In his famous work De la république (1576) [Bodin] presents the idea that a state must contain a sovereign power, really sovereign in every department of positive law, and subject only to the laws of God, of nature, and of nations; the latter subjections being merely notional, Bodin’s sovereign is in practice absolute, the source of law, and untrammelled by any necessity to secure the consent of others.

Naturally Jean Bodin considered that it was of the essence of sovereignty that the sovereign should not be bound by the laws; though it may be noted that even this foremost apostle of absolutism thought that a kingdom ought to be governed “as far as this may be possible” (“quantum fieri poterit”) by laws rather than by the arbitrary will of the ruler. [Citing: Bodin, De republica 1. 9, 1. 8, and 4. 4.]

27 Briefly, in Law of Nations, at pp. 9-10, lists several laws still binding upon Bodin’s sovereign: “the divine law, the law of nature or reason, the law that is common to all nations, and also certain laws which he calls the leges imperii, the laws of the government. These leges imperii, which the sovereign does not make and cannot
The powers of Bodin’s sovereign (or “marks” of sovereign power), included those of: making and repealing laws, declaring war or making peace, hearing final appeals of law, appointing and dismissing the “highest officers,” imposing and exempting taxes, granting pardons, making and regulating currency, and compelling loyalty of vassals. The broadest and most inclusive category of these sovereign powers was the ability to make laws. This is interesting because it highlights the fact that sovereign powers work within a specifically legal context, as well as are themselves legally constructed. A final characteristic of Bodin’s sovereign that needs mention is that revolt against him was generally impermissible. The only exception, or occasion when revolt would be permissible, was against a “tyrant.” The tyrant is specifically defined as one who has attempted to gain sovereignty illegitimately. Otherwise, revolt cannot be taken against a legitimate sovereign, “even if he has committed all of the misdeed, impieties, and abrogate, are the fundamental laws of the state, and in particular they include the laws which determine in whom the sovereign power itself is to be vested and the limits within which it is to be exercised; we should call them today the laws of the constitution.” More importantly, at ibid., Brierly sees Bodin as locked in a non-positivist tradition that will not allow a human to step outside of higher (divine) laws:

[H]e was following the medieval tradition of the nature of law, for in the Middle Ages men looked on law not as something wholly man-made; they believed that behind the merely positive laws of any human society there stood a fundamental law of higher binding force embodying the wisdom of the past, and that positive laws must conform to this higher law if they were to have validity. The notion that legitimate power could ever be purely arbitrary is alien to all legal thought of the Middle Ages, and in this respect Bodin’s work made no break with the past. Medieval rulers might, and no doubt often did, behave arbitrarily; but that could not alter the fact that it was still by the law that the rightful or otherwise of their conduct must be judged; it was law that made the ruler, not, as later theories of sovereignty have taught us to believe, the will of rulers that made the law. [Citations omitted.]

See also: Knutsen, History of International Relations Theory, pp. 60-62. The third limitation, that of covenants, is interesting because the sovereign is not held to be bound qua sovereign by contracts made with his subjects (which a king is obligated to respect merely as an individual and hence may break or be released from them under specific conditions), but only by ones with other princes, which Bodin calls “treaties.” The latter are not personal agreements but are made “on behalf of their commonwealths, thus making them in the exercise of their sovereign powers.” Ibid., p. 62.

E.g., Bodin, On Sovereignty, pp. 10 and 13 (princes subject to the “laws of God and of nature and to various human laws that are common to all peoples”), 13-15 and 35 (the prince being bound to honour his own “just and reasonable contracts”), 38-39 (inability of the prince to seize the goods of his subjects without just cause), and 42-43 (the prince being bound by the acts of his own predecessors in cases where the prince assumes the throne as a “beneficiary of a testament,” rather than through the operation of custom or law of the land). See also, Steinberger, “Sovereignty,” pp. 401-402.

Bodin, ibid., pp. 58-59 [the relevant passage is reproduced in the following footnote].

Law-making is the first “mark of sovereignty” discussed in Book 1, ch. 10 of Bodin’s On Sovereignty, at pp. 58-59, and includes all other sovereign powers within its fold:

This same power of making and repealing law includes all the other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it—such as declaring war or making peace; hearing appeals in last instance from the judgements of any magistrate, instituting and removing the highest officers; imposing taxes and aids on subjects or exempting them; granting pardons and dispensations against the rigor of the law; determining the name, value, and measure of the coinage; requiring subjects and liege vassals to swear that they will be loyal without exception to the person to whom their oath is owed. These are the true prerogatives of sovereignty, which are included in the power to give law to all in general and to each in particular, and not to receive law from anyone but God. [Citations omitted.]
cruelties that one could mention.”31 This unchallengeable nature of Bodin’s sovereign made him terrible and supreme—a solid precursor to the Hobbes’ Leviathan.32

Hugo Grotius also influenced the development of absolutist theory by providing a transition point from Bodin’s non-consensual monarchical ruler (who was selected, and who maintained his rule, without any input from the people), to Hobbes’ more ‘consensual’ one. When dealing with sovereignty Grotius grappled with the problem of its location or source. He was unable to resolve whether it was to be found in the ‘People,’ on the one hand, or the ‘Ruler’ (Bodin’s view), on the other. Grotius located it in either position according to his needs.33 He also contributed to the development of absolutist theory by formally adopting the Roman legal system within his framework of international law. The latter system saw territorial sovereignty as a proprietary right, encouraging rulers to think of it as a thing exercisable without responsibility. As summarised by Brierly: “By denying that government necessarily exists for the sake of the governed, and treating sovereignty as a proprietary right, a *jus regendi* capable of vesting in soverigns as fully and by the same titles as rights over

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Note however, that this law-making power is a very general power to command, comprising “not only the ordinary power to make law, but also what in modern usage would be called the constituent power, or right to change the constitution.” *Ibid.*, xvi.

31 *Ibid.*, pp. 110-11 (defining the term ‘tyrant’ in terms of illegitimacy), and p. 115 (a sovereign prince cannot be killed). Bodin’s strongest statement of the latter comes in *Ibid.*, at p. 120:

I conclude then that it is never permissible for a subject to attempt anything against a sovereign prince, no matter how wicked and cruel a tyrant [using the word in a contemporary sense] he may be. It is certainly permissible not to obey him in anything that is against the law of God or nature—to flee, to hide, to evade his blows, to suffer death rather than make any attempt upon his life or honour. For oh, how many tyrants there would be if it were lawful to kill them!

32 Kelly, in *Short History*, at p. 175, quotes the following passage from Bodin’s *De republica* (1.8), which clearly reveals the latter’s anti-revolutionary stance:

[The prince’s sovereignty shines forth, when the people and the estates with humble mien bring their petitions to him; they have no power to command or to forbid him anything, nor has his approval any significance; the prince ordains everything by his own will and judgement, and whatever he had decreed or commanded has the force of law. The opinion of those who consider him bound by the people’s sovereignty—a view commonly found in books—must be put down; since it only gives ammunition to seditious men for their revolutionary projects, and brings turmoil into the life of the state.

33 Hinsley, in *Sovereignty*, at pp. 139-40, discusses Hugo Grotius’ attempts in the work *De Jure Belli ae Pacis* (1625), to construct a unified theory of sovereignty, as well as his failure to do so:

It is clear what Grotius was searching for—some doctrine that would amalgamate the thesis that the original sovereignty of the People had been exclusively and permanently transferred to the Ruler, in return for the protection of government, with the thesis that government had the function and the duty to protect. It is equally clear that he did not succeed in this search—that ultimately these two theses remained distinct in his thought. For on the one hand, the right of resistance against the Ruler which he gave to the People was based essentially on a reserved remnant of the People’s original sovereignty. On the other hand, he remained insistent that so long as it performed its proper tasks the right of the Ruler or the state could be based equally legitimately on contract or on conquest; and this was because, just as in the end his body politic reverted to being merely the People as traditionally conceived, so his conception of the state continued to be fundamentally the old idea of the Ruler with his patrimony, the rights of which he could freely dispose of [i.e., to his heirs] except in so far as he had contracted with the People not to do so without their concurrence.
corporeal things vest in private persons, Grotius encouraged the unfortunate trend of opinion towards a view of sovereignty as absolute and irresponsible power.”

Bodin’s and Grotius’ powerful rulers were transformed in the 16th and 17th Centuries—as much by changes in technology as by those in politics. Theory about the laws governing princes cast off the earlier, medieval and customary limitations that underlay Bodin’s writings. The physical limitations upon rule decreased with the consolidation of strong governments in the sixteenth century. Both of these developments were seized upon by Thomas Hobbes who, in his Leviathan, sought to set out in a scientific manner a theory of rule that was power-based rather than legally-oriented. As explained by J.L. Brierly, the Hobbesian sovereign is defined by his absolute and illimitable might:

Hobbes believed that men need for their security ‘a common power to keep them in awe and to direct their actions to the common benefit’, and for him the person or body in whom this power resides, however it may have been acquired, is the sovereign. Law neither makes the sovereign, nor limits his authority; it is might that makes the sovereign, and law is merely what he commands. Moreover, since the power that is the strongest clearly cannot be limited by anything outside itself, it follows that sovereignty must be absolute and illimitable; ‘it appeareth plainly that the sovereign power ... is as great as possibly men can be imagined to make it.’

In order to make the sovereign unchallengeable and absolute Hobbes located sovereignty in the state itself rather than in the individual ruler or the people.

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34 Brierly, Law of Nations, p. 32. At the same page, however, Brierly points out that this theory was not maintainable even at the time Grotius was writing, a time when “subordinate feudatory princes were waging war.”

35 Brierly, in ibid., at p. 12, notes how the consolidation of government power without effective checks paved the way for Hobbes’ theory:

[Int]he main it was new political facts that were making of the ruler a supra-legal power, and accustoming men to think of the sovereign not, as Bodin had pictured him, as the ruler by law established, but as the holder of the strongest power in the state, no matter how that power might have been acquired.


37 Brierly, Law of Nations, pp. 12-13 (citing the Leviathan, chs. 17 and 20). See also: C.B. Macpherson’s “Introduction” to Hobbes, Leviathan, p. 9 (arguing that Hobbes’ theory is attractive today for its focus on the “lineaments of power”).

38 John Dunn, in the “Conclusion,” to Democracy: The Unfinished Journey, 508 BC to AD 1993, ed. J. Dunn, 239-66 (Oxford: Oxford University Press, 1993), at pp. 247-8, goes further. He alleges that theorists like Bodin and Hobbes actually created the state to deny popular rule:

It is important to recognize that the idea of the modern state was constructed, painstakingly and purposefully, above all by Jean Bodin and Thomas Hobbes, for the express purpose of denying that any given population, any people, had either the capacity or the right to act together for themselves, either independently of or against their sovereign... The idea of the modern state was invented precisely to repudiate the possible coherence of democratic claims to rule or even take genuinely political action, whether these claims were advanced under secular or religious inspiration.
Hobbes’ argument in favour of this form of sovereignty can be traced to two fundamental axioms, both of which are identifiable in his analysis of the relations of men in a state of nature. His first axiom is that in the state of nature there is no moral code except that of self-preservation (his ‘right of nature’). His second, following from the first, is that since all men are relatively equal in body and mind, they inevitably must always be in fear of violent death, and tend towards perpetual struggle and war. These two factors, combined with a rational desire not to harm oneself, produce our need for a ‘common Power’ to keep us in awe, a ‘Leviathan.’ Hobbes creates this sovereign by means of what may be considered a ‘social contract,’ but it is an unusual one. Rather than involving a delegation of power, Hobbes’ social contract involves an alienation of power. All individual rights are irrevocably transferred to the sovereign since the social contract is ‘spent’ after its creation. Further, Hobbes’ sovereign is not itself bound by the social contract. The Leviathan is not a party to the contract, only a product of it.

Interestingly, Hobbes did not see the need for an inter-state ‘Leviathan’ to impose a similar order at the international level. Rather, he largely re-created his ‘state of nature’ in the international sphere. Internationally each sovereign was assumed to share a basic equality, and

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39 Macpherson sets out a detailed analysis of Hobbes’ argument in his introduction, breaking it down into seven major components: Hobbes, Leviathan, pp. 30-39. An essential point raised by Macpherson’s analysis, not immediately apparent in the simpler one I set out below, is that Hobbes’ argument is justifiable through examining man as an individual and in society, and does not require any reference to a fictional ‘state of nature’: ibid., pp. 37-8.

40 For a summary of these two axioms, see: Knutsen, History of International Relations Theory, p. 89. See also, Hobbes, Leviathan, pp. 86-92. See more generally, ibid., chs. 14 and 13 (pages 189 and 183-5, for the relevant portions of the text).

41 This desire not to harm oneself is what Hobbes calls the ‘Law of Nature,’ and is argued logically to lead to the understanding that we must all give up freedoms to achieve it. Hobbes sets out his Law of Nature, and its two components, in Leviathan, at pp. 189-90, as follows:

A LAW OF NATURE, (Lex Naturalis,) is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved. [...] And consequently it is a precept, or generall rule of Reason; That every man, ought to endeavour Peace, as farre as he has any hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre. The first branch of which Rule, containeth the first, and Fundamentall Law of Nature; which is, to seek Peace, and follow it. The Second, the summe of the Right of Nature; which is By all means we can, to defend our selves.

From this Fundamentall Law of Nature, by which men are commanded to endeavour Peace, is derived this second Law; That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty as against other men, as he would allow other men as against himselfe.

42 Hinsley, in Sovereignty, at pp. 142-50, discusses in detail Thomas Hobbes’ views of the transfer of sovereignty from the people to the state via an original social contract. This was a transfer “in which the state, necessarily sovereign, necessarily took no part.” Ibid., pp. 142-3. Out of the transfer a “ruling Leviathan” was born: a unitary state personality which abolished the legal rights of the individual. The sovereign, once created, was unable to do wrong—its laws could only be “just laws and [it] could commit only just acts.” Ibid., p. 150. Thus, with his theory, Hobbes took us further than Grotius in the extent to which the body politic is understood to be absorbed into the will of the Ruler, making that body politic, rather, “a union of wills only for the moment in which they surrendered all will to the state.” Ibid., p. 143 (my emphasis).
each had a right to self-preservation.43 Such a position allowed Hobbes to avoid the problems involved in trying to balance absolutism and yet at the same time uphold the rules against breach of covenants (treaties) amongst sovereigns. Bodin was caught in this contradiction because his sovereign, despite being unlimited by positive laws in the domestic sphere, was required to uphold such international covenants. In contrast, the Leviathan (like Machiavelli’s prince), is free to break treaties and alliances at will if in its own interest.44 Thus, under Hobbes’ model, at the national level human weaknesses dictate an absolutist sovereign, and yet at the international level the sovereign is left to contend with the unpredictability of a state of nature. I will examine the weaknesses of this internal/external dichotomy when looking at the failures of modern absolutist theory below.

Before leaving Hobbes, notice that one of the achievements of his theory is unique, and potentially helpful to non-absolutist forms of sovereignty. Hobbes reverses the usual argument of absolutism in a subtle but fundamental way. He posits the need for an absolutist sovereign because of the basic equality of human beings.45 All earlier absolutist theorists, it should be noted, use inequality as the basis for their sovereign—whether using the inequality of members of the populace (in order to posit a need for a stronger being to control the more ruthless amongst us), or the inequality of the sovereign himself (making him greater by means of divine right,

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44 See, e.g., *ibid.*, p. 89.
45 Hobbes, in the *Leviathan*, at pp. 183-4, argues that at the most basic level we are physically and mentally equal:

Nature hath made men so equall, in the faculties of body, and mind; as though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himselfe.

And as to the faculties of the mind ... I find yet a greater equality amongst men, than that of strength. For Prudence, is but Experience; which equall time, equally bestowes on all men, in those things they equally apply themselves unto. That which may perhaps make such equality incredible, is but a vain concept of ones owne wisdome.... For such is the nature of men, that howsoever they may acknowledge many others to be more witty, or more eloquent, or more learned; Yet they will hardly believe that there by many so wise as themselves: For they see their own wit at hand, and other mens at a distance. But this proved rather that men are in that point equall, than unequall. For there is not ordinarily a greater signe of equall distribution of any thing than that every man is contented with his share.

From this position of equality, Hobbes continues, *ibid.*, at pp. 184 and 185, respectively, because of our competitive nature we must tend towards mutual enemy and war if unchecked:

From this equality of ability, ariseth equality of hope in the attaining of our Ends. Any therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End, (which is principally their own conservation, and sometimes their delection only,) endeavour to destroy or subdue one another. [...] 

Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.
noble birth or ability to harness power). Hobbes moves from the position of equality to absolutism through an understanding of the human being, as a microcosm of the universe itself, as always being in motion, either to satisfy a basic need (appetite) or to avoid something harmful (aversion).\(^46\) From this premise he sets out a logical progression of human behaviour, starting with these drives of ‘appetite’ and ‘aversion’ and ending with a ‘war of all against all.’ Hobbes demonstrates this progression in two different settings, namely, that of man in society, and later, that of man in a ‘state of nature.’ Although we may be more familiar with his arguments about the latter, the arguments about humanity’s social existence are important because they avoid the difficulties inherent in using a fictitious ‘pre-society’\(^47\). In the final stages of his argument Hobbes postulates a three-stage progression from equality to submission: from rational agreement, to universal contract, to omnipotent sovereign as the enforcer of that contract. In other words, Hobbes argues that because each man must balance his acquisitive nature (appetites) against his most fundamental aversion (death), he will rationally choose to agree with all others that each must give up the ‘Right of Nature’ (aggressive ‘self-preservation’). He will therefore enter into a covenant with all others that suppresses this ‘Right of Nature.’ Yet because none can trust in a mere contract to stifle these appetites, Hobbes argues, an all-powerful sovereign must be created.\(^48\) An apparent contradiction in this progression lies in its underlying contrast between rationality, on the one hand, and incessant, irrational appetites, on the other. Or

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\(^{46}\) See Macpherson’s “Introduction” to Hobbes’ *Leviathan*, in *ibid.*, at pp. 18-19 (view of natural world as in a state of motion, applied to the motions of men), and 28. At the latter page Macpherson states:

Hobbes’s bold hypothesis was that the motion of individual human beings could be reduced to the effects of a mechanical apparatus consisting of sense organs, nerves, muscles, imagination, memory, and reason, which apparatus moved in response to the impact (or imagined impact) of external bodies on it. ... Hobbes postulated an innate impulsion to keep going, which in its most fundamental form was the impulsion to avoid death: ‘every man ... shuns death; and this he doth, by a certain impulsion of nature, no less than that whereby a stone moves downward.’ This same impulsion to keep going could be said to determine the whole activity of the individual system, for its whole activity consisted of endeavours towards what could assist its continued motion and away from what would impede it. These endeavours could also be called appetites and aversions. [Citation omitted.]

\(^{47}\) The ‘man in society’ argument is explained by Macpherson, in *ibid.*, at pp. 32-7, after setting forth Hobbes’ basic assumption of the existence of these appetites and aversions. The former, argues Hobbes, vary from person to person (some of whom would manifest the same appetite more strongly than others), and could change over time and with experience, although some were innate, and appetites themselves were generally incessant. See generally, Hobbes, *Leviathan*, ch. 6. Thus, all men must incessantly seek to satisfy their desires. This ability to do so is called generally ‘the Power of a Man,’ which all will seek to varying degrees: *ibid.*, p. 150. But the key to this ‘Power’ is that it is defined in terms of the *surplus* one possesses beyond other men (‘Natural Power’). This brings in an element of competition, since power becomes a ‘zero sum’ entity, and all acquired power (‘Instrumental Power’) is no more than the ability to command other men’s powers: *ibid.* Finally, as some men’s desires will be without limit, there must be a continual struggle for power. It is a short step from here to the anarchy and war of all against all that Hobbes predicts. This is summarised succinctly, in *ibid.*, at p. 161, where Hobbes posits “a generall inclination of all mankind, a perpetuall and restless desire of Power after power, that ceaseth onely in Death. And the cause of this, is not alwayes that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power: but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more.”

\(^{48}\) See generally, *ibid.*, pp. 40-44. Hobbes’ famous phrase about contracts is that “Covenants, without the Sword, are but Words, and of no strength to secure a man at all”: *ibid.*, p. 223.
to put it another way, the contrast between long-term and short-term individual self-interest. The contradiction arises because if short-term self-interests are irresistible, then humankind will be unable to obey either the contract or the sovereign. On the other hand, if they can be resisted, then human beings should be able to obey without the sovereign's assistance. This is a basic argument against Hobbes, one succinctly raised by Macpherson.49

Hobbes is aware of this difficulty, however, and attempts to answer it in two ways. Firstly, he describes the role of the sovereign as being one of protecting the 'safety of the people' (to which he gives a fairly broad substantive content).50 Secondly, he makes our duty to obey the sovereign reciprocal upon the latter's ability to protect us.51 Thus on the one hand Hobbes softens his sovereign, by making his powers exercisable towards a more benign end, and on the other, he provides an escape from situations where that sovereign forgets his rationale for existence. What these two moves ensure, at least in theory, is that it should always be in the interest of subjects to obey the sovereign. But notice that once again Hobbes' arguments all boil down to self-interest, which can be dominated either by long- or short-term rationality, each of which is in turn challenged or supported by our most basic appetites. In sum, Hobbes (in a manner strikingly similar to some theories about market capitalism), hinges everything on (rational) competitive self-interest, which must always be pursued because of human kind's basic human nature.52

49 See Macpherson's analysis of this problem in his "Introduction," in ibid., at pp. 47-8 and 61-2. This contradiction is phrased as a question at p. 61:

If the obligation of individuals to the state is based only on their calculation of their own self-interest, how can it be sufficient to hold a society together, since the same self-interest can be expected to dictate a breach of that obligation whenever changed circumstances would seem to make that profitable?

50 Hobbes, in ibid., at p. 376, sets out this duty of the sovereign and fleshes out its content:

THE OFFICE of the Sovereign, (be it a Monarch, or an Assembly,) consisteth in the end, for which he was trusted with the Sovereign Power, namely the procuration of the safety of the people.... But by Safety here, is not meant a bare Preservation, but also all other Contentments of life, which every an by lawfull Industry, without danger, or hurt to the Commonwealth, shall acquire to himself.

See further, ibid., chs. 24 and 30.

51 Our duty to obey that sovereign, as stated in ibid., at p. 272, lasts only so long as we are protected by it:

The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished.

52 The strong connection between Hobbesian theory and bourgeois capitalism is a dominant theme in Macpherson's "Introduction" to the Leviathan: ibid., pp. 9-63. That competition is endorsed by Hobbes is articulated in ibid., at p. 53:

His sovereign state was designed not to deny men a life of competition and acquisition, but to ensure that they could have it: it was designed to provide the conditions in which they could go on with that life securely, without endangering civil peace. The price they would have to pay did not seem to Hobbes to be too high: they would have to acknowledge, as if they had contracted to do so, an obligation to obey the laws of the sovereign as long as the sovereign was able to protect them. It was the sort of long-term contract a business man could be expected to understand and enter into with a view to his own advantage.
Hobbes remains one of the more interesting absolutist theorists precisely because his basic position of equality, which is common to social contractarian and democratic theories of governance, yields a Leviathan. Hobbes differs from either of these latter categories of sovereignty theory, however, because of his ultra-aggressive, competitive, self-interested view of human nature. As illustrated below, some contractarian theories present a different view of human nature. Not a non-competitive view, or one made up of humans devoid of appetites and aversions, neither of which would be realistic. Rather, they present one in which these tendencies are counteracted by a stronger one, namely, the desire of human beings to form groups or societies. In other words, contractarian theories overlay the absolutist’s individualist foundation with a social or communitarian one, seeing humanity as naturally tending towards a civic existence.

Hobbes takes us to the pinnacle of the development of absolutist theory. He creates the most powerful secular sovereign, one which capitalises upon the theories of absolutist rule handed down to us from the Romans, to Machiavelli, to Bodin. He sets up an ultimate, absolute authority, one that challenges the binding force and validity of international law. He does so in a way that paradoxically, both supports and challenges attempts to link democracy and sovereignty. He creates a absolutist sovereign that is made by the people because of their fundamental equality.

B. THE ABSOLUTIST VIEW OF SOVEREIGNTY AT PRESENT

Let me set out a modern, secular version of the absolutist theory of sovereignty, relying primarily upon the work of Robert Lansing. Lansing describes sovereignty as the power to do

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53 Steinberger, in “Sovereignty,” at pp. 402-3, argues that Hobbes and Spinoza challenged the rationality of international law:

As States have no Leviathan above them, but are in a "state of nature" warring against each other, no superior law or legal order would appear to be binding upon them. Sovereignty does not define or delimit mutual spheres of freedom of action of States, or of unlawful intervention as between States, because law does not govern their relations. With Hobbes the theoretical difficulties in finding a rational basis for the binding force and validity of international law began. According to Hobbes, only a man or an assembly of men could be sovereign, because he saw sovereignty primarily as a status with respect to power, a factual (psychic) relationship between will (command) and obedience, a relationship which only exists between men. With Hobbes, sovereignty became "absolute" in a radical sense, whereby external sovereignty was a factual potestas iure gentium soluta. The same holds true for Spinoza (1632-1677) who viewed States in relation to each other as living in a "state of nature" where no international law exists limiting normatively their factual power. Hobbes and Spinoza are the true fathers of the theory of absolute sovereignty. [Emphasis added.]

54 Robert Lansing is one of the most forthright modern proponents of this school and hence his theories will be referred to throughout this section to illustrate the flaws inherent in the power-based view. See generally, Lansing, Notes on Sovereignty. Although Lansing’s theories may not be considered significant in other respects, it should be noted that he filled the role of Secretary of State to US President Woodrow Wilson at the Paris Peace Conference and became one of the harshest critics of the theory of self-determination of peoples at the time. This is of interest as it illustrates how closely connected absolutist theories of sovereignty have been to attempts to limit the role of self-determination under international law. See generally Chapter 9, below. See also, Daniel Patrick Moynihan, Pandæmonium: Ethnicity in International Politics (Oxford: Oxford University Press, 1993), at pp. 81-
all things within the state without human accountability (i.e., contrasted with divine accountability, as per Bodin), external compulsion or limitation.\textsuperscript{55} The absolute sovereign is the entity which is able to compel obedience from every individual within the state through the possession of (or ability to harness) superior physical force.\textsuperscript{56} Force, as we have seen, is crucial to the state.\textsuperscript{57} But a central distinction between the two is that the state’s power must be legitimate, whereas under the absolutist view, the sovereign is unconcerned with legitimacy at the formal level. Since sovereignty is based upon ultimate physical power, the sovereign need not be, and in fact cannot be, subject to the dictates of “reasonableness, justice, or morality.”\textsuperscript{58}

Nor need it be concerned with law. To be absolute, the sovereign is born through a union of political and physical power.\textsuperscript{59} It also must be indivisible.\textsuperscript{60}

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\textsuperscript{5} (discussing Lansing’s opposition to Wilson’s principle of self-determination and reproducing two pages from Lansing’s Confidential Diaries that strongly criticise the principle).

\textsuperscript{55} E.g., Lansing, \textit{ibid.}, p. 3. Again, empirically speaking, such autonomy is, and has always been, a fiction. E.g., Dahl, \textit{in Democracy and its Critics}, at p. 319, states:

\begin{quote}
[W]e need to remember that the autonomy of the city-state and the sovereignty of the national state were always less fact than fiction. International conflicts, rivalries, alliances, and wars have eternally demonstrated how much the autonomy of all states, democratic and non-democratic, has been radically incomplete. Not just conflict but also trade, commerce, and finance have always spilled over state boundaries.
\end{quote}

\textsuperscript{56} Lansing defines sovereignty solely on the basis of possession of superior power. As a result he argues that sovereignty preceded statehood since superior physical strength has resided in individuals or groups in the most primitive of social structures. Lansing, in \textit{ibid.}, at pp. 8-9, explains:

\begin{quote}
[I]t is impossible to conceive of a human community, whether organized or unorganized, in which there is not superior physical strength resident in an individual or a collection of individuals, and where this superiority of strength resides there is the sovereignty (even if it is never exercised) and its possessor is the sovereign. […]
\end{quote}

\begin{quote}
[T]he characteristics of a state are union and organization, the union and organization of the individuals composing a community, each of whom possesses a certain measure of physical power. These individual powers must have existed en masse prior to the union and organization of those possessing them; and, if it did, this power was present before the state came into existence as an organized unit…. Now, it is evident that there can be no act of union and organization without the consent of the possessor of this superior power; and, therefore, the act of organizing a state is an exercise of the will of the possessor. To distinguish this power by different names before and after a state is organized is a mere quibble in nomenclature, which can serve no good purpose. [Citations omitted.]
\end{quote}

\textsuperscript{57} See the earlier discussion of force and statehood Chapter 2, above.

\textsuperscript{58} See, e.g., Lansing, \textit{Notes on Sovereignty}, p. 3. Physical power is the greatest coercive force available, and since sovereignty relies upon physical power, other forms of power such as those based upon morality or religion, are unnecessary and counterproductive. Any obedience to such matters can only be discretionary or voluntary. Lansing, in \textit{ibid.}, at p. 8, states:

\begin{quote}
Now the only actual power known in human society is physical. However religious and moral instincts may affect human action, the physical is the power that compels, including in the term the ability to effectively exert it.
\end{quote}

\begin{quote}
Therefore, if sovereignty is the supreme coercive power in a state, it must rest upon material force without regard to the righteousness of its exercise.
\end{quote}

\textsuperscript{59} See, e.g., \textit{ibid.}, pp. 84-5.

\textsuperscript{60} Feminist theorists have strongly criticised unified and indivisible conceptions of sovereignty because they cannot accommodate difference, including differences related to sex and gender. As noted by Diana Coole, in “Women, Gender and Contract,” in \textit{The Social Contract From Hobbes to Rawls}, ed. D. Boucher and P. Kelly, 191-210 (London: Routledge, 1994), at p. 202, “[t]he formal, unified and universal form authority takes in \textit{Leviathan},
Because the absolutist theory of sovereignty may seem extreme, its proponents have attempted to make it more palatable in various ways. Even Lansing tries to put a democratic ‘spin’ on his theory by importing a distinction between ‘real’ and ‘artificial’ sovereignty. ‘Real’ sovereignty is said to rest in the hands of the entire populace of a state which, after all, can in combination harness greater physical power than any one ruler. But ‘artificial’ sovereignty remains located in the ruler or ruling organ of the state, who may exercise it absolutely. In this way, according to Lansing, ‘real’ sovereignty rests with the people. ‘Artificial’ sovereignty, however, remains necessary for efficient governance which, according to Lansing, requires centralised decision making regardless of the size of the political unit.61

Let us now examine some of the problems associated with the absolutist view of sovereignty.

C. A CRITIQUE OF THE ABSOLUTIST VIEW

Absolutist versions of sovereignty suffer from five crucial flaws, namely, (1) they cannot provide a determinate locus for the sovereign, (2) they require amorality, (3) they are unable to support such fundamental international legal doctrines as sovereign equality and (4) sovereign independence, and (5) they are incompatible with, and erode the basis for, international law.

a. Indeterminate Locus

Firstly, appearances notwithstanding, the task of ascertaining the precise location of sovereignty does not become easier using an absolutist model. Finding the person or group with ultimate power remains difficult. The easiest solution, namely, identifying the entire population as the sovereign, is impermissible because it both frustrates efficient decision-making as well as violates the unlimited nature of the absolutist sovereign. A sovereign cannot be unlimited and at the same time bind itself. Rather, the absolutist sovereign must be the group or individual that at any particular moment exercises the greatest control over the most people. Since the absolutist mechanism of control is the exercise of, or ability to exercise, physical force, the absolutist sovereign must be the individual or group capable of wielding such force. But the consequence

where it is authorized to speak for all, cannot accommodate the diversity and particularity of persons, such as their female embodiment or their gender.”

61 Bartelson, A Genealogy of Sovereignty, pp. 11-14. Note, however, that this division between the holder of real sovereignty and those who exercise it (the ‘artificial’ sovereigns), will often dissolve into open conflict. Lansing, in Notes on Sovereignty, at p. 18, uses the English revolution as his example:

Since the execution of Charles I, the English people have known that they were sovereign in England. The revolution of 1688 and the peaceful revolution of 1832 are but cumulative evidence of the fact. The sovereignty of an English king, resting solely upon the will of his so-called subjects, is not real but artificial, a fiction perpetuated by custom, by reverence for the past, and, if you please, by the “habit of obedience” which Hume and Austin have made so prominent. The king, the monarch, cannot by his own might compel obedience; the sovereign people can.
of this position is that the locus of the sovereign remains uncertain until such an entity can clearly emerge—usually as a result of a decisive victory over all others within the sovereign unit. This also applies at the external level, with sovereignty vis à vis other states becoming clear only following global wars. Without such a war we are unable to ascertain sovereign superiority between any two states, let alone between one state and all of the others in the international community. For even if one state conquers another, thus establishing its relative superiority, we will not know the strength of the conquering state in comparison to other individual states, or to all other states.\(^{62}\) A consequence of the absolutist model, therefore, is that in times of peace, both domestically and internationally, we must remain uncertain as to which group or organ actually possesses this ultimate force.\(^{63}\)

The lack of a certain and identifiable locus of absolute sovereignty causes practical as well as theoretical problems for this model. Foreign states, for example, are unable to know which person or organ represents the true sovereign at any given moment. As a result, if we follow this theory to its logical consequences, in international relations states can only deal with the foreign organ presumed to possess sovereignty. If a mistake is made, it is likely that the real sovereign will eventually make its views known. Such a presumption at the international level also entails an assumption on the part of each state that all other states are sovereign, even though the identity (or even existence) of the real sovereign may never be certain. Absolutists such as Lansing have attempted to overcome such difficulties by contrasting ‘external’ and ‘internal’ sovereignty, where external sovereignty is presumed at the international level even if the locus of internal sovereignty cannot be identified.\(^{64}\) For practical purposes, however, the real possessor of sovereignty remains unknown, both internally and externally.

This difficulty can be further illustrated by the problems involved in locating sovereignty within a federal system. In a federal state, under the absolutist theory sovereignty must be possessed either by the federal body or the sub-federal units. Sovereignty under the absolutist view cannot be divided and located in various places throughout the state and at the same time remain absolute. It must be uniform, exclusive and indivisible. As a result any exercise of international competence by a sub-federal actor is incompatible with the absolutist theory. Only

\(^{62}\) See Bartelson, ibid., pp. 66-67.

\(^{63}\) See, e.g., Lansing, Notes on Sovereignty, pp. 19-20 (outcomes of wars, either victories or suppressions of rebellions, revealing "the possessors of the real sovereignty"), 20 (acts of 'real' sovereign in times of peace being limited to establishment and maintenance of government), and 87 ("civil war, whether it is termed an insurrection, a rebellion or a revolution, is the practical process, by which the possession of the sovereignty in a state is determined as a fact, and that through no operation of law in time of peace can such possession be actually determined").

\(^{64}\) See, e.g., ibid., p. 30. This 'external' position is justified because sovereignty is assumed to lie somewhere within the state (even though we may not be able to determine where at any given moment). Also, we need to posit its existence in order to prevent other states from challenging it.
the federal state may be sovereign; if the sub-federal unit is sovereign, then no federal state can be said to exist. This viewpoint, it may be noticed, is reflected in some aspects of current international law, which generally treats each state as a unified entity. The rules regarding the creation of treaty obligations, for example, for the most part do not allow a state to invoke internal constitutional constraints as an excuse for breach of a treaty. But of course international law even in this area has exceptions, whereas absolutist theories of sovereignty cannot. Such problems are heightened when an attempt is made to apply the absolutist theory of sovereignty to the democratic state. A uniform, exclusive, absolute sovereign is incompatible with the idea of democratic power exercise by a near-universal demos. It also cannot accept the political accountability provided by a democratic system. The locus of

65 Art. 27 of the Vienna Convention on the Law of Treaties (1969) states: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.” Art. 46(1) allows a state to invalidate its consent to a treaty if “its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties . . . [where] that violation was manifest and concerned a rule of its internal law of fundamental importance.” Art. 46(2) defines a violation as “manifest” if “it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.” An example of a case in which the executive entered into an obligation which it could not fulfill because of constitutional limitations is that of Attorney-General for Canada v. Attorney-General for Ontario (1937) A.C. 326.

66 But cf., Lansing, Notes on Sovereignty, pp. 34-7 (trying to fit federalist models within absolutist theory). Lansing argues that the federal sovereign only has powers to deal with foreign nations, yet at the same time that it is able to act directly upon the citizens of states in order to enforce its externally sovereign actions (i.e., to implement international treaties). Lansing’s model is not really compatible with federalism, however, as he gives the individual state few rights against the federal sovereign. If the latter wishes to dissolve the former, for example, it is “legally right, and entirely within the scope and power of the [federal] sovereign” (regardless of moral rightness). Ibid., p. 41. How the ‘morality’ of revolutions is compatible with an ‘amoral’ sovereign (see below) is never fully explained by Lansing.

67 Briefly, in Law of Nations, at p. 14, argues that sovereignty cannot be linked with democracy and that any attempts to do so leave us unable to locate the holder of sovereign power. This prompts him, Ibid., to argue that democracy requires “a new theory of governing power”:

Such a linkage tries to combine two contradictory ideas; that of absolute power somewhere in the state, and that of the responsibility of every actual holder of power for the use to which he puts it. It is possible to locate a sovereign in Bodin’s sense in a constitutional state, though Bodin went too far in holding that the supreme power of making law must always be concentrated in a single hand; he could not foresee that the device of federation would make it possible to divide that power between different holders without producing chaos in the state. But it is not possible to locate a Hobbesian sovereign in a constitutional state, and the political philosophers failed to see that with the coming of democracy a new theory of the nature of governing power was called for. [Citations omitted.]

Nevertheless Brierly has difficulty sketching such a theory, because he cannot accept the idea of identifying the sovereign as the people as a whole for reasons similar to those of the absolutists. In Ibid., at p. 15, he argues that there are three reasons refuting the idea of the sovereign being the people as a whole. Firstly, a government bureaucracy is required to run a state, and this government will be distinct from the populace. Secondly, any politically strong group within the state will be able to control the state (making the people subservient to the strongest group). Finally, and perhaps crucially, the idea of the people acting as a whole is anti-democratic.

The sovereignty of the people is not even, as soon as we begin to examine its implications more closely, a genuine democratic ideal, for the people can only act by a majority, and a majority rarely is, and never ought to be, all powerful. No democrat if he is true to his principles can believe that there ought somewhere in the state to be a repository of absolute power, and to say that such a power resides in the people is to deny that either minorities or individuals have any rights except those that the majority allow them. That is totalitarianism, for autocracy is autocracy whoever the autocrat may be.

Ibid.
sovereignty either must remain indeterminate for absolutism or be recognised as incompatible with the realities of modern constitutional democracies.

b. Amoral Nature

A second difficulty with absolutism is that it excludes the possibility of moral and ethical checks upon the sovereign. This necessarily follows from the definition of sovereignty in terms of absolute physical power. In order to be absolute, the sovereign must be unlimited by any other force. It cannot be restricted by morality, ethics or natural law and still remain sovereign. Bodin was reluctant to accept such an amoral sovereign and attempted to get around this difficulty by formulating a version of absolutism that was limited by natural law. Such a version, in Bodin’s view, provided the basis for sovereigns to respect covenants between one another (treaties). But even imposing this limitation Bodin encountered further difficulties since he was unable to find mechanisms by which to enforce it. Natural law is not self-enforcing, at least during the lifetime of the sovereign. Nor could Bodin’s sovereign ensure that other sovereigns obeyed natural law by keeping their covenants with one another. Instead, the sovereign was left to rely upon such things as the ‘faith’ of one prince in another (i.e., that the latter will keep his promise), or was required to use simple force (bringing us back to the power-based view). As a practical matter then, like Machiavelli’s Prince the absolutist sovereign must be amoral. This does not mean that those exercising sovereign power need to ignore moral considerations. But if the sovereign is to be absolute, it must not be bound by them. This is a weakness for the absolutist theory because it makes sovereignty incompatible with certain fundamental features of international law, such as jus cogens obligations, which exist because they offend humankind as a whole and are necessary for international legal order.

c. Incompatibility With Sovereign Equality

Thirdly, the fundamental international legal doctrine of sovereign equality cannot be maintained under an absolutist model. Although equality is assumed to exist between sovereigns at an international level by most proponents of the power-based view, such ‘equality’ must be recognised as an insupportable fiction. This is because states clearly are unequal in their abilities to muster and use force, and under the absolutist view, state sovereignty is based solely upon

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68 See, e.g., Lansing, Notes on Sovereignty, pp. 20-21 and 54. At the latter page Lansing ‘justifies’ amoral sovereignty as being inevitable in our world because of the inherent inability of humanity to understand ethics or morality. Although there may be one perfect ethical standard, we are imperfect, and hence we are as likely to impose an immoral one as a moral one. We are therefore forced to choose, so the argument goes, an amoral sovereign by default. The bizarre result, according to Lansing, is that our inability to reach perfection yields ethical relativism.

69 See, e.g., Bodin, On Sovereignty, pp. 15 and 35; Knutsen, History of International Relations Theory, pp. 61-2.
possession of ultimate force. Sovereign equality defined in terms of force therefore cannot exist. The real and practical inequality of states thus becomes crucial for the absolutist view in a way that it does not for other theories.71 Even if the absolutist theorist attempted to explain these differing levels of equality by positing another distinction—one between 'real' and 'artificial' types of sovereign equality (the latter existing, the former not)—this explanation would fail for the same reasons as the above distinction between internal and external sovereignty in the context of federalism.72 Just as absolutism makes it impossible to locate the sovereign within the state, so too it makes it impossible to prove any relation of equality, or inequality, between states.

d. Incompatibility With Sovereign Independence

Fourthly, absolutist models subvert sovereign independence and thereby undermine the idea of the sovereign state itself. If the life-dynamic of the absolutist sovereign is to continually seek and assert ultimate power, then there can be no such thing as sovereign independence. The anarchic 'state of nature' supposed to exist at the international level leaves the absolutist sovereign free to assert power over (even conquer) weaker entities. Since the absolutist sovereign is untrammelled by moral or other considerations there is no reason to stop it from overstepping state borders to increase its powers (and therefore its sovereignty).73 As a result, such fundamental rules of international law as that prohibiting the use of force become incompatible with absolutist conceptions of sovereignty. In fact, the only kind of sovereign that could exist under the absolutist vision would be a kind of 'world sovereign.'74 A world sovereign could exist if the strongest entities in the world—whether states or other groups—managed to gather together as a single entity and force their will upon the rest of the world. Such a power grouping does not exist today and is unlikely to come about in the near future. It cannot

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70 Knutsen, ibid., pp. 62-4 (also noting, inter alia, that Bodin contributed to international relations theory by inserting the doctrine of pacta sunt servanda into the inter-state sphere).

71 It should be noted that sovereign equality could be supported by other theories, such as the social contract and democratic ones, on the basis of being an extension of the fundamental equality of the individuals within each state. See also Chapter 8, below.

72 Lansing struggles with these problems in Notes on Sovereignty. He argues that sovereigns must be presumed to be equal (at pp. 22-3), in part because independence is a necessary requirement for sovereignty (p. 38). But he then goes on to formulate a 'real' versus 'artificial' equality distinction. This is necessary because no state can have sovereign equality, as none is immune from coercion from others (p. 60). Finally, he argues that all states thus really must be protectoreats of the world community or the 'World Sovereign.' Ibid., pp. 64-5.

73 Lansing falls prey to this inconsistency in a spectacular way. 'External' sovereignty (i.e., independence from other states), is supposed to arise from "the nature of things" (there being "no primacy of nations"). Yet nations, like human beings, exist in a "rude and savage" state of nature: ibid., p. 32. Thus we see a form of international society that rests entirely upon dominance by force (where disputes are settled "by physical combat or mutual concessions"), juxtaposed against a natural requirement that states respect each other's external sovereignty. Ibid., p. 32.

74 This is the provocative title to Lansing's third paper in ibid.: "Notes on World Sovereignty." For Lansing's explanation of the idea of 'world sovereignty' (the "union of physical strength of all the human beings in the world") representing the "collective might of all mankind"; and its unorganised status, see: ibid., pp. 57-65 and 67-68.
be found in the United Nations Security Council or in the executive of the remaining super-
power, the United States of America. It is unlikely to come about in the future because 
absolutism does not encourage co-operation at the international level. As a result, absolutism’s 
destruction of the notions of sovereign equality and independence must limit the ability of states 
to maintain any form of international community. No community can exist in a vicious, 
Hobbesian, absolutist state of nature.

e. Incompatibility With, and Erosion of the Basis for, International Law

Fifth, absolutist notions of sovereignty are incompatible with international law for two 
reasons. On the one hand, international law cannot be binding upon the absolutist state; on the 
other it cannot be created by the absolutist state. Absolutism cannot admit the binding nature of 
international law because it is based upon unlimited physical power. As we have seen, this 
means it cannot embrace anything that could check or limit that power, including morality and 
natural law. Positive international law is both impermissible and impossible under the absolutist 
theory. What we now describe as “international law” the absolutist would see as momentary 
expressions of will on the part of sovereigns—mere statements of power. International law 
could not exist as a binding system of rules in such a context.

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75 It could be argued that the United Nations Security Council becomes the ‘world sovereign’ during the 
moments it is exercising its powers under Chapter VII of the Charter of the United Nations (1945). During such 
periods it would seem to be exerting unchallengeable force against an individual state, as seen, for example in the 
recent Gulf War. Such an analysis seems untenable, however, because Chapter VII powers are not only extremely 
difficult to set into motion, but also because even at the moment of concerted UN action there will always be 
internal conflicts within bodies such as the Security Council and General Assembly. Such internal conflicts will 
effectively limit and destabilise this power, making it no longer absolute. Also, the subsequent lack of compliance 
by Iraq with UN arms inspections reveals how powerless the Security Council can be as a practical matter. I am 
indebted to Dr. Stephen Neff for the suggestion that the Security Council acting under Chapter VII might represent 
a current form of ‘world sovereignty.’

76 Hoffman, in Beyond the State, at p. 183, argues that absolutist sovereignty and international society are 
mutually incompatible: “Either the state is sovereign or it belongs to an international society. It is logically 
impossible to do both.”

77 Steinberger, in “Sovereignty,” at p. 414, states:
The problem of “absoluteness” of sovereignty is ultimately a problem of the source of validity of 
international law and, accordingly, a question of philosophy of law.... Absolute sovereignty would mean 
the very denial of the idea of an international legal order or mankind, be it a society of juxtaposed States 
of equal status or a global State.

78 Lansing, in Notes on Sovereignty, at pp. 93 and 94, respectively, arrives at this conclusion in the following 
manner:

Assume, if you cannot agree, that sovereignty is the supreme physical power in a state. Law, upon that 
assumption, is the announced will of the possessors of the sovereignty. Sovereignty is the energizing 
force behind the law. It is in no sense a creature of law nor a concept of law, since it existed before law. 
The legal right to announce the will of those, who possess the sovereignty, may be retained by them or 
delegated to agents. But such legal right, like all other legal rights, is created, continued and destroyed at 
the will of the possessors of the sovereignty. [

The supreme coercive physical power I would define as sovereignty; the expression of the dominant will 
of its possessor or possessors I would define as law.
The incompatibility of absolutist notions of sovereignty with the creation of international law is most apparent in the case of those theories that, in a solipsistic manner, assume the sovereign state to be the sole basis of legal obligation.79 Ironically, these theories appear to be founded upon absolutist visions of domestic law. They assume that each sovereign, being supreme, must be responsible for all laws regarding its territory. This assumption is incompatible with an external legal order (such as international law), since the existence of any binding rules not made by the sovereign would refute that sovereign’s supremacy.80 The only way that a law external to the state could be compatible with absolute sovereignty is if that law was created by the sovereign state in question. But this is both theoretically and practically impossible, as no single state creates (or validates) the laws of all other states or all of international law by itself. Hans Kelsen makes this point in the context of explaining the impossibility of a dualist conception of the relation between national and international law, one which at the same time assumes the sovereign state to be the sole source of all legal obligation.81 Kelsen points out that if the sovereign state is absolute in the sense of being the ultimate maker of laws, difficulties must arise in explaining how the laws of other states, or even international laws, may exist. He argues that in order to overcome such difficulties those advocating dualist conceptions have needed to resort to the fiction of “recognition” or acceptance, namely,

In making this criticism I assume the possibility of a distinction between law and power. As Kelsen explains, in his Introduction to the Problems of Legal Theory, at p. 61 (%30(b)): “[W]hile law cannot exist without power, neither is it identical to power. The law is . . . a certain system (or organization) of power.”79

But see, e.g., Lansing, ibid., pp. 72-4 and 69-72 (asserting that the existence of a ‘world sovereign’ is compatible with international legal rules against piracy and slavery, which are manifestations of its will, as well as other general components of the laws of nations, since they can be derived from natural law or acquiesced to by the world sovereign).

80 E.g., Kelsen, in Introduction to the Problems of Legal Theory, at p. 100 (%48(a)), states:

So long as there is no legal system higher than the state legal system, the state itself is the highest, the sovereign legal system or legal community. The territorial and material spheres of validity of this legal system are in fact limited, because the state coercive system restricts its own validity to a certain area and to certain objects—that is, it does not claim validity everywhere, at least not substantively, and does not purport to cover all human relations. To say, however, that the state is the sovereign legal system means, in particular, that it has the capacity, unrestricted by any higher legal system, to extend its validity territorially as well as materially. This is usually characterized as absolute sovereignty. But as soon as the international legal system rises above the legal systems of the individual states, the state can no longer be understood as the sovereign legal system; it can be understood only as the highest legal system relatively speaking, that is, the highest legal system save for international law, a legal system directly under international law.

81 Kelsen argues that there are two possible ways in which two different legal systems (systems of norms), such as municipal and international law can be unified into a single system. The first possibility (the monist view), sees one system as subordinate to the other, with the subordinate system’s “(relative) basic norm, the basic determinant of its creation—[being] found in the other system, that is, in a norm of the other system.” Ibid., p. 112 (%50(b)). The other possibility (the dualist view), sees the two systems as separate, but co-ordinated by a third, higher-order system. Kelsen, in ibid., at pp. 112-13 (%50(b)), explains about the latter view:

[Alternatively, the two systems [could] appear as coordinates of one another, equally ordered, which really means that they are separated from each other in their spheres of validity. Coordinate systems presuppose a third, higher-order system that governs the creation of both of the other systems, separating them from each other in their spheres of validity, and thus, first and foremost, coordinating them.”

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the doctrine that if international law is to be binding for one’s own state, and if states other than one’s own are to be considered as legal communities vis-à-vis one’s own state, then they must be ‘recognized’ as such by one’s own state. In this way, the basis for the validity of both international law and state legal systems other than one’s own is built into the legal system of one’s own state, into the ‘will’ of one’s own state qua highest legal entity in the social sphere. International law, valid only if a state recognizes it as binding for that state, does not appear, then, either as a supra-state legal system or as a legal system independent of, and isolated from, the system of one’s own state; rather, in so far as international law appears as law at all, it is as a freely incorporated component of the legal system of one’s own state, as ‘external state law’, that is, as the aggregate of those norms of the state legal system that govern behaviour towards other states, and that are adopted by way of ‘recognition’.82

The legal existence and laws of other states thereby depend upon the recognition of one’s own state, as if “the legal system of one’s own state ... [extended] over the legal systems of other states.”83 Such a solipsistic view of the centrality of one’s own legal order cannot imagine, let alone accept, the sovereignty of another state’s legal order: “The sovereignty of one State excludes the sovereignty of every other State.”84 The existence of both foreign states and international law therefore are merely reflections of the sovereign will of the individual state.85 There can be no multiplicity of laws for international law to co-ordinate in this view—only the projections of the legal system of one’s own state.86 A unified conception of international law is also impossible, as each solipsistic state produces its own unique version of ‘international law.’87 Interestingly, any binding conception of treaty law fails for the same reasons, as without recognition of both another independent entity existing outside of one’s sovereign borders as well as an overarching legal system to co-ordinate the relations between one’s state and the other

82 Ibid., p. 115 (§50(d)).
83 Ibid.
85 E.g., Kelsen, in Introduction to the Problems of Legal Theory, at p. 116 (§50(e)), explains:
The subjectivist’s own ‘I’ is his point of departure in comprehending the world, but despite extending it to the universe, the subjectivist cannot get past his own sovereign ‘I’ to arrive at an objective world. ... Similarly, a monistic construction based on the primacy of the legal system of one’s own state is completely incompatible with the notion of a plurality of coordinate states, equally ordered and legally separated from each other in their spheres of validity. (And it is precisely this monistic construction that dualism, with its bias for preserving the dogma of sovereignty, transforms itself into by way of recognition.) Thus, the primacy of the state legal system implies in the end not only the denial of the sovereignty of all other states (in terms of the dogma of sovereignty), but also the denial of international law itself.
86 E.g., in ibid., at pp. 117-18 (§50(b)), Kelsen argues that by being wholly subsumed into national law international law loses its ability to envisage or deal with separate entities: “within the confines of a state legal system, international law can no longer perform its essential function of coordinating, of equally ordering, all states.”
state, no treaty could ever exist. As a result, when pushed to its theoretical limits the absolutist view of sovereignty can only comprehend a single, solipsistic state projecting its sovereign will onto the entire world. Other states cannot exist in the same absolutely sovereign sense and cannot exist for the purposes of international law. International law itself dissolves when faced with the twin impossibilities of having nothing to co-ordinate and of being derived solely from the legal order of a single state. As a result, in Kelsen’s colourful phrase, the absolutist conception of sovereignty must ‘self-destruct.’

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In sum, absolutist models of sovereignty collapse under the weight of their own premises. They fail to establish the location of the sovereign at any given moment because the supreme possessor of raw, physical power may change at any instant. Being based solely upon physical power, such models create a sovereign who himself, and in his exercise of power, must remain amoral. Absolutist sovereignty also is incompatible with the concept of an international community, as well as with such international legal doctrines as sovereign equality, non-intervention, non-use of force and human rights. In fact, power-based models are by their very nature incompatible with both international law and, paradoxically, with state sovereignty itself. Finally, absolutist models do not possess some of the positive benefits of the other models of sovereignty, such as the contractarian one discussed below and the democratic one elaborated in the following Chapter. These latter models can locate sovereignty within law, as an international legal construct, and thus ensure its compatibility with various international legal norms. Additionally, contractarian and democratic models allow sovereignty to fulfil certain normative roles, to be imbued with legitimacy and authority, because they link sovereignty to the consent of

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87 Kelsen, in General Theory of Law and State, at p. 386, notes: “There would, incidentally, on this view, exist as many numerically different international legal orders as there are States or national legal orders.”

88 See Kelsen, Introduction to the Problems of Legal Theory, pp. 122-24 (§50(h)).

89 E.g., Kelsen, General Theory of Law and State, p. 386.

90 Kelsen, in Introduction to the Problems of Legal Theory, at pp. 115-16 (§50(d)), emphasises:

The necessity of comprehending as valid legal norms not only the legal system of one’s own state, but also other state legal systems and, in particular, international law, drives the dualistic construction to self-destruct on the doctrine of recognition indispensable to it. And the consequences of the dualistic construction, never entirely worked out by its own proponents, exhibit clearly the political design underlying the dualistic view, namely, the interest in preserving the notion of sovereignty of the state, the notion that the state represents, in absolute terms, the highest legal community. This sovereignty, of course, can only be that of one’s own state, which serves as the point of departure for the entire dualistic construction; for the sovereignty of one state—‘sovereignty’ in its original, absolute sense—is incompatible with the sovereignty of another state.

The dogma of state sovereignty, resulting in the primacy of the legal system of one’s own state, corresponds completely to a subjectivist view that ultimately collapses into solipsism, the view that would comprehend the single individual, the ‘I’, as the centre of the world, and the world, therefore, merely as something willed and imagined by the ‘I’. 
the people. Power-based theories, in contrast, do not and cannot create legitimate authority.\footnote{A power-based sovereign could not exert authority on the basis of any of the Weberian formulations of authority (traditional, charismatic, or formal-rational). Pure power satisfies neither formality nor rationality. It eschews tradition (always overturning structures in pursuit of greater power), and is not the locus of charisma (which instead is focused upon a leader or a leading group).} By linking sovereignty solely to physical power, absolutist theories cannot even satisfy the desires for long-term stability that spawned them in the first place. Their quest for the ever-more-perfect and awe-inspiring authority figure, without recognition of the need for the legitimacy of that sovereign, is a self-destructive and futile one.

II. CONTRACTARIAN MODELS OF SOVEREIGNTY

The second general theory of sovereignty is the “contractarian” one. This views sovereignty as originating in the populace as a whole, who then delegate it to the organs of the state by means of a contract-like common agreement. Such sovereignty remains (at least potentially), reclaimable through the mechanism of popular revolt. I call this general category of theory ‘contractarian’ rather than ‘social contract’ because I intend to include some theories not usually associated with the latter term (i.e., consent-based, contractual notions of international law), and particularly wish to highlight the ‘contractual’ analogy that these theories rely upon.\footnote{Extensive literature exists regarding the diverse forms of social contract theory and the appropriate terminology. David Boucher and Paul Kelly, for example, in “The Social Contract and Its Critics: An Overview,” in The Social Contract From Hobbes to Rawls, ed. D. Boucher and P. Kelly, 1-34 (London: Routledge, 1994), distinguish between three broad categories of social contract: moral, civil and constitutional. The first uses the idea of a social contract to ground moral principles, the second to legitimate coercive political authority through the agreement of individuals, and the third to explain the relationship between the ruler and the people (rather than between the people themselves): \textit{ibid.} Dario Castiglione, in “History, Reason and Experience: Hume’s Arguments Against Contract Theories,” in \textit{ibid.}, 95-114, at p. 96, describes the latter two categories with the terms “social pact” and “governance pact.” Martyn P. Thompson, in “Locke’s Social Contract in Context,” in \textit{ibid.}, 73-94, at p. 73, describes other varieties of social contract theory, including ‘alienation’ (Hobbes) and ‘agency’ contract theory (Locke), and original, explicit, tacit and hypothetical contractarianism. Thompson, in \textit{ibid.}, at p. 77 ff., goes on to offer his own categories, namely, constitutional contractarianism, philosophical contractarianism and integrated contractarianism. Perhaps the most interesting conception of the social contract is that offered by Immanuel Kant, who regarded it as an “\textit{a priori idea of pure practical reason}”: Howard Williams, “Kant on the Social Contract,” in \textit{ibid.}, 132-46, at p. 135. In simpler terms, Kant views the social contract as such an essential idea that without it we could not know or experience civil society and the state: \textit{ibid.} For more on social contract theory see generally the other essays in the above text and J.W. Gough, \textit{The Social Contract: A Critical Study of its Development}, 2\textsuperscript{nd} ed. (Oxford: Clarendon Press, 1957). For critiques of social contract theory on feminist and anti-racist grounds, see Carole Pateman, \textit{The Sexual Contract} (Stanford, CA: Stanford University Press, 1988), and Charles W. Mills, \textit{The Racial Contract} (Ithaca, NY: Cornell University Press, 1997), respectively. Pateman argues that social contract theories reinforce patriarchal ideologies; Mills argues that they reinforce white supremacist ones. Interestingly, Mills argues that the “racial contract” referred to in the title of his work is not only a political and moral contract, but also an “epistemological [contract], prescribing norms for cognition to which its signatories must adhere”: Mills, \textit{ibid.}, p. 11.} The central element connecting such theories is what I argue is essentially a \textit{transfer} of sovereignty to the governing structure (even though usually described as “delegation”). This ‘transfer’ is not irrevocable (i.e., not full alienation), since it is limited by a contractual obligation, which if breached, allows the people to regain their original sovereignty.
Nevertheless it is argued that there is a significant difference between possessing power, on the one hand, and having the ability to reclaim it, on the other. Contractarian theory is deficient in this regard.

Contractarianism does not, however, fall prey to many of the difficulties experienced by absolutist versions of sovereignty. For example, it is capable of accepting an imperfect form of authority, one that can be limited and controlled. As a result it does not suffer from problems related to perfectionism. However it fails in its inability to maintain continuous control over the sovereign, mainly as a result of the overly formal nature of the ‘contract.’ Like absolutist theory, its overarching concern for stability leaves sovereignty firmly in the possession of the contractually-created sovereign, far from the populace. Contractarian theories thus do not go far enough in allowing a participatory sovereign structure.

A. DEVELOPMENT AND CENTRAL PREMISES

Although most commonly associated with John Locke, the origins of contractarian theory can be traced as far back as the ancient Greek civilisation in Athens, where mutual duties were understood to exist between the people and the government. Socrates’ death, for example, can be linked to his acceptance of a quasi-contractual bond between himself and the Athenian city-state. In the Crito we are told of the reasons why Socrates accepted the hemlock and refused the option of escape urged upon him by his friends. Strong among these reasons was the idea that Socrates had an obligation to obey the laws from which he had benefited all his life, laws which had helped create a society and system he strongly believed in and which he could have left at any time.93

A crucial premise of the contractarian theory that developed during this early period, particularly in the works of Plato and Aristotle, was the idea that human beings by their very nature are inclined to a social or ‘civic existence.’94 This view of human nature strongly contrasts with that of Hobbes which, as seen above, views it as being intrinsically aggressive, competitive and self-interested.95 Plato and Aristotle arrived at their view of human nature as a


94 See, e.g., Kelly, ibid., p. 13. Kelly discusses Aristotle’s use of the term “politikon zoon”, which he translates as “civic existence” rather than “political animal” to help alleviate misunderstandings. The term is used by Aristotle in a paragraph describing the natural progression of man from lesser units to the city-state, ending in the sentence: “From these things therefore it is clear that the city-state is a natural growth, and that man is by nature a being inclined to a civic existence (politikon zoon).” Ibid. p. 13 (citing: Politics I. 1. 8-9, II).

95 Note that this ‘civic existence’ view of human nature is crucial because it shapes our attitude about how to best implement sovereignty. For example, if sovereignty is a product of collective human association, but human association itself is not a natural state of affairs, then it seems reasonable to support coercive forms of authority in order to keep that association in place. As we have seen, this is how Hobbes’ Leviathan was born. On the other hand, if
result of theorising about the development of their societies. They both postulated a desire on the part of humans to gather together to form ever larger groupings. The difference between the two was that Plato (at least in his early writings), saw civic existence as requiring divine assistance, whereas Aristotle saw it as a natural, organic development (neither seeing societies as existing from the start). The 'civic existence' view of human nature took on both a descriptive and moral (or normative) content for ancient Greeks, with human society being seen as a means towards each individual's perfection. The Greeks also viewed the city-state as the ideal form of polis, one that best fulfilled their aspirations for civic existence.

Later Roman thinkers further developed two of the basic elements of the contractarian approach. Firstly, foreshadowing subsequent developments, at least near the beginning of their Empire they maintained that the source of power was located partly in the people and collective human association is viewed as part of the natural order of things, then it becomes possible to conceive of self-created and self-enforcing governance structures; the Leviathan becomes unnecessary.

Kelly, in Short History, at p. 12, argues that Plato required the intervention of Zeus to teach men mutual respect and a sense of justice:

While primitive man had the capacity to feed himself [Plato argued], he was unable as an individual to defend himself against wild animals; at this stage he was still without 'civic skill' (politeia techne), the faculty of living in community with others; men learned however the necessity of combining in order to defeat the threats of the wild, and saved themselves by founding cities. This did not work too well at first because of men's ill behaviour to one another; but ultimately Zeus bestowed on them the mutual respect and sense of justice which made civic existence feasible. [Citing: Plato, Protagoras (322 BC) and Laws, 677 ff.]

Aristotle, on the other hand, as argued by Kelly in ibid., at p. 13, saw this development as a natural progression:

Aristotle also presented the origin of civic existence as an organic development, resting for him on the progressive and natural accumulation of units, starting with the family, and thence evolving into the city or state (polis) through the union of neighbouring villages.

Of permanent importance in Aristotle’s conception is his emphasis on the natural character of this familial and social coagulation. Deploying his idea that the nature of everything is to reach always towards its own perfection in the achievement of its purpose, he presented the city-state as the perfected framework for leading the good life, and man's instinct to combine in such an organization as something natural to him for this reason. [Citing: Aristotle, Politics 11 ff.]

Note in this context that D'Entreves, in “The State,” at p. 313, argues that since both Plato and Aristotle saw the state as the necessary complement of man, it fulfilled the normative requirements of legitimacy: “As the bearer of the highest values, the State stood in no need of any further legitimisation.”

Farrar, in “Ancient Greek Political Theory,” at p. 24, connects this social existence to human well-being and democracy in ancient Greece:

In affirmation of democracy's radical extension of political power to all citizens, Protagoras argues that the highest form of self-realization—for demos and élite alike—was to be achieved by means of the constant interaction of men of all classes, since men of great natural ability were to be found outside as well as within the élite of the wealthy and well-born. For Protagoras, in contrast to Glaucón, political society is not merely an instrumental good, but essential to human well-being. The polis secures more than human survival. Politics makes possible man's development as a creature capable of genuine autonomy, freedom, and excellence. The very process that enables every citizen to be a citizen (and hence fully a man) enables him to be the best citizen and man he can possibly be. All men—demos and traditional élite—can be expected to appreciate that the workings of the democratic polis serve their own best interests.

E.g., Kelly, Short History, pp. 63-4. Note however, that both Plato and Aristotle had strong reservations about democracy, as well as about the ability to express the human good through politics generally. See, e.g., John
partly in the senate. This implied that part of the government’s power could be seen as derived from the people, an understanding that would later yield ‘ascending’ theories of government. For the Romans themselves, however, as their Empire grew and developed the opposite, ‘descending’ theory of government came to prevail. Political legitimacy came to be founded upon theories of power as emanating from the ruler and not the people. Secondly, the Romans helped to develop the contractual aspects of contractarian theory. Taking as a foundational premise the idea of humankind tending by nature towards a civic society, they refined Greek theory by incorporating legal notions of partnership to help explain the resulting obligations. Cicero is said to have been one of the earliest writers to do so, with his works linking the notion of humankind as politikon zoon (tending towards a civic existence), and


Aspects of the ascending theory of government also were displayed in rudimentary form by the ancient Germanic peoples, the enemies of the Roman empire, as noted by Kelly, in ibid., at pp. 92-3:

These German peoples, according to Tacitus, took their kings on the basis of their high birth (‘ex nobilitate’), but the power of those kings was not unlimited or arbitrary (‘nec regibus infinita aut libera potestas’); and some decisions rested with the people, who listened in their assembly to their kings, respecting the weight and authority which attached to their counsels, but not their power simply to give orders (‘audientur auctoritate suadendi magis quam iubendi potestate’); their chief’s proposal, if unpopular, was shouted down (‘si displicuit sententia, fremuit aspernatur’). This picture of monarchy limited by important democratic checks, even if coloured by Tacitus’ own sentiments, has never been suspected in regard to its general accuracy. The Germans who dominate the history of Western Europe after the fall of the western empire were seen at first to reflect, despite the lapse of four centuries since Tacitus had written his Germania, something of the same political feeling—the ‘ascending’ view of government—that he described.

Citing: Tacitus, Germania, p. 7. Note, however, that Kelly, in ibid., at pp. 93-4, cautions us that the Germanic peoples “were not quite as austere or incorruptible as Tacitus had imagined,” and goes on to detail their comforts and riches, as well as eventual absorption of Roman culture, and later Christianity.

Kelly, in ibid., at p. 92, briefly describes the ‘ascending’ and ‘descending’ theories of government:

These competing conceptions have been labelled the ‘descending’ and the ‘ascending’ theories of government. The ‘descending’ theory means the view according to which power is originally centred in the ruler, who is beholden to no human being for it (though in its Christian guise the theory implores to God its original bestowal on the ruler), and whose subjects have no role in moderating or imposing conditions on its exercise, but must simply submit. On the ‘ascending’ theory, power derives ultimately from the people, from whom it is delegated upwards to rest in the ruler’s hand: this ruler not being absolute, but in conformity with the source of his authority, bound to respect the people’s laws which are antecedent to him. By the neat if oversimple affiliation of each of these theories to one of the two main cultural elements in Europe at the outset of the Middle Ages, the descending theory is characteristic of the Roman, the ascending theory of the Germanic tradition.
Roman partnership theory. This ‘partnership-based,’ pseudo-contractual notion of human society helped later theorists de-legitimise tyranny, as its assumptions prevented a complete transfer of power. In fact, tyranny was thought by some to mean a negation of the state itself. As summarised by Kelly,

In this contract-based state there is (unlike the polity imagined long afterwards by Hobbes as under an absolute ruler whose dominion all have acquiesced in) no room for tyranny. Cicero represents tyranny, indeed, as the negation of the state itself: ‘where all are oppressed by the cruelty of a single man ... would anyone call it a state (res publica)? ... It must be said that, where a tyrant rules, the state is not so much defective as non-existent.’ A similar thought is expressed later by Seneca, when he visualizes an original golden age subverted by vice and sinking under tyranny: it was then, and as tyranny’s antithesis, that the need for laws arose.

Even in its earliest uses social contract theory had the potential to be a tool against absolutist power, having within it the fundamental notion of a mutual obligation between the ruler and the populace.

Contractarian theory developed further in Europe during the Middle Ages. The most explosive idea to take hold at this time, reacting to theories about the divine source of rule, was the idea of limiting a king with a form of popular compact. The institution of kingship might be divinely supported, it was reasoned, but the royal person was not: a “kingly office itself [was] of divine origin, [but] the basis on which a particular monarch occupied his throne was one of mutual compact with his people.” Evidence for the influence of this early form of social

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102 Kelly, in ibid., at pp. 65-66, reveals this development by analysing Cicero’s language, first quoting a passage from De republica in which Cicero limits which groups can constitute a state:

‘Not every assemblage of men howsoever brought together makes up the populus, but an assemblage of a great number allied together in binding agreement [tuis consensu sociatus] and in sharing of interests [utilitatis communione]. And the first cause of their coming together is not so much their individual weakness as the natural social instinct of men; for the human race is not one of solitary wanderers.’

Note here not merely an echo of the Aristotelian notion of human beings as creatures tending naturally to civic society (the politikon zoon), but the certainly deliberate legal references. When to this passage another phrase from the De republica is added—‘a single bond of law, and an agreement and partnership in coming together which is what makes a people’ (unum vinculum tuis [ae] consensus ac societas coetus, quod est populus)—Cicero can probably be seen as alluding to the Roman ‘consensual’ contract of partnership (societas), of which the sharing of the partners’ goods (communio) was an aspect. That, in restating, in Roman terms, the social-contract theory of the state’s origin which had already appeared among the Greeks, Cicero was conscious of his forerunners is perhaps proved by his express dissent from the idea—first put forward by the sophists—that the weakness of individuals had been their motive in entering the primordial social bargain. [Citing: De republ. I. 25. 39.]

103 Ibid., p. 66 (citing, inter alia: Cicero, De republ. 3. 31. 43; Seneca, Epistulae morales 90, ss 3, 5, 36, 38, 40).

104 Ibid., p. 97.
contract may be found in the coronation oaths of kings and lords at the time.\textsuperscript{105} It is also weakly intimated in the ideas of mutual obligation that existed in the system of feudalism (although it would take later developments before direct ties could be imagined between the king and the common people).\textsuperscript{106}

Perhaps the greatest development of contractarian theory occurred when it faced the challenges of absolutists in the late or High Middle Ages. Absolutists, responding to early contractarian views, argued that even if there could be such a thing as a social contract, it would transfer power from the people irrevocably, ceding all rights to the monarch. The contractarians in turn rejected the irrevocable nature of such a transfer. They insisted that the social contract merely delegated power, thereby preserving the residual ability of the people to check the ruler if the latter committed a breach of trust (contract) or other misbehaviour. The boldest theorist to discuss this latter view arguably was Marsilius of Padua, who in his \textit{Defensor pacis} wrote that the sovereign was in fact the people and that the ruler was only their instrument, being necessary for the things which they could not accomplish as a group.\textsuperscript{107} To the extent that these views briefly dominated, they represented a moment of triumph for contractarianism before it was displaced for a time by absolutist theory.

When contractarian views re-emerged during the Renaissance and Reformation, the theories of Marsilius of Padua were taken up by scholars such as Manegold of Lautenbach

\textsuperscript{105} Kelly, in \textit{ibid.}, p. 97, writes that the idea of a monarch having a compact with his people was "in part suggested by the oaths which medieval kings commonly swore at coronation, to do justice and to respect the laws, and the oaths of allegiance which were sworn to them by their greater subjects on the same occasion."

\textsuperscript{106} Kelly, in \textit{ibid.}, p. 97, writes:

Central and common to all the forms taken by feudalism was a bilaterality of obligation: the vassal owed allegiance to his lord, but his lord in turn owed protection and support to his vassal, and if the lord failed in his duty to provide this, the vassal was thought entitled to renounce his allegiance. It cannot be said that medieval theory consciously extended this idea by analogy so as to take in also the king-subject relationship; but it seems likely that the universal familiarity of feudal patterns of reciprocal obligation made easy its construction on contractual terms, particularly in the light, too, of the universal teaching as to the good ruler's duties towards his people.

Note that this 'bilateral' characterisation of feudal life limits absolutism—as obligations go up and down the chain of authority, rather than only in one direction. This can be distinguished from Brierly's point about feudalism helping absolutism, discussed above. Brierly, in contrast, argues that feudalism fed absolutist tendencies by setting up a model of respect for a lord or authority (an immediate superior) that could be transferred to a broader respect for the monarch or state (the ultimate superior).

\textsuperscript{107} E.g., Kelly, in \textit{ibid.}, p. 130-31, states about the theory of Marsilius of Padua:

\textit{[I]n his Defensor pacis he insisted on the separate spheres of Church and state, and even proposed the subordination of the former to the latter. But his republicanism went further. For him the sovereign in the state was the people, who set up a ruler not irrevocably, but to carry out such functions as the community, in the nature of things, was unable to discharge. This ruler can be checked or deposed by the people, of whom he himself remains only the 'secondary, instrumental or executive part.' [Citing: Defensor pacis 1. 12. 3, 5.]}
and Nicholas of Cusa. These two developed social contract arguments beyond the level of justification of governments and into the realm of moral justification, with temporal government being founded upon a form of agreement. Their arguments were paralleled by those of the Dutch cleric Wessel of Groningen, the English lawyer Sir John Fortescue, and the Italian Marius Salamonis. But the greatest advances came from a group of jurist-clerics in Spain, two of the most important being Francisco de Vitoria and Francisco de Suárez. I will briefly touch upon the scholars in the Spanish School again at the end of this work. For the present, it should be noted that as a group the Spanish School emphasised human rights and developed a more egalitarian, Christianity-based world-view. Importantly, they transposed this view to the state. They argued that the state was the product of a mutual agreement of the citizens (although differing amongst themselves about the nature of this agreement), and that this agreement was the source of the earthly power conferred on the ruler. The social contract thus explicitly limited the sovereign. Of this group, Suárez and a Juan de Mariana went so far as to recognise a power to depose the ruler as stemming from this contract.

108 Ibid., pp. 168-69 (Kelly also adds John Wycliffe to this list, although the latter’s contributions to this area are more mixed, with some of his theories inclining to support absolutism).
109 Ibid., pp. 169 and 173-74.
110 Note, however, that the writers in the Spanish school also shared strong theological views about the order of things, and these views underpinned and influenced every aspect of their writings. These theological assumptions had some negative consequences, especially for those unwilling to accept Christian faith, such as the indigenous peoples of the Americas.
111 Kelly, in Short History, at p. 170, summarises:
In Spain the sixteenth century saw a late flowering of scholastic thought in the work of several jurist-clerics, of considerable importance ... in the history of international law and of natural rights. These, too, present the state as the product of a mutual agreement to confer power on a ruler. Francisco de Vitoria (c. 1485-1546), the earliest of them, is close to Aristotle and St Thomas in presenting the state not as the consequence of a human act of will, but as a natural organic growth founded on man’s instinct to associate, and offering him obvious material advantages such as solidarity in defence against his enemies and the possibility of a great diversity of trades within a society. Luis de Molina (1535-1600), on the other hand, while acknowledging the divine origin of the state’s power, wrote that men came together of their own free will to form the state; and although they did not create its power themselves, this voluntary union was a necessary condition without which it could not materialize. Francisco de Suárez (1548-1617) also saw the act of association as conscious rather than merely instinctual: men by common consent, he wrote, came together into a body politic for mutual aid towards a single political end, and with a common governance. [Citing: Francisco de Vitoria, Relectiones 3. 1-8; Luis de Molina, De justitia et iure 2. 22. 8; Francisco de Suárez, De legibus ac Deo legislatore 3. 2. 4.]
112 Kelly, at ibid., continues:
But with Suárez a definitely bilateral sort of obligation is visible (as it had been with Manegold), binding the ruler as well as the ruled: there is a pact between king and people, according to which, for as long as the king performs his duty, they may not renounce their allegiance to him; but if he turns into a tyrant, he is in breach of the condition on which he was accepted as a ruler, and may be deposed (or, in extreme cases, even killed). A similar justification of tyrannicide was offered in 1599 by the Jesuit Juan de Mariana (1536-1624), who also presented the state’s order as having replaced man’s original solitary savagery, once men had bound themselves in mutual partnership and agreed to obey one man of outstanding virtue. [Citing: Francisco de Suárez, De legibus ac Deo legislatore 3. 4. 6 (about tyrannicide: a ‘just war may be waged against him’); and Juan de Mariana, De rege et regis institutione I. 1-2.]
Despite this flowering of social contract theory, and the familiarity of some with the notion of humankind by nature inclining to a civic existence (the Aristotelian contribution), the thinking of these scholars was overly influenced by strict, contractual ideas about power transfer. They retained a view of society that was based upon a simple, original contract, and hence could not surmount such problems as how to explain why future generations were to be bound indefinitely by a bargain made long before their birth. Nevertheless, contractarian theories provided the foundations for seventeenth-century views of the world that divorced government from divine will, and brought it firmly into the sphere of human powers. The social contract model became so prevalent that it was included in ceremonies and other events of significance. This is evidenced by the historic Mayflower Compact made by the sailors of the Mayflower in 1620. Another, more extreme, example is that of the oath taken by the members of the Aragonese Parliament to respect the King only so long as he preserved their traditional rights and liberties.

Of the more modern contributors, Thomas Hobbes could be argued to be the first major social contract theorist, as his ‘Leviathan’ is spoken of as arising through a transfer of power from the people to the state. But such a view misconstrues his theory for two reasons. Firstly, Hobbes’ Leviathan was all-powerful precisely because it was not a party to the contract, and hence was not limited by ties to the populace. Rather, the sovereign was born of an agreement between the people themselves in which it (not yet having been created), necessarily took no


114 Kelly, in ibid., at pp. 208-9, states that this kind of social contract theory “was quite at odds with a theocratic view of government, one which saw kings as divinely appointed, and their subjects as divinely commanded to obey them, in other words with that which held government to be of God rather than human contrivance.”

115 The “Mayflower Compact” (11 November 1620), as reproduced in Grewe, Fontes Historiae Iuris Gentium, vol. 2, at p. 181, states:

IN THE NAME OF GOD, AMEN. We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid: And by virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience. IN WITNESS whereof we have hereunto subscribed our names at Cape-Cod the eleventh of November, in the Reign of our Sovereign Lord King James, of England, France, and Ireland, the eighteenth, and of Scotland, the fifty-fourth, Anno Domini, 1620.

Note that this is probably the closest example to be found of an actual social contract.

116 Kelly, Short History, at p. 211, explains: “The oath taken to the crown by the members of the Cortes (parliament) of Aragon recited that ‘we, who are as good as you are, take an oath to you who are not better than we, as prince and heir of our kingdom, on condition that you preserve our traditional constitutional rights (fueros)
part. Secondly, the contract transferred or alienated, not merely delegated, sovereignty. This can be seen in the way that Hobbes' Leviathan possesses the sole right to select its successor, whether it be another sovereign or Sovereign Assembly. Thus, Hobbes' theory does not fall in this contractarian category: no reciprocal obligations are formed, and no control lasts beyond the moment of creation of the Leviathan.

It is John Locke, therefore, who is most commonly identified as the originator of the modern social contract. Unlike Hobbes, Locke considers sovereignty as arising from, and remaining with, the people. Government only exercises sovereign power on trust; the people maintain rights of control over its use. Locke saw communities and governments as being created only by means of the consent of the people (individuals naturally being free and unable to subject themselves to the power of another without consent), and this consent left power perpetually in the hands of the people. Legislative power, according to Locke, was a fiduciary power exercised on behalf of the people: there remained in the hands of the people a "supreme power to remove or alter the legislative, when they find the legislative act contrary

and liberties, and, if you do not, we do not" (citing: E.N. Williams, The Ancien Régime in Europe (London, 1970), p. 87).

117 Hinsley, in Sovereignty, at pp. 142-3 summarises:
For Hobbes there could only be a single contract in which all individuals agreed to submit to the state but in which the state, necessarily sovereign, necessarily took no part. This remaining contract, Hobbes' covenant of every man with every man, bore some relation to the social contract which Althusius had been the first to make distinct from the rulership contract, and on which he had based the inalienability of the sovereignty of the People. But with Hobbes, who followed up Grotius' attempt to absorb the body politic of the People in the will of the Ruler, it made the populace a union of wills only for the moment in which they surrendered all will to the state; and such few rights as were retained against the state, the sole judge of what is in the public interest, were retained only by the individual, were enjoyed by all individuals equally and were restricted to the basic purpose for which individuals had originally covenanted—the preservation of their lives.

See generally: ibid., pp. 142-50. Note as well, the similarities between Hobbes' Leviathan and Machiavelli's Prince, both of which were posited as being in a relationship of externality with respect to the state and the populace.

118 See, Hobbes, Leviathan, pp. 54-55 and 247-8 (stating succinctly at the latter that "[t]here is no perfect forme of Government, where the disposing of the Succession [of the sovereign] is not in the present Soveraign").

119 This assumes that the contractarian theory does not embrace what Norberto Bobbio calls an 'autocratic pact.' Bobbio, in "Democracy and the International System," in Cosmopolitan Democracy: An Agenda for a New World Order, ed. D. Archibugi and D. Held, 17-41 (Cambridge: Polity Press, 1995), at p. 26, describes the 'autocratic pact' as 'one in which sovereign power is instituted either without limits or solely with self-imposed limits, and collectively binding decisions are taken by a narrow power group or even by a single authority without the participation and consent of the recipients.' Hobbes' Leviathan would seem to fall under this category, which I have argued lies outside the contractarian model, properly speaking.


121 Locke, in ibid., at p. 92 (II. 149), argues that the community perpetually retains its powers. This position is derived from a natural law theory of the priority of self-preservation, with the people being unable to delegate a power they do not have—thereby being unable to give up their liberty or will.
to the trust reposed in them.” Thus, the “community perpetually retain[ed] a supreme power” to save itself in case of breach of trust. 123 Although Locke was not eager to press for revolution, his work supported the idea that a government’s breach of the trust of its people would—in extreme situations—allow the latter the right to regain their original sovereign powers (i.e., through revolt). 124 Locke’s doctrine, however, like all contractarian approaches remains limited by the ‘contractual’ quality of the transfer of power, which is spoken of in terms emphasising its formality and the momentous nature of the original contract. For Locke the social contract remains a thing that only could be repudiated in a time of great crisis, such as in an extreme case of breach of trust. 125

A final theorist that is relevant to contractarian theory is Jean-Jacques Rousseau. 126 It is difficult to characterise Rousseau as a social contract theorist in the normal sense, because he argues that omnipotent sovereignty rests permanently with the people and that the government and executive organs only exercise that power as a commission. 127 Rousseau’s social contract, therefore, is best described as a “contract of association” rather than a “pact of submission.” 128 In contrast to Hobbes, Rousseau starts from the premise that human beings are peaceful and kind in the ‘state of nature’ and only tend towards aggression after being placed in society. 129

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122 Ibid., pp. 58 (II. 95-6) (mankind by nature being “all free, equal, and independent,” man cannot divest himself of his natural liberty without his own consent; but if consenting, man can make a community or a government), and 60 (II. 99) (governments requiring the consent of the people).

123 Ibid., pp. 92-3 (II. 149-50).

124 For the passages suggesting rights of revolution see: ibid., pp. 147-8 (II. 240-42) (discussing the people’s power to judge a sovereign, in which their right to “appeal to Heaven” appears to be a euphemism for popular revolt—although any revolt in turn will be judged by God), 128-9 (II. 209-10) (potential for rebellion against tyranny), and 134-5 (II. 221-22) (with the legislative and “supreme executor” losing trust, power devolves again to the people). For Locke’s defence of the ‘revolutionary’ components of his doctrine, see ibid., pp. 139-41 (II. 228-30). See also, Hinsley, Sovereignty, pp. 153-54.

125 John Locke’s conception of sovereignty is limited by his reliance upon a contractual or trust-based theory of transfer of power to the state. Although no doubt motivated by concerns about stability, the contractual nature of this transfer tends to ‘lodge’ Locke’s sovereignty firmly in the organs of the state, requiring an odious abuse of its associated powers for it to be returned to the people. Hinsley, in ibid., at pp. 153-54, surmises: “[I]n Locke’s case remnants of the belief in a contract between the community and the government had restricted the right of revolution against the government to occasions when government had betrayed its trust or failed in its proper task.” Locke, in his Second Treatise, at pp. 92-3 (II.149-50), spoke of the people’s resumption of power as occurring only in cases of extreme breaches of trust or ‘manifest’ neglect of trust. In fact, he had nothing but strong words for those who might incite unjust revolutions. In Locke’s view, he who “lays the foundation for overturning the constitution and frame of any just government, is guilty of the greatest crime, I think, a man is capable of... and he who does it, is justly to be esteemed the common enemy and pest of mankind; and is to be treated accordingly.” Ibid., p. 141 (II. 230).


129 This marks a startling departure from the approach taken by most other philosophers, as pointed out by Knutsen in his History of International Relations Theory, at p. 114.
Rousseau’s general aim, therefore, is to change the nature of society rather than humankind.130 Unfortunately, the only way that Rousseau can conceive of changing society is by suppressing it with a Leviathan-like formulation of the state. Rousseau also tends towards perfectionism and thus cannot accept the possibility of checks and balances upon power. Based upon the free consent of the individual, Rousseau’s sovereign body (the entire people), requires the “total and permanent submission of each associate individual, with all his rights, to the state.”131 Such submission brings his state perilously close to that of Hobbes. Other difficulties associated with Rousseau’s theory include the practicalities of creating an executive organ that can effectively implement the sovereign ‘general will.’132 We will return to these latter difficulties below. For the present let us examine the current role of contractual theory.

Where Hobbes, Crucé, Grotius, Hume, Kant, Voltaire and Saint-Pierre reduce the dynamics of international politics to human nature, Rousseau introduces other elements as well. Whereas Hobbes, for example, portrays man as proud and covetous, Rousseau portrays man as peaceful and kind. There is nothing inherent in human nature that predisposes man to aggression, Rousseau claims. Man becomes a fighter and a warrior only when he is moved from the state of nature to civil society. War is a social undertaking; it is a product of human civilization. It is the citizen who is most eager to become a soldier, not natural man. Armies and wars do not exist, until societies exist with states which organise their citizens into armies and march them off to further the interests of their ruler. At this point Rousseau is at odds with all other contract thinkers; for them, the social contract ends conflict among men, but for Rousseau it creates the preconditions for war. [Citations omitted.]

130 According to Knutsen, in ibid., at p. 117, Rousseau argues that the ‘fall of man’ from his original position of happiness to his lowly position in society is in a large part due to the institution of private property:

Ever since the advent of private property [according to Rousseau], all human features have been tainted with possessive qualities, infusing strength with an element of vanity, skill with competitiveness, love with jealousy. ...  

Finally, man developed political institutions backed by law. These institutions consolidated the principle of private property, sanctioned social inequality, protected the wealth and power of the ruling elite, oppressed the poor majority of mankind and alienated them all in the process.

131 E.g., Hinsley, in Sovereignty, at p. 153, remarks upon the similarities between the theories of Hobbes and Rousseau:

There was only one essential difference between the argument of Rousseau’s Contrat social (1756) and that of Leviathan. Rousseau took over every ingredient in Hobbes’s statement but made it yield, not to the exclusive and omnipotent sovereignty of the rulership whatever its form, but the exclusive and omnipotent sovereignty of the community or the People. Like Hobbes, he insisted on the concept of the state as a unitary personality, eliminating from the contract theory all vestige of the ancient idea that the constituted body politic accepted government via a contract with the Ruler. Like Hobbes he replaced this ruler-society contract with the demand for the total and permanent submission of each associate individual, with all his rights, to the state. Like Hobbes, he based this demand on the free consent of the individuals, and justified it with the need to respect the equality of individuals: only this total submission could enable the state to perform its task of recreating in political society the liberty and equality of the state of nature which the state of nature had been unable to preserve. Like Hobbes, he insisted that the sovereignty of the state was illimitable in scope: it could do everything and it could do nothing that was wrong. [Emphasis in original.]

See also, ibid., p. 156 (discussing Kant’s analysis of Rousseau, the former arguing that Rousseau’s state “was in fact Hobbes’s sovereign which absorbed all popular rights, including the right to rebel or disobey”).

132 See, e.g., Hinsley, ibid., pp. 155-7 (discussing this failure of Rousseau, and of the subsequent attempts by other scholars to get around the problems caused by trying to relate the organs of the state with the basis of sovereignty, namely, the consent of the people). Another challenge facing Rousseau’s theory is the way in which its permanent location of sovereignty in the people could be argued to create a perpetual right of revolution. Hinsley, in ibid., at p. 154, discusses this possibility.
B. **CURRENT ROLE**

No society can trace its origins to a society-wide, formal social contract.\(^{133}\) Contractarian theories are therefore most potent if understood as a kind of myth.\(^ {134}\) The nature of the mythical contract has varied. Early theorists envisaged the social contract as existing through a single crucial moment of agreement. Modern theorists have imagined the contract as one developing in stages, encompassing a number of parts. It might start, for example, with a non-aggression pact, then be followed by a rule-establishing pact, and be concluded with a ‘third party’ pact that allows arbitration of conflicts between the first two.\(^ {135}\) Regardless of how it is conceptualised, the contractarian view of sovereignty retains a critical role in challenging absolutist conceptions of power because it firmly acknowledges links between the sovereign and the populace. By serving such a role, the ‘mythical’ nature of the social contract does not take

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For Rousseau the power to dismiss government, which was merely the non-sovereign executor of the legislative commands of the sovereign community, was permanently exercised by the community, which automatically suspended the government’s commission whenever it assembled, because the unlimited sovereignty of the people could be bound by no law or constitution and could not be transferred even as to its own exercise. He accordingly rejected constitutionalist notions—the division of powers and the idea of representation no less than all attempts to divide the sovereign authority itself—as absolutely as he opposed the notion that the state, which could alone possess the sovereign authority, was identical with the rulership or in any way distinct from the social body produced by the social contract.

\(^ {133}\) Early social contract theorists argued for the historical, or descriptive validity of the social contract, a point which was subject to scathing criticism by later writers. Jeremy Waldron, in “John Locke: Social Contract Versus Political Anthropology,” in The Social Contract From Hobbes to Rawls, ed. D. Boucher and P. Kelly, 51-72 (London: Routledge, 1994), at p. 55 comments that “[f]rom the moment the theory of the social contract was invented, critics have ridiculed what they took to be its absurd historical pretensions.” But Waldron defends Locke’s writings against such attacks, arguing that not only was Locke “perfectly well aware of the strain that the contract story placed on the credulity of his contemporaries,” but that he specifically developed an alternative, “political anthropological story” to explain the growth of modern political institutions. The role of Locke’s consensual social contract, according to Waldron, was to articulate a framework for interpreting and judging historical events (the anthropological story):

The contract story is not intended as a historical description; it is intended rather as a moral tool for historical understanding. It is the function of the political anthropology [story] to offer us an account of what actually happened; while the contract story offers us the moral categories in terms of which what actually happened is to be understood.

... The point of the social contract story is to provide a moral template to be placed over historical events and over our present predicament, for the purpose of ascertaining what is right and wrong for us and our political rules to do.

*Ibid.*, p. 63. Note that Howard Williams postulates a similar viewpoint regarding the role of the social contract for Immanuel Kant. Even though Kant did not allow the possibility of violent resistance, his social contract was to be a strong guide for both citizens and rulers as to how to attain the ideal state: Williams, “Kant on the Social Contract,” in *ibid.*, 132-46, at pp. 138-40.

\(^ {134}\) Rather than use the term “myth,” Waldron, in *ibid.*, at p. 51, characterises the modern view of the social contract as a “purely hypothetical construction” or “purely normative model”:

To the extent that it is used at all, the social contract is understood as a purely hypothetical construction: not an assumption of fact but, as Kant described it, ‘merely an idea of reason’ that generates the basis of a normative standard for testing laws and social arrangements. We do not ask whether the arrangements were in fact agreed to; we ask whether they could have been agreed to by people working out the basis of a life together under conditions of initial freedom and equality.

away from its power. Contractarian theory, in fact, has been so widely accepted that the 'social contract' model is relied upon by almost all political systems, even Communist ones.\textsuperscript{136} In fact its reach extends to the sphere of international law.\textsuperscript{137}

The mythical 'contract' at the heart of contractarian theories of sovereignty allows them to overcome some of the difficulties encountered by absolutist theories. Under the latter theories, sovereignty had to be unitary in nature, and therefore tended to be envisaged as existing in a single, discrete being or group. For absolutists, efficient rule was unimaginable under a system containing multiple decision-makers. As revealed above, however, the requirement for an absolute and unitary sovereign posed several fundamental difficulties for the absolutist view, ones that actually prevent our locating the real sovereign at any given point in time. Contractarian theory, on the other hand, shifts sovereignty from the single ruler to the people, or state as a whole, making the source of sovereignty both permanent and easily identifiable. Although sovereign powers might be delegated to the ruler by means of the social contract, the source of sovereignty remains in the people. Thus, the social 'contract,' by providing a rhetorical tool to position sovereignty in the entire body politic, overcomes the problems of co-ordinating a multiplicity of actors for a single purpose. At least notionally, it harmonises the entire population of the state for the formative moment of transfer of power. Even if in practice sovereignty may be exercised by a particular organ of government, its origins are rooted in the people.

\section{C. The Insufficiency of the Contractarian View}

Despite providing great advances over absolutist theories, contractarian views of sovereignty remain insufficient from a democratic perspective because they do not allow continuous participation by the public in decision-making. If one imagines the three theories as existing in a continuum regarding concentration of power, the contractarian one remains uncomfortably in the middle. Absolutist views of sovereignty concentrate all power in a single

\textsuperscript{136} One of the most novel formulations of social contract theory was that implicit in the communist theory of the former Soviet Union. As described by Neil Harding, in "The Marxist-Leninist Detour," in Democracy: The Unfinished Journey, 508 BC to AD 1993, ed. J. Dunn, 155-87 (Oxford: Oxford University Press, 1993), at p. 171:

There was an implied social contract within this state form that was never directly articulated, but which none the less constituted its inner logic and helps us explain its dramatic collapse in 1989 and 1991. We reconstruct it as follows: in return for sacrificing his autonomy as a producer ... the individual is admitted to a social system of production that plans what is to be produced, by whom, in what location and quantity. In return for the individual yielding to society the right of disposing of his labour ... society undertakes to provide him with a greater range of material and cultural benefits than would be available under any other system.... Like all social contract theories it carried a sting in its tail: namely, if the state transparently failed to live up to its foundation promises, then the people's obligation to it therewith ceased. Another way of putting this is to say that the state's real power to sustain popular allegiance almost wholly coincided with its ability literally to produce the goods.

ruler; democratic views disperse power to the nearly universal *demos*. The contractarian view is indecisive. Even though in theory it locates power in the hands of the people, in practice it shifts that power to the government or ruling organ. Little or no popular participation is required under the contractarian model, and no efficient mechanism allows the people continuous access to their sovereign powers. As seen in Locke’s theory, for example, the general public remains unable to reclaim its sovereignty except by using drastic measures like revolt. Nevertheless, because contractarian theory moves sovereignty part of the way along the continuum in a democratic direction—placing more power in the hands of the people—it is less odious than absolutist theory. As a consequence, the criticisms I level against it are not as strong as those levelled against absolutism.

Three fundamental weaknesses plague the contractarian view of sovereignty: (1) it separates the locus from the source of sovereignty, (2) it effectively transfers, rather than merely delegates, power, and (3) its contractual analogy is inherently limiting.

1. **Separation of the Locus from the Source**

Through its use of a social contract, the contractarian theory imagines a form of sovereignty that moves back and forth between two possible holders. At the formative moment, the point of creation of the original contract, the entire people possess sovereignty. They are its source and locus. But once the contract is formed, since the people ‘delegate’ their sovereign powers to a ruler or governing organ, the latter becomes its locus. The source remains the people, but the locus has changed.\(^{138}\) Such a change need not be permanent, of course, as a breach of the social contract by the ruler will allow sovereignty to revert to the people as a whole. But the difficulty posed by such a conception of sovereignty is that it creates a *restless* sovereign, one almost as difficult to locate as the absolutist one. It will be recalled that the absolutist model attempted to avoid this problem by positing a sovereign that was unified and indivisible. It failed, however, because its conception of sovereignty was linked solely to the possession of superior physical power. The possessor of such power, as we saw, may be difficult to ascertain. The difficulty created by the contractarian view is not one involving the divisibility of sovereignty which (as I will argue in Chapter 8), is both possible and potentially helpful. Rather, the difficulty lies in the contractarian assumption that there can only be one locus of sovereignty. Either the people must possess sovereign powers, or the government must do so. They cannot be shared and as a result an irresolvable tension is created between the two

\(^{138}\) Note that one of Rousseau’s substantial contributions to social contract theory (even if it is hard to classify him as a contractarian, strictly speaking), is that he was able to continuously locate both the source and the locus of sovereignty in the people. In the words of Jeremy Jennings, in “Rousseau, Social Contract and the Modern Leviathan,” in *The Social Contract From Hobbes to Rawls*, ed. D. Boucher and P. Kelly, 115-31 (London:
possible holders of sovereignty. Such a limited view of sovereignty has fascinating implications for contractarian theory. It forces it to face the challenges of identifying the moment of transference of sovereignty, the conditions for its transference, and a mechanism through which the people (the delegator) can communicate their will to their ruler (the delegatee). The latter challenge raises the substantial difficulties involved in ascertaining the sovereign will, or in Rousseau’s terminology, the “general will.”

a. The ‘General Will’

The idea of a ‘general will’ attempts to get around the problems of a shifting form of sovereignty by linking its source and locus through direct communication of will. If the people can express a single, unified ‘general will,’ and the interpreters of that will (the rulers) faithfully implement it, then any separation of the source and locus of sovereignty becomes inconsequential. The will of the people and the ruler are unified through the general will. Two difficulties, however, are inherent in the notion of a ‘general will.’ Firstly, there is the difficulty of determining its existence; secondly there is that of determining its content. In other words, does a ‘general will’ in fact exist, and if so, how can we know what it is? In the language of philosophy, these difficulties are ontological and epistemological in nature.\(^{139}\)

The first question, whether a ‘general will’ even exists, is raised because of the heterogeneous nature of modern societies. In the past it seemed possible to rely upon unifying, nationalist ideologies in order to posit the existence of a general will. Even today the rhetoric of the ‘nation’ flourishes, as seen recently, for example, in the conflicts surrounding the dissolution of Yugoslavia.\(^{140}\) Other states, however, accept and even cherish their heterogeneous, multicultural, multiethnic characters. The processes of globalisation also make it difficult for states to remain homogeneous, since global communication can influence national cultural and linguistic identities.\(^{141}\) As a result of such developments in many states

Routledge, 1994), at p. 117, Rousseau was able “to attribute not only the origin but also the exercise of sovereignty to the people” (citations omitted).


\(^{140}\) See Chapter 10 for an analysis of the difficulties involved in recognising the republics that emerged after the dissolution of Yugoslavia. Note that Bartelson, in *A Genealogy of Sovereignty*, at p. 210, argues that in the modern period sovereignty is in fact partly concealed by identifying the state with the nation:

If the classical concept of the state was based on a problematic—and to our eyes highly fictitious—identification of the person of the sovereign with the abstract space of power and interest, one could say with some simplification that the modern state is based on an equally problematic identification of state with nation, concealing its sovereignty by dispersing it at the ideological level.

\(^{141}\) See Chapter 2, above.
it would be difficult to establish the existence of a 'general will,' except perhaps for trivial issues.\textsuperscript{142}

The idea of the 'general will' faces a related challenge, albeit at a more theoretical level. This is the problem posed by the circular nature of its logic: in order to have a general will we must assume the very thing that the general will creates, namely, a united community.\textsuperscript{143} Without the existence of such a unified community or state we cannot have a general will; but without the general will we cannot have the unified community or state (or sovereign).\textsuperscript{144} The problem of the circularity of the general will—with the supposition of a strong community needed to create itself—arises in any situation of disunity. This problem bedevils Hobbes, for example, when he argues that a social contract is needed to bring humanity out of a barbarous and discordant state of nature. With no general will and resultant strong community the contract is impossible; but if there is a general will, then the social contract is unnecessary. In a similar manner, if the social contract is argued to arise as a consequence of a society's need to gather together to repel foreign intrusions (from the external state of nature), then we are still left to explain the pre-contractual unity as well as the necessity of the contract.\textsuperscript{145} In sum, contractarian theory presupposes its basic premise:

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\textsuperscript{142} Similar difficulties may have inspired absolutists such as Hobbes to require the 'general will' only to exist for the brief moment of creation of the original social contract. Hobbes posited a terrible unity only at the moment of the birth of the sovereign, a unity in which the sovereign could not itself take part. In order to be absolute and illimitable, the Leviathan logically could not be dependent upon any other being for its creation. It could not be a party to the social contract, and instead sprung into being at the moment the people renounced their rights. See generally, Hobbes, Leviathan.

\textsuperscript{143} As summarised by Bartelson, in \textit{A Genealogy of Sovereignty}, at p. 212:

[T]he people are absorbed into the state and constituted as a collective, which presupposes a general will in order for it to be intelligible as a unity and as the basis of its assimilation within the state, a general will which already presupposes as a condition of its existence a prior unification of the people into a community or nation in order to be manifest in the state.

\textsuperscript{144} The community itself must be completely united because, as explained by Rousseau in \textit{The Social Contract and Discourses}, at p. 211 (II. 6), a general will cannot be directed towards a particular object or accept particular wills and remain general:

[T]here can be no general will directed to a particular object. Such an object must be either within or outside the State. If outside, a will which is alien to it cannot be, in relation to it, general; if within, it is part of the State, and in that case there arises a relation between whole and part which make them two separate beings, of which the part is one, and the whole minus the part the other. But the whole minus a part cannot be the whole; and while this relation persists, there can be no whole, but only two unequal parts; and it follows that the will of one is no longer in respect general in relation to the other.

See also the discussion of the same passage in Bartelson, \textit{A Genealogy of Sovereignty}, at p. 213.

\textsuperscript{145} Both Kant and Hegel described the state as originating as a consequence of the need for (external) self-defence. Bartelson, for example, in \textit{ibid.}, at p. 215, describes Hegel as arguing that "[I]t is the essential unity of the state does not reside in an anterior cultural, linguistic or religious identity, but in the allegiance to a common authority for common defence" (citations omitted). Bartelson, \textit{ibid.}, at p. 214, makes a similar point in discussing the work of Kant:

The fact of culturally and geographically determined difference between peoples leads us to expect that even if they were not compelled by internal dissent to submit to coercion of public laws, war would have produced the same result from outside; each people would find itself confronted, thus forcing it to form
the existence of the community united by the general will that is required to form the social contract.

The second basic difficulty with the general will is that of determining its content. If the general will is both indivisible and general (as argued by Rousseau), then it is hard to imagine a process whereby we might ascertain its nature.\textsuperscript{146} We cannot take a poll or hold a vote, because such mechanisms aggregate particular wills, not general ones. If, on the other hand, the general will is not indivisible, then it may be determinable by democratic processes. If this is the case, then the social contract analogy is unnecessary and democracy alone is sufficient.

2. Transfer of Power: Non-Continuous and Limited Consent

The second overall weakness of the contractarian theory of sovereignty lies in the way that the concept of delegation has been manipulated so as to effectively remove sovereignty from the control of the people. This occurs because the social contract model only allows limited possibilities for the people to express their consent regarding exercises of sovereign power. Different contractarian theories posit different models for determining popular consent, but all share this overall weakness. Some models, for example, see the social contract as a 'once off' phenomenon. The original constitutional act of the people creates the social contract, and thereafter only the most major constitutional changes, or revolts, will amend or challenge it. Other models may accept the possibility of national elections creating a new, or renewing the old, contract. More flexible models could go even further than this by, for example, positing a social contract that may be subject to constant change and amendment as a result of a variety of daily actions within society. These latter models are the most interesting ones, and I shall return to them in a moment. Both of the former two models pose problems, however, because they are overly concerned with a few, formal representations of consent. Under a 'constitutional' model, for example, consent is given at the time of the creation of the constitution and is deemed to continue unless amendment or revolt occurs. Under the 'electoral' model consent is only ascertained at the moment of the election, and is otherwise deemed to continue between elections. Additionally, under both of these models the range of matters over which the public can register consent is extremely limited. In the electoral model, at best one is able to choose between political platforms (that may or may not be followed), or individual candidates.

\textsuperscript{146} See the passage from Rousseau's \textit{The Social Contract and Discourses} quoted in footnote 144, above.

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\textit{ibid.}, pp. 213-20.

See generally, ibid., pp. 213-20.
As a result, contractarian theories are weak because they accept infrequent, formal and cumbersome mechanisms to determine consent, rather than more frequent, substantive and participatory mechanisms that exist in deliberative democracies. This problem persists even if we hold very frequent elections, as they merely allow us to select a new candidate. They will not allow us to make substantive decisions.

Ironically, contractarian theorists may have accepted such infrequent and limited manifestations of consent because they over-emphasised its importance at the time of the creation of the social contract. This can be seen in the fact that most contractarian theories start out with the assumption that the original social contract requires unanimity or near-unanimity. We find this, for example, in Rousseau’s formulation of the social contract, where “‘[e]ach of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an individual part of the whole.’”

Because such an onerous requirement of near-unanimity was imposed at the time of the formation of the social contract, contractarian theorists may have felt logically compelled to impose an identical requirement for every subsequent modification of it. But rather than face the practical difficulties of obtaining a unanimous general will, the same theorists chose to avoid further determination of consent except in the most extreme circumstances. As a result, even though speaking in terms of delegation, contractarian models in fact accept notions of sovereignty that involve substantial transfer of power from the people to the organs of government. As seen in the work of John Locke, this can mean that the sovereignty of the people will remain in the hands of the government unless the latter engages in extreme behaviour (i.e., breach of trust, or breach of contract). Only at this point can it be regained, and only then through revolt. Revolution, it is submitted, is a rude and impractical instrument to control sovereign powers.

[147] Rousseau, ibid., p. 192 (I. 6). Rousseau continues: “At once, in place of the individual personality of each contracting party, this act of association creates a corporate and collective body, composed of as many members as the assembly contains voters, and receiving from this act of unity, its common identity its life and its will” (emphasis added). Note, however, that Rousseau does not impose this requirement of unanimity upon the “general will”, which is indivisible and general, but “need not always be unanimous; but every vote must be counted: any formal exclusion is a breach of generality.” Ibid., at p. 201 (II. 2) (in the footnote).

[148] Other contractarians imposed extreme conditions before sovereignty could be regained by the people. Samuel von Pufendorf, for example, only accorded individuals the right to resist their sovereign when faced with imminent death, and the people as a whole the right to revolt when the prince had “persistently demanded actions which [were] contrary to divine, natural law”: Martyn P. Thompson, “Locke’s Social Contract in Context,” in The Social Contract From Hobbes to Rawls, ed. D. Boucher and P. Kelly, 73-94 (London: Routledge, 1994), p. 85. According to Pufendorf, when the prince behaves in such a manner he treats his people as an enemy, not as subjects, and thus they have the right to defend themselves: ibid. David Hume largely rejected social contract models because they undermined the security and stability of government: Dario Castiglione, “History, Reason and Experience: Hume’s Arguments Against Contract Theories,” in ibid., 95-114, at pp. 102-4. Immanuel Kant also did not permit violent resistance to the sovereign: Howard Williams, “Kant on the Social Contract,” in ibid., 132-46, p. 134.
3. Contractual Analogy as Inherently Limiting

Finally, at a deeper level I believe that the metaphor of the 'contract' in contractarian theory is itself unhelpful. Even though social contract theories vary greatly in the formality of their requirements for a contractual relation, they all ultimately require a contract. In doing so, contractarian forms of sovereignty become restricted by the legal or quasi-legal metaphor implicit in the concept of contract. For example, even the most advanced contractarian theories tend to use notions such as "implied acceptance" or "implied consent" to explain how an alien, or infant, can join an existing social contract. They also use the notion of "acquiescence" to explain the basis for the continued consent of the individual (or society as a whole) to governance. Such notions may be illuminating and helpful in some contexts. But they derive from, and remain fixed within, a basic legal contractual model that is unsuitable for socio-political relations. It is too rigid and unwieldy for human interaction and hampers the ability of people to genuinely consent to, or participate in, sovereign power exercise. It places human relations in an arid and artificial atmosphere, changing us from actors to passive recipients and dictating the way we relate to one another. Patricia Williams explains this clearly:

[The contract] constrains the lively involvement of its signatories by positioning enforcement in such a way that parties find themselves in a passive relationship to a document: it is the contract that governs, that 'does' everything, that absorbs all responsibility and deflects all other recourse.

Contract law reduces life to fairy tale. The four corners of the agreement become parent. Performance is the equivalent of passive obedience to the parent. Passivity is valued as good contract-socialized behavior; activity is caged in retrospective hypotheses about states of mind at the magic moment of contracting. Individuals are judged by the contract unfolding rather than by the actors acting autonomously. Nonperformance is disobedience; disobedience is active; activity becomes evil in contrast to the childlike passivity of contract conformity.149

The interactive and participatory nature of social and political processes is denied under a contractual model.

In addition, normal contract law governs legal relations between two parties based upon various fictions. These include the notions that: (1) parties are free to contract or not contract with each other (ignoring inequalities in material power), (2) parties are equal in their ability to negotiate terms of the contract (formal equality, i.e., with the question of adequate consideration on both parts being for the most part unexamined), and (3) the contract deals only with a discrete transaction (ignoring the long-term relationship of the parties as being immaterial to the

contract). Such fictions are considered necessary in the sphere of contract law because our legal-commercial system has a very limited ability (or desire) to understand the true nature of any given contractual relation. The role of contract law is limited to that of facilitating exchanges through structured agreements between individual participants. It does not generally concern itself with the task of evaluating such things as that nature of the power differential between the parties or the moral consequences of their actions because other spheres of law, morality and politics concern themselves with such things.

Problems arise, however, when such a contractual model is applied to the running of a political system or society. In such a situation, it becomes untenable to assume the existence of freedom on the part of an individual to accept or reject a society-wide contract. Nor can the terms of a 'social' contract be unilaterally altered by a single party. More generally, examining social relations under an individual-to-individual 'discrete transaction' model simply misses the point of what it means to be an ongoing, evolving, interactive political community. In addition, political and legal systems are inherently concerned with some of the issues considered irrelevant under contract law. Things like material inequality, moral behaviour, and justice are properly part of social and political debate.

Whether the contractual model underlying contractarian theories of sovereignty could be altered to accommodate some of these concerns is open to debate. However I would argue that any theory that changes contractarianism enough to do so—for example, positing something like a 'continually interactive, participatory and ever-changing social contract'—no longer could properly be included within the bounds of social contract theory. In other words, to get to a truly interactive, participatory model, I would argue that the 'contractual' analogy must be abandoned.

150 For an example of this kind of analysis of contractual relations see, e.g., Hugh Collins, The Law of Contract (London: Weidenfeld and Nicolson, 1986), ch. 2.

151 Note that I am not equating the social contract with ordinary contracts. Murray Forsyth, in "Hobbes's Contractarianism: A Comparative Analysis," in The Social Contract From Hobbes to Rawls, ed. D. Boucher and P. Kelly, 35-50 (London: Routledge, 1994), at p. 39, specifically warns us about this when he cautions that "the social contract is always a distinct and special contract, which cannot and must not be put on par with everyday contracts of buying and selling with which everyone is familiar." In fact my point is that problems are caused precisely because the way of thinking about ordinary contracts is transposed to the social contract.

152 These problems implicit in contractarian theory, however, are not solely products of contract law. They also can be seen as faults in the liberal conception of the state. Some liberal theories, for example, characterise people as discrete right-holding individuals, and prioritise the individual as the most important component of our society (ignoring community ties, etc.). For critical analysis of the liberal model see, e.g., Roberto Mangabeira Unger, The Critical Legal Studies Movement (Cambridge: Harvard University Press, 1986) (explaining the critical legal studies movement generally, and providing solutions to the crises facing the western liberal state); Shlomo Avineri and Avner De-Shalit, "Introduction", in Communitarianism and Individualism, edited by S. Avineri and A. De-Shalit, 1-11 (Oxford: Oxford University Press, 1992) (contrasting communitarian and liberal positions); Duncan Kennedy, "Form and Substance in Private Law Adjudication," in Critical Legal Studies, edited by A.C. Hutchinson, 36-55 (Totowa, NJ: Rowman and Littlefield Publishers, 1989) (contrasting individualist [liberal] and altruist [communitarian] approaches inherent in private law, and suggesting a prioritisation of the latter approach). For the alternative argument that "a commitment to the contractarian strategy does not entail a commitment to
a. Contractual Analogy Undermines International Law

A related difficulty with contractarian theories of sovereignty is regarding their general incompatibility with a binding system of international law. This problem is similar to that faced by absolutist theory. It arises when contractarian theory is projected on the international level to help explain the creation of binding international rules. Just as individuals are seen to contract together to create the sovereign at the domestic level, sovereigns are seen to contract together to create international law at the international level. Both the analogy and result are imperfect. Nevertheless it forms the basis for the ‘state-consent’ view of the nature of international law.

This contractarian view of international law has two fundamental weaknesses. The first lies in its analogy between states and individuals. States, as artificial entities, can only consent to international legal rules on behalf of their people. The contractarian theory accepts this limitation. However, in order for states to obtain the consent of their people their must be some mechanism to allow them to obtain authorisation. In practice such a mechanism will be rare; if one exists, it tends to be extremely weak in nature. Many states, for example, have constitutional structures permitting the executive of the state to enter into treaties on behalf of the state (and thereby the entire people), without any requirement that the executive consult with, or even inform, the population about such matters. This is equally true for democratic states. Even if international matters should be more visible in democracies as a result of freedoms of the press et cetera, in practice almost no information is available to the general public because the news media pays little attention to such issues. As a result there is almost no possibility for open public debate during the tenure of a government. Even during election campaigns media coverage of international matters tends to be very limited. Reporting rarely focuses upon a candidate’s international policies, even though the campaign period is the one occasion when the public could genuinely obtain information and express some form of consent.

Furthermore, even if a social contract could be said to exist within the state, and a ‘contract’ between states could be argued to exist at the international level, there is no connection between the two forms of contract. The lack of any requirement for a clear link between domestic and international consent may stem from the development of international law, which historically treated the state as its sole subject and was more concerned with effectiveness than


153 Simpson, in “Imagined Consent,” argues that Franck’s work on rights to democratic governance (see Chapter 11, below), tries to work its way through this problem of ‘split consent’ by simply accepting it as a new, dual form. Simpson, ibid., at p. 118, describes the view of Franck and the other "new democratic liberals" as holding that “[t]he old positivism based on the consent of States has been replaced and extended by a theory of international law based on dual consent of States and individuals.” This remains equally problematic, however, because states are supposed to express the consent of their peoples.
representativeness.  

Contractarian theory's second fundamental weakness at the international level is tied to its formal and rigid conception of consent in the context of the creation of international law. To put this problem in its simplest form, there is one core principle agreed upon by nearly all theorists who hold 'state-consent' views regarding the formation of international law, namely, that each state has the basic right to withhold its consent from international legal rules. This view can be seen, for example, in the topic of the creation of customary international law in such doctrines as that of the 'persistent objector.' This doctrine allows states that persistently object to the application of an emerging customary international legal rule to themselves to escape the binding force of that rule when it later emerges. In this manner, it allows states to escape from being bound by customary international law. Some

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154 Simpson, in ibid., at p. 118, summarises:

The internal lives of States were not the concern of these [post W.W.II] scholars who, with the exception of a few human rights experts, were instead busy constructing a minimum world order with stability at the centre. International law, in this period of classical liberalism, was the law between States. It regulated their extra-territorial affairs, prohibited transborder use of force and provided for a process of diplomatic intercourse. The authority and legitimacy of international law was derivable from State consent. What States agreed to was law, what they refused to agree to was not law. The legitimacy of law was based on consent but the legitimacy of States themselves was founded on effectiveness. In this way, governments represented regardless of representativeness. A social contract existed between the States and the system, but this was not extended to a compact between the State and its citizens despite the best efforts of human rights lawyers. Indeed, it is arguable that the single most important legal text extant in this period was article 2(7) of the United Nations Charter.

See also Kelsen, "Recognition in International Law," at pp. 607-8 and 616-17 (criteria for statehood, and criteria for recognition of belligerent powers, respectively, both heavily weighted towards effectiveness).

155 Simpson, ibid., at p. 115, argues this point in a similar way, stating that "[t]he consent of States is real enough in practice (though extremely difficult to decipher at time) but the States themselves, as conduits of representativeness, are largely imagined."


157 Brownlie, ibid., at p. 10, defines it as rule providing that "a state may contract out of a custom in the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted." The International Court of Justice allowed Norway, in the Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116, at p. 131, to invoke its persistent objections to developing rules about territorial sea boundaries to avoid being bound by those rules: "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."

158 Note that other doctrines, such as estoppel and acquiescence can allow states to escape the consequences of a binding rule with respect to states that have accepted, or not protested against, what would otherwise be illegal behaviour on their part. Norway, for example, was allowed to benefit from its consistent use of the 'straight baseline' system of boundary delimitation against the UK because the latter did not sufficiently object to this practice: Fisheries Case, ibid., pp. 138-9. Another exception providing states with the opportunity to avoid being bound by evolving international rules in the area of title to territory is that of historic title. This concept was also
have even argued that the persistent objector principle allows a state to escape being bound by an emerging *jus cogens* rule, a non-derogable or peremptory rule of international law.¹⁵⁹ Such a possibility would fundamentally challenge the binding nature of international law. Even if only a few states object to relatively insignificant rules every now and then, the practical and theoretical consequences of this approach are profound. For if a state is bound by international law *only when it desires to be bound* then it becomes difficult to describe international law as being ‘binding’ in any meaningful sense of the term. The problems posed by this view have caused some international lawyers to attempt to limit the requirement of consent in the formation of customary international law. Maurice Mendelson, for example, dismisses as incorrect the assumption that the subjective element of customary international law (*opinio juris*) requires “consent.” He argues that the better view is that requirement for *opinio juris* can be satisfied if we can show belief on the part of the state of the existence of a legal obligation (without the further requirement of consent in each particular instance).¹⁶⁰ If,

affirmed by the Court in the *Fisheries Case*, *ibid.*, at pp. 130-31, when Norway was allowed to assert title to ‘historic waters’:

In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without the opposition of other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force. Norwegian sovereignty over these waters would constitute an exception, historic titles justifying situations which would otherwise be in conflict with international law.

¹⁵⁹ Cassese, in *International Law in a Divided World*, at p. 178, takes this viewpoint:

[Peremptory norms suffer from the limitations inherent in the sources to which they owe their existence, namely custom and treaties. Like the rules generated by these two sources, peremptory norms bind States to the extent only that the latter have not staunchly and explicitly opposed them at the moment of their emergence.... It follows that a State which has clearly and consistently expressed its dissent at the stage when a peremptory norm was taking shape, and has not changed its attitude subsequently, is not bound by the norm even if it comes to possess the overriding role proper to *jus cogens*. Such a State can make an agreement contrary to the peremptory norm with another State which also consistently objected to the norm, without the agreement becoming void. The ultimately *conensual* foundation of *jus cogens* clearly indicates the limitations of this class of norms (as well as of all international law-making). Even Cassese, however, accepts that his stance would not have any impact upon the currently existing examples of *jus cogens*, all of which have universal support as binding customary rules. Also, it would be very difficult if not impossible for any state to oppose a newly-emerging *jus cogens* rule: *ibid.*, p. 179. Higgins, in *Problems and Process*, at p. 34, takes the opposite position, namely, that *jus cogens* rules, once formed, are binding regardless of the individual consent of the state:

The role of protest is to slow the formation of the new legal rule, or to prevent a unilateral act from being opposable. But, if a rule of general application *does* emerge (perhaps because the phenomenon is a more general one, widely practised), then an initially protesting state will not remain exempt from the application of the new customary rule.

¹⁶⁰ See Maurice Mendelson, “The Subjective Element in Customary International Law” (1995) 66 Brit. Yrbk Int’l L. 177-208 (distinguishing consent from belief in relation to *opinio juris*). Consensus, for Mendelson, (1) may be necessary for the rule to form in beginning, and (2) is sufficient to bind a state once the rule has formed. However consent is not always necessary, since there are examples of cases where states have been bound without any “consent” (in the normal meaning of term). *Opinio juris*, in the sense of belief in the existence of a binding legal obligation, serves the roles of revealing why: (1) law is binding at the system level, (2) law may be viewed as a social practice, (3) law may be separated from non-law (since most cases applying the concept use *opinio juris* to distinguish mere practice from law). Another way of understanding the relation of consent and *opinio juris* would be to see the former as necessary for the *creation* of the customary rule, and the latter as explaining why the rule is
on the other hand, formal and universal consent is taken to be a serious requirement for customary international law, the 'state-consent' view would seem to remove the theoretical justification for binding international law.

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In summary then, the contractarian approach, although moving part of the way along the continuum towards allowing participation by the people in governance, does not go far enough. The population of the state has very little control over the daily decisions of those to whom it delegates sovereign powers. Any attempt by the people to check sovereign abuse of power must be dramatic, either requiring re-election, constitutional amendment, or revolution. The contractarian model also hampers the possibility of the existence of generally binding international legal rules.

It is time to move beyond a contractual framework and inject elements of democratic participation and accountability into the affairs of the state. This will be the goal of the democratic model of sovereignty, discussed in Chapter 8, below. Before we turn to this model, however, let us compare and contrast the three concepts central to this work: statehood, democracy and sovereignty.

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later observed. Nevertheless, it is notable that even after his extensive analysis Mendelson concludes that both of these notions should be rejected, and that we should only look at state practice.
Chapter 6: Sovereignty at Present

Having examined two prominent theoretical models of sovereignty, the absolutist and contractarian ones, let us now flesh out a modern understanding of the concept. To do so, let us review the three short definitions of sovereignty found in Chapter 1, before setting out and answering some of the more persistent questions regarding its nature, and concluding with an exploration of the main characteristics and roles of sovereignty today.

I. Revisiting the Definitions

In Chapter 1 we examined the following three brief definitions of sovereignty:

[Sovereignty is a] term used in much political and legal theory, sometimes at the cost of confusion, to characterize both (1) a modern nation-state and (2) a supreme legislature within a state. The sovereignty of a state is that area of conduct in which according to international law it is autonomous and not subject to legal control by other states or to the obligations of international law. On the other hand a legislature within a state is said to be sovereign if there are no legal limits on its legislative competence.

In general 'sovereignty' characterizes powers and privileges resting on customary law and independent of the particular consent of another state.

[Sovereignty denotes] the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law.1

Amongst other things, these definitions described sovereignty’s internal and external aspects—its role as the ultimate legal authority within a state, and its role of preventing the state from being subject to control or interference from external elements, respectively. The external, protective role of sovereignty is founded upon the reciprocal duty of all sovereigns not to interfere with one another’s internal affairs, often identified with the fundamental principle of ‘sovereign equality.’ The internal role is based upon, under the absolutist view, the sovereign’s possession of supreme power; under the contractarian view it is based upon the sovereign’s delegated competence.

An interesting element of each of these three definitions is the way in which they differ about the limitability of sovereignty by law. The first definition views sovereignty as unlimited by international law, and the latter two view it as limited, by either customary international law, or public international law generally. To explain the difference, we could characterise the former as a political understanding of sovereignty and the latter two as legal understandings of the concept (both seeing the concept as being an international legal construct). But we need not do so. Even in the first definition sovereignty’s ‘unlimited quality’ is characterised as such by international law; the area of conduct not subject to the obligations of international law is one “according to international law.” As a result it may be argued that all three definitions pre-suppose checks by international law, with the only difference between them being one of the extent of limitation imposed. This difference, however, highlights a major tension between absolutist and contractarian definitions of sovereignty. The former projects an unlimited and absolute sovereign, and the latter accepts a much more limited version. Both models continue to exert an influence upon modern understandings of sovereignty, which tend to rely upon either absolutist or contractarian understandings, or a combination of the two.

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2 This raises difficult issues about how we characterise something as ‘legal.’ Sovereignty could be argued to exist a priori and the reference in this quotation to its sphere of unrestricted power “according to international law” could be merely a shorthand to indicate that international law recognises, as contrasted to defines, certain areas as unlimited. But such distinctions are less troublesome if one recognises that even if sovereignty possesses a certain a priori character, that nevertheless sovereignty’s use of legal powers will legally constrain it. This constraint comes in two different ways. Firstly, the manner in which legally created and defined powers may be used is itself subject to legal regulation. If, for example, I wish to have police officers come to my property to remove a troublesome individual, I must allow those police officers to carry out their duties in the manner prescribed by law. If I demand that they act outside of the law, and for some reason they follow my wishes, then they will cease to be acting as police officers and I will no longer be availing myself of legal powers. In other words, the nature of the formal mechanisms of legal power may have a profound effect upon both what one can do as well as how one can do it. For a fascinating historical exposition of the way that form can determine substance, see F. W. Maitland, The Forms of Action at Common Law: A Course of Lectures, ed. A.H. Chaytor and W.J. Whittaker (Cambridge: Cambridge University Press, 1936). The second way in which sovereignty becomes constrained by a legal system, even if sovereignty somehow pre-dates that system, is simply through the simultaneous acceptance of the validity of that legal system and the sovereign legal system. Hans Kelsen, for example, in his Pure Theory of Law (2nd ed.), at pp. 328-29, points out that it is a logical contradiction to say that two legal orders can govern the same thing without contradiction unless they are unified. Once they are unified under a single normative order (encompassing sovereignty and international law), then it does not matter if sovereign states actually pre-dated international law, once inside that order the sovereign state is bound by its norms. As summarised by Kelsen, in ibid., at pp. 338-39:

It may be objected that the individual state cannot be conceived as an order delegated by international law, because historically the states—the national legal orders—preceeded the creation of general international law, which was established by custom prevalent among states. This objection, however, is based on the lack of differentiation between the historical relation of facts and the logical relation of norms. ... [T]he validity of the order of a single member state is based upon the constitution of the federal state, although the latter’s creation is later in time than the formerly independent states which only subsequently are gathered together in a federal state. Historical and normative-logical relations should not be confounded.
II. SOVEREIGNTY’S REAPPEARING QUESTIONS

Let us return to the four fundamental questions about the nature of sovereignty raised in Chapter 5, namely, those regarding its source, locus, scope and attributes.

A. SOURCE

When asking about the source of sovereignty two lines of enquiry arise, namely, questions about its origins (historical and present) and questions about its basis for validity. Questions about origins ask about the development of the concept of sovereignty (e.g., its important time periods and influential figures). Questions about validity ask about the concept’s theoretical underpinnings, about a ‘source’ in the sense of a theoretical foundation or justification for sovereignty. The historical origins of sovereignty are open to debate. Jean Bodin’s writings may be identified as setting out the earliest complete version of sovereignty but, as seen above, aspects of absolutism and contractarianism can be traced to earlier periods. Some identify multiple historical sources for sovereignty. Jens Bartelson, for example, focuses on three potential periods during which sovereignty may be said to have originated, namely, the late Middle Ages and the Italian Renaissance, the period following the Thirty Years War and the Treaty of Utrecht, and the ‘Modern’ period (after the late 18th Century). Hendrick Spruyt argues that the sovereign state emerged during the Capetian Dynasty in France (987-1328), eventually replacing earlier, competing models of organisation offered by such entities as the Holy Roman Empire, the Hanseatic League, and Italian city-states. Another common view is that sovereignty may be traced to the Peace of Westphalia of 1648, since the two Treaties establishing this peace recognised the existence of some three hundred territorially-based, legally distinct and equal entities. But even if the Peace of

If we start from international law as a valid legal order, then the concept of “state” cannot be defined without reference to international law.

3 Bodin, On Sovereignty.

4 Bartelson, A Genealogy of Sovereignty, pp. 85-6 (short discussion of each period), and chs. 4-6 (discussing each period in depth).

5 Spruyt, The Sovereign State and Its Competitors, chs. 3 (Holy Roman Empire), 5 (sovereign state), 6 (Hanseatic League), and 7 (Italian city-states).

Westphalia is often associated with the origins of the modern international system, it would be difficult to say that it conclusively represents the historical source of sovereignty.7 As argued by Alfred-Maurice de Zayas, "the Treaties of Münster and Osnabück did not create but merely sealed an existing state of affairs which, by being legalized, acquired new importance."8

Besides struggling with the exact moment of conception of the idea of sovereignty, questions related to its 'source' also ask us to ascertain its basis for validity. Because sovereignty is a form of authority, one permitting the exercise of coercive power, it requires some form of legitimation or justification. Questions related to the source of sovereignty in this sense ask why we should obey sovereign power. These questions, as we have seen, have been answered in different ways during different historical periods. In earlier periods absolutists argued that sovereignty derived its authority from God and thus associated it with Papal powers. Later absolutists identified the source as resting in the monarch, or more

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7 Malanuz, in Akehurst's Modern Introduction to International Law, 7th ed., at p. 11, describes the important impact of the Peace of Westphalia:

Within Europe the Peace of Westphalia ended the devastating religious wars between Catholic and Protestant countries and led to the recognition of Protestant powers and of the fact that the state is independent of the Church. Three hundred or so political entities, constituting the remains of the Holy Roman Empire, received the right to enter into alliances with foreign powers under certain restrictions. While Germany was divided into a number of comparatively small states, France, Sweden and the Netherlands were recognized as new big powers, and Switzerland and the Netherlands were accorded the position of neutral states. The Empire disintegrated and the decline of the power of the Church accelerated. As the Italian scholar Cassee notes with regard to the system set up by the Peace of Westphalia: 'by the same token it recorded the birth of an international system based on a plurality of independent states, recognizing no superior authority over them.' [Citations omitted.]

accurately, the institution of monarchy, which received sovereign powers and authority by means of the divine right of kings. Although technically the source remained the same (in the sense that legitimacy was still traceable to the divine), as a practical matter secular authorities began to trace it only as far as the king, thus moving authority from the Church to the state. For contractarians, on the other hand, the source of sovereignty has consistently rested in the people. Even if the locus of sovereign authority might shift, all powers exercised by the ruler are legitimated by the people by means of a social contract or agreement.

B. **LOCUS/(IN)DIVISIBILITY**

Questions regarding the “locus” of sovereignty attempt to ascertain the present, immediate location of final authority. For absolutists, sovereignty’s locus either would be in the Pope or the King, or in later versions, in the person or organ of government with the most power. For contractarians, for practical purposes the locus of sovereignty would be the King or ruler, even though in theory it should remain in the hands of the people. Although treated as a scientifically-ascertainable question today, the locus of the sovereign remains an inherently normative problem. This is seen in the two contradictory solutions posed to the question, namely, that of “unitary sovereignty” whose locus is in the one or the few, or ‘pluralist sovereignty’ whose locus is the entire community. I will discuss the problems of this dichotomy further in the following two Chapters. For the moment, however, notice that both solutions assume that the locus is fixed. This assumption may arise in large part because of the central role accorded to sovereignty in the definition of the state. If the locus of sovereignty is fluid, changing from the government to the people and vice versa, then sovereignty’s role in helping to define the state is eroded. We have seen this difficulty in relation to both the absolutist and contractarian conceptions of sovereignty in Chapter 5. If, as in the absolutist conceptions, the sovereign is the person or entity holding the most coercive power within a state, then it becomes difficult to ascertain the locus of sovereignty when power shifts between coalitions or leaders. For contractarians, on the other hand, the locus of sovereignty shifts back and forth between the people and the ruler, depending upon the latter’s adherence to, or breach of, the

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9 It is interesting to note in this regard that current international law still distinguishes between monarchies, in which “the monarch appears as the representative of the sovereignty of the state,” and republics, in which “the people itself, and not a single individual, appears as the representative of the sovereignty of the state”: Jennings and Watts, *Oppenheim’s International Law*, 9th ed., p. 1035. A president may represent the state (“at any rate the totality of its international relations”), but is “not a sovereign, but a citizen and a subject of the very state of which, as president, he is head.” *Ibid.*, p. 1036. This distinction may be relevant for modes of address in formal correspondence, but is otherwise of little importance. *Ibid.*


11 See, e.g., *ibid.*, pp. 26-8 (discussion of these two commonly-posited locations).

12 E.g., in *ibid.*, at p. 26, Bartelson comments that “the givenness of sovereignty implies that its locus must be treated as a constant rather than as a variable in international political theory”.

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social contract. Both theories fail to describe a model of sovereignty with a fixed, determinate locus.

Nevertheless the 'fixity' of sovereignty continues to influence modern theorists, who tend to conceive of it as both singular and indivisible. Bartelsson explains this assumption as follows:

What is more important, however, is what is taken for granted in the practice of identifying or defining the locus of sovereignty. Quite irrespective of whether sovereignty is held to be concentrated or dispersed in the social body, or turned into property of the state as a whole by means of abstraction, the entire locus problem rests on the assumption that sovereignty is one and indivisible within the political order.

Since Bodin, indivisibility has been integral to the concept of sovereignty. ... Whether thought to be upheld by an individual or a collective, or embodied in the state as a whole, sovereignty entails self-presence and self-sufficiency; that which is sovereign is immediately given to itself, conscious of itself and thus acting for itself. That is, as it figures in international political theory, sovereignty is not an attribute of something whose existence is prior to or independent of sovereignty; rather, it is the concept of sovereignty itself which supplies this indivisibility and unity. 13

As indicated in this passage, the indivisibility of sovereignty stems from absolutist understandings of the concept, which require a single supreme power. Such views are indirectly shared by contractarian models, which tend to delegate sovereign powers to one organ of government.

It is likely that sovereignty is conceived of as unified and fixed because of its domestic and international roles. Domestically, sovereignty creates a final authority within the state, and in order for this authority to be final it must be singular. Internationally, sovereignty requires the state to be seen as a discrete unit, in order for it to have the privileges associated with sovereign equality. If the state is viewed as having two sovereigns, or two supreme authorities, it becomes difficult for the international community to identify the appropriate sovereign with whom to relate. Again, this is illustrated by the modern absolutist view of sovereignty, which reveals the difficulties caused when one cannot ascertain the location of the most powerful individual or unit in a given territory. By being defined as unified, indivisible and self-sufficient, sovereignty is able to fulfil its pivotal role in conceptually underpinning both the state and international society.

But the supposition of a unitary locus of sovereignty is difficult to satisfy in practice. In many constitutional systems even though sovereignty may rest in a single organ, that organ is made up of a number of individuals, who will compete for power. Even dictatorships are based upon the tacit or explicit support of high ranking police and military officials, and thus the real

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13 Ibid., p. 28 (citations omitted).
controlling power may at times reside in an individual or group besides the dictator. Also, modern conceptions of statehood require us to disconnect sovereignty from any particular individual in order to preserve the continuity of the sovereign state. Because of this abstraction of the state from any particular ruler, the locus of sovereignty becomes diffused throughout the entire state, and thereby continues to be uncertain. In fact, Bartelson argues that sovereignty becomes so abstracted that its locus can no longer be ascertained:

[T]he question of locus becomes difficult to answer with reference to the present, since sovereignty floats free of location at the domestic level. It is the logical condition of an abstract state and the secret of its unity.\(^\text{14}\)

In other words, in order to conceive of a state independently of its individual ruler or government, questions regarding the locus of sovereignty must be displaced into the background. As further highlighted in the following two Chapters, both the unitary and pluralist theories prove problematic upon closer scrutiny, and the assumption of indivisibility is equally unstable. In Chapter 8 I will suggest that such problems may be overcome if we relinquish our need for an indivisible sovereign.

C. Scope

Questions regarding the scope of sovereignty are about the boundaries within which sovereign power may be exercised. Such questions today appear to be non-controversial, as the scope of sovereignty is often assumed to be identical to the territorial boundaries of the state:

In the standard solution to this problem, endlessly repeated or simply taken for granted in the discourse on international politics, sovereignty is taken to be a political or legal fact within an already given and demarcated territory, simultaneously signifying sovereignty over the same territory, and everything that happens to be inside this portion of space.\(^\text{15}\)

As will be argued later, however, this understanding of sovereignty’s scope is problematic because it does not recognise the ways in which the notion of scope has varied over time in conjunction with the development of the notion of boundary. Sovereignty’s scope has been continuously determined by what the sovereign could encompass through ownership, possession or control. In this way the phrase “territorial sovereignty” is in fact tautological: what constitutes ‘territory’ over which sovereignty can be exerted is itself defined by sovereignty, and sovereignty is usually deemed to exist only within some form of bounded territory. I will argue below that this tautology is caused by our confusing sovereignty with statehood. I will suggest, perhaps

\(^{14}\) Ibid.

\(^{15}\) Ibid., p. 29.
generally, that sovereignty may exist without a stable or permanent territory.\textsuperscript{16} Bounded territory may also exist without sovereignty, as indicated by the existence of such things as \textit{terra nullius}, \textit{res communis} and the "common heritage of mankind."\textsuperscript{17} As a result, even though for the most part sovereignty is associated with demarcated territory, the two may exist apart.\textsuperscript{18}

\section*{D. Attributes and Sovereign Powers}

\subsection*{1. Traditional Attributes}\textsuperscript{19}

There are various candidates for the basic attributes of, or powers exercisable as a result of, sovereignty. The difficulty is that these attributes have changed over time. Thus, for Jean Bodin, writing near the end of the 16th Century, law making was the most important "mark" of sovereignty, from which most others could be derived:

This same power of making and repealing law includes all the other rights and prerogatives of sovereignty, so that strictly speaking we can say that there is only this one prerogative of sovereignty, inasmuch as all the other rights are comprehended in it—such as declaring war or making peace; hearing appeals in last instance from the judgements of any magistrate; instituting and removing the highest officers; imposing taxes and aids on subjects or exempting them; granting pardons and dispensations against the rigor of the law; determining the name, value, and measure of the coinage; changing the limits of the territory; and the like.

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\item I will argue below that non-state forms of sovereignty did and can in fact exist. However such an assertion does not necessarily imply non-territorial sovereignty, in a strict sense. Nomadic forms of social organisation, for example, exert authority over sections of territory, even if these sections change from time to time. Nomadic authority in this sense is exercised over changing segments of territory, even if it can never be contained within fixed territorial boundaries per se. But cf. Bartelson, ibid., p. 41 (discussing the indissoluble nexus between statehood and territory in macrosociology, with the result that "[t]here seems to be no space for nomads in macrosociology, neither literally, nor metaphorically").
\item For present purposes, \textit{terra nullius} can be defined as juridically vacant territory, \textit{res communis} can be defined as shared territory belonging to none, with freedom of access, exploration and exploitation, and the "common heritage of mankind" can be defined as shared territory belonging to none, with \textit{restrictions} upon freedom of access, exploration and exploitation. See e.g., Shaw, \textit{International Law}, 4th ed., pp. 342-4 (\textit{terra nullius}), and 361-2 (common heritage of mankind contrasted with \textit{res communis}). Notice, however, that because all of these non-sovereign areas are presently bounded by sovereignty territories (i.e., they may be demarcated through juxtaposition with sovereign-held lands), it is difficult to establish a truly non-sovereign-bounded territory today.
\item Note that Schriever, in "The Changing Nature of State Sovereignty," at pp. 87-88, after examining several case studies, points out that the scope of sovereignty may be limited by international law as well as by the interdependent nature of the international community:
As to the scope of sovereignty, two of the case studies, the climate change treaties and the draft MAI [Multilateral Agreement on Investment], illustrate how new international law rules can lead to third parties intervening in the territory and/or jurisdiction of a State, while the Iraq case [Gulf War] shows that it is impossible in an interdependent world to limit the economic sovereignty of a single State by the use of enforcement measures without also adversely affecting other countries. Hence, the cases show that the unintended result can be that the sovereignty of a State can be significantly affected by international arrangements.
\item By "attributes" I mean to refer to the fundamental, observable qualities or characteristics of sovereignty. E.g., in the \textit{Oxford English Dictionary Online} the term is defined as: "4. A quality or character considered to belong to or be inherent in a person or thing; a characteristic quality." Brownlie, in \textit{Principles of Public International Law}, 5th ed., tends to use the word "incident" to refer to such qualities. "Incident" as used in this sense is defined in the \textit{Oxford English Dictionary Online} as: "2. Law. Attaching itself, as a privilege, burden, or custom, to an office, position, etc."
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requiring subjects and liege vassals to swear that they will be loyal without exception to the person to whom their oath is owed. These are the true prerogatives of sovereignty, which are included in the power to give law to all in general and to each in particular, and not to receive law from anyone but God.20

To take another example, in one of the two treaties establishing the Peace of Westphalia, the Treaty of Peace Between France and the Empire (Münster, October 24, 1648), certain aspects of sovereign power were given special attention, including the abilities to impose “Tolls, Customs ... foreign Certifications, Exactions, Detentions; ... Charges of Posts” and—for territories “water’d by Rivers or otherways”—“full Liberty of Commerce, a secure Passage by Sea and Land: and after this manner ... full power to go and come, to trade and return back.”21 Belonging to the sovereign under the terms of this Treaty were such things as “Vassals, Subjects, People, Towns, Boroughs, Castles, Houses, Fortresses, Woods, Coppices, Gold or Silver Mines, Minerals, Rivers, Brooks, Pastures” and “Monasteries, Abdys, Prelacys, Deaconrys, Knight-Fees, Commanderships, with all their Bayliwicks, Baronys, Castles, Fortresses, Countys, Barons, Nobles, Vassals, Men, Subjects, Rivers, Brooks, Forests, Woods, and all the Regales, Rights, Jurisdictions, Fiefs and Patronages, and all other things belonging to the Sovereign Right of Territory.”22

2. Modern Attributes

A modern list of sovereign attributes and powers differs significantly from these earlier lists. Perhaps the most important attributes, as foreshadowed above, are those directly related to territorial sovereignty.23 This is both because historically sovereignty was linked to ownership of property, and also because many of the powers associated with sovereignty require either territory or the resources that are available through territory.24 Today sovereign ownership of

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20 Bodin, On Sovereignty (1st ed. 1576), pp. 58-59 (citations omitted).
21 Treaty of Peace Between France and the Empire (1648), Arts. LIX and LX, respectively.
22 Ibid., Arts. LXXVI and LXXVIII, respectively.
23 See Malcolm N. Shaw, “Territory in International Law” (1982) 13 Neth. Yrbk. Int’l L. 61-91. See generally, Jennings and Watts, Oppenheim’s International Law, 9th ed., chs. 5-6, Brownlie, Principles of Public International Law, 5th ed., chs. 6-12, Shaw, International Law, 4th ed., ch. 9, Malanczuk, Akehurst’s Modern Introduction to International Law, 7th ed., chs. 12-13 [sea, air space]. Shaw, in International Law, ibid., at p. 331, notes that “sovereignty itself, with its retime of legal rights and duties, is founded upon the fact of territory.” Brownlie, in ibid., at p. 121, points out that “the materials of international law employ the term sovereignty to describe both the concept of title and the legal competence which flows from it. In the former sense the term ‘sovereignty’ explains (1) why the competence exists and what its fullest possible extent may be; (2) whether the claims may be enforced in respect of interference with the territorial aspects of that competence against a particular state.” See also, Fowler and Bunck, Law, Power, and the Sovereign State, pp. 24-31 (importance of territorial jurisdiction for sovereignty).
24 Brownlie, in ibid., at p. 126, identifies the historical associations of sovereignty with ‘ownership’:

In the Middle Ages the ideas of state and kingship prevalent in Europe tended to place the ruler in the position of a private owner, since feudal law, as the applicable ‘public law’, conferred ultimate title on
territory (using the term in its broadest sense) encompasses its land (including subsoil), internal waters, airspace, territorial sea, archipelagic waters and portions of international straits.

the ruler, and the legal doctrine of the day employed analogies of Roman private law in the sphere of property to describe the sovereign's power. The growth of absolutism in the sixteenth and seventeenth centuries confirmed the trend. A treaty ceding territory had the appearance of a sale of land by a private owner, and sales of territory did in fact occur.

See also, Shaw, "Territory in International Law," ibid., Jennings and Watts, ibid., pp. 678-9. D.P. O'Connell, in International Law, Vol. 1, 2nd ed. (London: Stevens and Sons, 1970), at p. 403, reveals the close nexus between sovereignty and territory in traditional international legal theory:

Since the exercise of sovereignty is predicated upon territory this latter is perhaps the fundamental concept of international law. [...] Territory is not the index of sovereignty, but neither can it be conceived of without sovereignty. [Citations omitted.]

In the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, 1986 I.C.J. Rep. 14, at p. 111 (para. 212), the Court summarises:

The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.

It should be noted that even if states have sovereignty over their airspace this sovereignty is subject to certain rights of other states (and their nationals): Jennings and Watts, Oppenheim's International Law, 9th ed., pp. 651-61 [describing the various international agreements dealing with airspace]. Sovereign airspace includes that over land territory, internal waters, the territorial sea, archipelagic waters, and that over the same waters when falling within international straits: United Nations Convention on the Law of the Sea (1982), Arts. 2(2) [territorial sea], 49(2) [archipelagic waters], 34(1) [status of airspace over straits unchanged]. The legal status of airspace over other regions of the seas remains substantially unaffected by the Convention: ibid., Arts. 34(1) [legal status of airspace over straits unchanged], 38 [aircraft entitled to right of transit passage through certain international straits], 53(3) [overflight available for archipelagic sea lanes passage], 58(1) [freedom of overflight over exclusive economic zone], 78(1) [airspace over continental shelf unchanged], 87(1)(b) [freedom of overflight over high seas], 135 [airspace over deep seabed Area unchanged]. It should be noted that there is no consensus about the exact point at which airspace ends and outer space begins, with suggestions ranging from 10 to 100 miles (the latter being the lowest altitude at which an object can practically orbit the earth): Jennings and Watts, supra, pp. 839-41.


1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Art. 2(3) makes clear that such sovereignty is subject to customary international law and the rules of the Convention itself, including for example, the right of innocent passage. The territorial sea may extend up to 12 nautical miles from the baseline of the coastal state: ibid., Art. 3. Arts. 5-16 describe the general rules for drawing baselines. Art. 245 provides that coastal states also “in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea.” See generally, ibid., Part II (Arts. 2-32) [rules applicable to the territorial sea].

Art. 2(1) of United Nations Convention on the Law of the Sea (1982), reproduced above, makes clear that sovereignty extends to archipelagic waters. However, this is subject to the same limitations from international law and the Convention: ibid., Art. 49. See generally, ibid., Part IV (Arts 46-54) [rules applicable to archipelagic waters]. The breadth of archipelagic waters is generally determined by “drawing straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago,” such baselines being up
Sovereign possession of these latter areas of the sea is subject to limitations imposed by the United Nations Convention on the Law of the Sea and other rules of international law. Sovereign rights and powers may also be exerted over other areas of the sea, including the contiguous zone, exclusive economic zone and continental shelf. Under the Law of the Sea Convention more generally, “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.” In rare cases, sovereign rights may even exist over another...

to 125 nautical miles long: ibid., Art. 47(1)-(2). See the text of Art. 47, however, for an exact description of the rules for archipelagic baseline delimitation.

Art. 34(1) of the Convention, ibid., dealing with the legal status of straits, provides that “[t]he regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.” Art. 34(2) subjects such sovereignty to limitations from international law and the Convention. See generally, ibid., Part III (Arts. 34-45) [rules applicable to straits].

For a general explanation of the law of the sea, see Churchill and Lowe, The Law of the Sea, 3rd ed.

Art. 33 of the United Nations Convention on the Law of the Sea (1982), merely allows coastal states to exert “control” to prevent and punish “infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea,” and does not mention sovereignty or sovereign rights per se. However, since this zone overlaps the exclusive economic zone, and the latter provides sovereign rights, it is arguable that coastal states have sovereign rights over the waters simultaneously existing in both zones. The contiguous zone may extend up to 24 nautical miles from the coastal state’s baselines: ibid., Art. 33(2).

In its exclusive economic zone the state has, inter alia, “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”: ibid., Art. 56(1)(a). Such sovereign rights are provided under the “specific legal regime” established by the Convention: ibid., Art. 55. The exclusive economic zone may extend up to 200 nautical miles from the baselines of the coastal state: ibid., Art. 57. See generally, ibid., Part V (Arts. 55-75) [exclusive economic zone], and the more specific rules of Part XII [protection and preservation of the marine environment] and Part XIII [marine scientific research].

The continental shelf regime recognises each state’s “sovereign rights for the purpose of exploring and exploiting its natural resources,” and such rights are “exclusive”: United Nations Convention on the Law of the Sea (1982), Art. 77(1)-(2) (emphasis added). The term ‘sovereignty’ was deliberately avoided because of fears that its use might lead to confusion about the status of superjacent waters, which are not part of the continental shelf regime. E.g., Brownlie, Principles of Public International Law, 5th ed., p. 215. Interestingly, Art. 77 does not contain a limitation similar to those found in the ‘parallel’ provisions related to territorial seas and archipelagic waters (i.e., one regarding the applicability of customary international law and the rules of the Convention). Perhaps this omission is related to the understanding of the continental shelf as a ‘natural prolongation’ of land territory. It was described thus by US President Harry S. Truman in 1945 when he stated, inter alia, that “the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it”: United States: Proclamation by the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, September 28, 1945 (1946) 40 A.J.I.L., Supp. 45-48, at p. 45. The ‘natural prolongation’ view must be treated with caution, however, in light of its treatment in the Continental Shelf Case (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. Rep. 13. In ibid., at pp. 34-41 (paras. 36-41), the Court rejected Libya’s argument that ‘natural prolongation’ was the sole determining factor regarding continental shelf delimitation. In any event, since delimitation generally is circumscribed by the rules of the United Nations Convention on the Law of the Sea (1982), the omission of references to international law and the Convention may not be that significant: ibid., Art. 76 [definition of the continental shelf]. See also, ibid., Art. 82 [requiring states to make payments and contributions with respect to the exploitation of their continental shelves beyond a 200 nautical mile limit]. See generally, ibid., Part VI (Arts. 76-85) [continental shelf regime].

ibid., Art. 193.
sovereign’s territory, such as in the case servitudes.34 Sovereign powers also may be exercised in another’s territory with the latter’s consent.35 Restricted use of non-state territory is also available to sovereign states, including areas such as the high seas, international airspace (i.e., over the high seas), outer space and the Antarctic region—although none of these areas is properly subject to sovereign control, per se.36 The deep seabed, for example, is specifically not

34 The existence of servitudes, properly speaking, is a matter of international legal controversy. See, e.g., Jennings and Watts, Oppenheim’s International Law, 9th ed., pp. 670-76, Brownlie, Principles of Public International Law, 5th ed., pp. 377-80. Brownlie, in ibid., at p. 378, in fact concludes that the “concept [of servitudes] is useless.” A servitude would create a right in rem, that is, a right that remains affixed to the property even after ownership is transferred from one sovereign to another. There are many examples of things like servitudes, but most of these would not survive a change of sovereignty. Thus, international leases of territory, such as that taken by the British over Hong Kong, do not amount to servitudes. The Case Concerning Right of Passage Over Indian Territory (Portugal v. India), Merits, 1960 I.C.J. Rep. 6, at p. 40, came close to acknowledging the existence of a servitude when it held that Portugal was entitled to a limited right of passage across Indian territory to access its enclaves of Dadra and Nagar-Aveli. However this right was held to exist as a matter of local customary international law. Being a local custom, between two particular states, it likely would not have survived a transfer of sovereignty. Since India invaded all of the territories a year later this point has become moot. In another case, The S.S. "Wimbledon" (UK, France, Italy and Japan v. Germany), 1923 P.C.I.J. Rep., Series A, No. 1, Germany challenged its obligation to allow all vessels through one of its internal waterways, the Kiel Canal, by arguing that the Treaty of Versailles created a servitude under international law. Since servitudes have to be restrictively interpreted, Germany argued that this meant that the S.S. Wimbledon had no right of passage through the canal. The Court, however, did not need to decide whether the Treaty had created a servitude or merely a binding treaty obligation. In the Court’s view even a binding treaty obligation had to be restrictively interpreted. Ibid., p. 24. Ironically, however, this conclusion did not assist Germany, since even under the strictest interpretation of the Treaty it was still required to allow the S.S. Wimbledon to sail through the canal. The Permanent Court of Arbitration, in the North Atlantic Coast Fisheries Case (UK and USA), 1910 R.I.A.A., Vol. XI, p. 173, at pp. 181-3, expressly refused to recognize the existence of a servitude in the relevant treaty between the two states. In ibid., at p. 182, the tribunal explains its refusal to recognize such a servitude, inter alia,

(d) Because the doctrine of international servitude in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the domini terrae were not fully sovereigns; they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the Courts of that Empire; their right being, moreover, rather of a civil than of a public nature, partaking more of the character of dominium than of imperium, and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi-sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern State, and particularly Great Britain, has never admitted partition of sovereignty, owing to the constitution of a modern State requiring essential sovereignty and independence;

(e) Because this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present International relations of Sovereign States, has found little, if any, support from modern publicists. It could therefore in the general interest of the Community of Nations, and of the Parties to this Treaty, be affirmed by this Tribunal only on the express evidence of an International contract;


35 For example, a refugee or exile government may be maintained in another state’s territory with its consent. Brownlie, in ibid., at p. 370, notes that in such cases “a considerable quantum of sovereign powers may be exercised by the exile government over the nationals, armed forces, and both public and private vessels in the host state and on the high seas.”

36 See generally, Churchill and Lowe, The Law of the Sea, 3rd ed., ch. 11 [high seas], Jennings and Watts, Oppenheim’s International Law, 9th ed., chs. 6 [high seas] and 7 [outer space], Brownlie, ibid., chs. 11 [high seas] and 12 [Antarctica, outer space], Shaw, International Law, 4th ed., chs. 10 [air law and space law] and 11 [law of the sea], Malanczuk, Akehurst’s Modern Introduction to International Law, 7th ed., ch. 13 [air space and outer
subject to state sovereignty according to the provisions of the *Law of the Sea Convention*.\(^{37}\) In the same manner outer space, the moon and other celestial bodies are excluded from sovereign ownership.\(^{38}\)

Territorial sovereignty encompasses ownership of both the land and the natural resources attached to it. Since 1962, if not earlier, it has been accepted that states have permanent sovereignty over their natural resources.\(^{39}\) This point has been reiterated in both the 1966

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1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

The deep seabed regime is governed by Part XI of the *Convention*, *ibid.*, and the subsequent *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (1994). The “Area” is defined under Art. 1 of the 1982 *Convention* as being made up of “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.” The 1994 *Agreement* does not modify the non-sovereign character of the Area. In its Preamble, *ibid.*, it reaffirms “that the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as ‘the Area’), as well as the resources of the Area, are the common heritage of mankind.”

38 E.g., Art. 2 of the *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (1967), provides: “Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” Art. 11(1)-(3) of the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (1979), provide:

1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 or this article.

2. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.

3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the moon or any areas thereof.

39 *Declaration on Permanent Sovereignty Over Natural Resources* (1962). Jennings and Watts, in *Oppenheim’s International Law*, 9th ed., at p. 922, n. 42, point out that this right was also highlighted a decade earlier: “As early as 1952 the General Assembly adopted the proposition that ‘the right of peoples freely to use and exploit their natural
wealth and resources is inherent in their sovereignty': Res 626 (VII).” See generally, ibid., pp. 922-4, Brownlie, Principles of Public International Law, 5th ed., pp. 542-44.

40 Charter of Economic Rights and Duties of States (1974), Art. 2(1). Arts. 1(2) and 25 of the International Covenant on Economic, Social, and Cultural Rights (1966), respectively, provide:

1(2). All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

25. Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

For a general discussion of the Charter, see Jennings and Watts, Oppenheim’s International Law, 9th ed., pp. 335-9; for a brief discussion of the Covenant see ibid., pp. 1012-13.

41 This is a large topic in the area of the international law of state responsibility. On state responsibility in general and the more specific topic of expropriation, see e.g., Shaw, International Law, 4th ed., ch. 14 (esp. pp. 573-84), Brownlie, Principles of Public International Law, 5th ed., chs. 21-24 (esp. pp. 533-55), Jennings and Watts, ibid., ch. 4, Malancksz, Akehurst’s Modern Introduction to International Law, 7th ed., chs. 15 and 17 (esp. pp. 235-40).

42 As explained by Jennings and Watts in ibid., at pp. 897-98: “The reception of aliens is a matter of discretion, and every state is, by reason of its territorial supremacy, competent to exclude aliens from the whole, or any part, of its territory” (citations omitted).

43 Nationality for natural persons is usually determined by the application of principles such as jus sanguinis and jus solum which, respectively, operate by means of descent (through “blood,” or parentage) and place of birth. Nationality also may be voluntarily acquired, through naturalisation, or involuntarily acquired (for example, upon marriage to a foreign national). A corporation is deemed to be a national of the state “under the laws of which it is incorporated and in whose territory it has its registered office”: Barcelona Tracton, Light and Power Company, Limited (Belgium v. Spain), Second Phase, 1970 I.C.J. Rep. 3, p. 42 (para. 70). Ships and aircraft are ‘nationals’ of their state of registration. Thus, Art. 91(1) of the United Nations Convention on the Law of the Sea (1982), provides in part that “Ships have the nationality of the State whose flag they are entitled to fly.” See generally, Jennings and Watts, Oppenheim’s International Law, 5th ed., pp. 656 [aerial nationality and registration], 731-2 [ships and aircraft and high seas] and 851-96 [nationality of natural and legal persons]. Brownlie, Principles of Public International Law, 5th ed., chs. 19 [relations of nationality] and 20 [nationality of corporations, ships, aircraft, space objects, etc.].
(coinage) continue to remain important. Beyond its territory the sovereign may assert prescriptive criminal jurisdiction on the basis of various international legal principles, including the objective territorial, nationality, passive personality, universality and protective principles. Enforcement of these latter bases of jurisdiction, however, may only be accomplished within the state's own territory or in areas not subject to another state's sovereignty, unless specific permission is given by another state. Even within its territory, however, the jurisdiction of the sovereign, although in principle absolute, is in practice limited by a variety of international legal obligations, from those related to human rights, to the minimum standards related to treatment of aliens, to the rules governing sovereign and diplomatic immunities.

Modern sovereignty also provides certain benefits for states outside of their own borders. For example, sovereign states may bring legal and diplomatic claims against states and other entities possessing international personality. In fact, before some international tribunals only "states" are entitled to present such claims (although notice that there is no further specification that such states must be "sovereign"). Sovereign states (alongside other entities with international personality), may enter into treaties and other international agreements. They may

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45 As De Lupis points out in International Law and the Independent State, at p. 6, international laws oblige a state to uphold the basic human rights of its own population:

Indeed, it is not only aliens who have such rights under international law; the state's own nationals also enjoy some basic human rights. The rule that a state can legislate 'as it pleases' for its own nationals—a view which is still held by many writers of today—cannot be reconciled with emerging rules on human rights. [Citations omitted.]

Chief Justice Marshall in the US Supreme Court case of The Schooner Exchange v. McFadden (1812) 7 Cranch 116 (U.S.S.C.), at p. 136, explains the basis of sovereign immunity:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Since sovereigns can voluntarily impose limitations upon their jurisdiction, sovereign immunities may exist for foreign sovereigns while in another state's territory (in The Schooner Exchange sovereign immunity was allowed for the ship in question). See generally, Malanczuk, ibid., chs. 14 [human rights], 17 [treatment of aliens], and 8 [sovereign and diplomatic immunity], Shaw, ibid., chs. 6-7 [human rights], 14 [state responsibility] and 13 [sovereign and diplomatic immunity], Brownlie, ibid., chs. 24 [treatment of aliens], 16 and 17 [sovereign and diplomatic immunities, respectively].

46 Art. 98 of the Charter of the United Nations provides that "[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice," however, Art. 34(1) of the Statute of the International Court of Justice states that "[o]nly states may be parties in cases before the Court," Organ of the United Nations, such as the General Assembly and Security Council, and Specialised Agencies of the UN may only ask the Court for advisory opinions. See Arts. 96 of the Charter and 65 of the Statute.

47 The Vienna Convention on the Law of Treaties (1969) only applies to treaties between states (Art. 1), but Art. 3 of the same Convention makes clear that other agreements may nonetheless have legal force. This is recognized, for example, in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (1986), which governs some of these non-state treaties.
also become members of regional and international organisations. Sovereign states are the main actors responsible for creating international law, either through custom, treaties, or the general principles that they recognise.

Finally, sovereignty entails certain important duties to other states and the broader international community. This point is made by Judge Huber in the Island of Palmas Case:

Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

These duties are consequences of international law and the principle of sovereign equality, and are supported by the fundamental notion of reciprocity that underpins international relations. They include such things as the duties of each state to respect the sovereign and diplomatic immunities of the organs and agents of foreign states, as well as more general duties owed to all states as a result of the law of state responsibility.

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48 Art. 4(1) of the Charter of the United Nations (1945) only allows states to be members: “Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” But note that some regional organisations allow non-sovereign states to be members. The dependent territory of Montserrat, for example, is a full member of both CARICOM and the OECS. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (2001), Art. 3 [Art. 2 of the original, 1973 CARICOM Treaty], Treaty Establishing the Organisation of Eastern Caribbean States (1981), Art. 2.

49 The principle sources of international law are custom and treaties. ‘General principles’ may be used to fill in gaps in the international law or to help resolve conflicts between primary rules. Judicial decisions (national and international) and scholarly writings are considered to be “subsidiary means for the determination of rules of law”: Art. 38(1) of the Statute of the International Court of Justice (1945). This article, although merely setting out a list of authorised sources for use by the International Court of Justice in its deliberations, is generally considered the starting point for describing the sources of international law. Recent scholarship is moving to recognise the ability of non-state actors, such as organs of international organisations or non-governmental organisations, to influence the development of international law. The topic of ‘sources’ of international law is immense. For an overview, see, e.g., Malanczuk, Akehurst’s Modern Introduction to International Law, 7th ed., ch. 3; see generally, Jennings and Watts, Oppenheim’s International Law, 9th ed., pp. 22-52, Brownlie, Principles of Public International Law, 5th ed., ch. 1, Shaw, International Law, 4th ed., ch. 3.


51 De Lupis, in International Law and the Independent State, at pp. 5-6, highlights the importance of both international law and reciprocity (when referring to the above passage from the Island of Palmas Case):

[As] international law regulates the behaviour between members of the society of nations there must necessarily exist some rules, based on reciprocity, which restrain the power of a state within its own territory in the interest of the community. A state cannot enjoy its exclusive and general rights within its own territory under international law without at the same time assuming corresponding obligations.

52 See generally the sources indicated in footnotes 41 and 45, above.
3. Changing Nature of Attributes

What may be noticeable, even from such a cursory examination of these 'traditional' and 'modern' lists, is how difficult a task it is to describe the core attributes of sovereignty at any given time period, let alone to set out a more general, 'transhistorical' or universal description. The attributes of sovereignty have changed dramatically over time as a result of various social, economic and technological developments. In fact, several sovereign powers have either diminished or been greatly circumscribed. In the 15th and 16th Centuries, for example, sovereign ownership was asserted over the high seas, in the same manner that one might own territory. Today, as mentioned above, the high seas are excluded from sovereign possession,

53 In fact it would seem clear that no such 'transhistorical' or universal list of sovereign attributes or powers could be achieved—unless one were to distil all such powers down to the two very general ones of law-making and law-enforcement within state territory.

54 Schrijver, in "The Changing Nature of State Sovereignty," comments at p. 70:

It is ... interesting to look at the rich variation of the qualifications of sovereignty in the form of adjectives that have been employed. Well over twenty can readily be found in the literature; of these 'territorial', 'internal', 'external', 'absolute', 'relative' and 'functional' appear to be the most important. Each of these epithets indicates certain qualifications which can differ by subject and historical period. This is also true of the theories of which these qualifications are usually a part. Sovereignty is thus a dynamic concept. It can have a different meaning in different historical periods although certain essential characteristics remain.

Inis L. Claude, Jr., in his "Forward" to Fowler and Bunck's Law, Power and the Sovereign State, at p. x, comments:

Among the most basic changes that occur [to the multistate system] are alterations in convictions about what follows from the possession of sovereign status. Hence, the definition of sovereignty—if that is taken to include the delineation of the implications of being a sovereign state—is a perpetually tentative undertaking; one can only cite the latest edition and anticipate the next revision.

See also Fowler and Bunck, ibid., pp. 73-80 (changing and divisible nature of sovereignty).

55 Note in this context that Schrijver, in ibid., at pp. 96-8, points out that there has been a shift from the view of sovereignty as being concerned primarily with rights and powers, to a more recent focus upon the many duties associated with sovereignty. In this way, even if sovereign rights themselves have not been greatly restricted, the increasing imposition of duties upon sovereign states will have a similar effect.

56 As early as the 15th Century, as illustrated below, claims were made for ownership of seas in the same manner as territory. This debate came to a head in the 17th Century with the publication of Grotius' Mare Liberum (1609), on the one hand, and Welwood's Abridgment of All Sea Lawes (1613) and Selden's Mare Clausum (1635), on the other. These works set out the two conflicting approaches of freedom of the seas and ownership over the seas, respectively. See Churchill and Lowe, The Law of the Sea, 3rd ed., pp. 3-5 and 71-2. In ibid., at p. 71, the authors also distinguish between 'rights of property (dominium) and rights of jurisdiction or control (imperium) in the sea,' with Grotius seeming to admit the existence of the latter. The current position favours the freedoms of the high seas. E.g., United Nations Convention on the Law of the Sea (1982), Arts. 86-90. An example of a claim to such ownership is found in a papal bull addressed to the Portuguese regarding ownership of western Africa: "Sanction of the Portuguese Monopoly of Navigation by Nicholas V in the Bull 'Romanus Pontifex' (1455), as reproduced in Greve, Fontes Historiae Iuris Gentium, vol. 1 (1995), pp. 642-46. In this bull the Pope states, at pp. 645 and 646, respectively:

And in order to confer a more effectual right and assurance we do by these presents forever give, grant, and appropriate to the aforesaid King Alfonso and his successors, kings of the said kingdoms, and to the infante, the provinces, islands, harbors, places and seas whatsoever, how many soever, and of what sort soever they shall be, that have already been acquired and that shall hereafter come to be acquired, and the right of conquest also from the capes of Bojador and of Naao aforesaid. [...]"

Moreover, we entreat in the Lord, and by the sprinkling of the blood of our Lord Jesus Christ, whom, as has been said, it concerneth, we exhort, and as they hope for the remission of their sins enjoin, and also by
even though all states have certain rights and freedoms over them.\(^57\) Looking again at Bodin’s list, it also may be noticed that law-making powers, even though remaining central to sovereignty, have been significantly limited by recent developments in international human rights law and the law of regional organisations (such as the EU).\(^58\) Also, as discussed at greater length in Chapter 2, above, the effects of globalisation and aspects of the international economy make sovereign decision-making a mere formality in some economic areas.\(^59\) The sovereign power to wage war still exists in fact but has been drastically limited in law by developments since end of the Second World War, most significantly through the development of customary and treaty-based prohibitions against use of force.\(^60\) Currencies too are no longer solely a ‘mark’ of sovereignty, as seen in the use of the United States dollar by several states in the Caribbean and the Americas, as well as more generally in the recently created Euro.

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57 United Nations Convention on the Law of the Sea (1982), Art. 89. See also the discussion in footnote 36, above.

58 This is a tricky point, since an argument could be made that any such ‘limitation’ is consensual because these international entities have been created by treaties between sovereign states. For arguments about customary human rights at international law (which would be binding without formal consent for new states), see, e.g., Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (Oxford: Clarendon Press, 1989). For analyses of the debates related to the status of the European Union, either as a constitutional structure or international organisation, see Gräine de Búrca, “The Institutional Development of the EU: A Constitutional Analysis,” and Deirdre Curtin and Ige Dekker, “The EU as a ‘Layered’ International Organization: Institutional Unity in Disguise,” both in The Evolution of EU Law, ed. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 1999), at pp. 55-81 and 83-136, respectively. See also the sources in footnote 45, above.

59 See generally, David Held, “Democracy and Globalization,” in Re-Imagining Political Community: Studies in Cosmopolitan Democracy, edited by Daniele Archibugi, David Held and Martin Köhler, 11-27 (Cambridge: Polity Press, 1998) [examining the inter-linked nature of global society and its impact upon real exercise of democracy by the state, and discussing, inter alia, the globalisation of the international economy].

In addition, while some sovereign attributes have decreased, others have significantly increased. Perhaps the most significant increases have occurred in the area of the law of the sea. In this area, as highlighted above, state ownership of, and ability to regulate, living and non-living resources has dramatically expanded as a result of the increases in the size of the territorial sea and the creation of the regimes of the continental shelf and exclusive economic zone. To put this in context, as late as 1958, when the Convention on the Territorial Sea and the Contiguous Zone came into being, states could not agree upon the acceptable limit of the territorial sea under international law. The customary position itself was subject to debate since it had evolved gradually, without much uniformity. The acceptable limits of each state's territorial sea progressed from the breadth of waters which it was capable of militarily defending from land—often described as the 'cannot shot rule' (terrae potestas finitur ubi finitur armorum vis), which defined the breadth of the territorial sea on the basis of the actual range of one's defensive armaments (literally the distance one could fire one's cannons)—to the more uniform position of a continuous belt of one marine league (three nautical miles). However even the latter position did not attract agreement for the 1958 Convention, and thus may never have achieved customary status.

At present sovereign possession of territorial seas has been extended from three to twelve miles, and sovereign rights and powers over an “exclusive economic zone” may extend up to two hundred nautical miles from the state's baselines. Due to such things as the


62 See, e.g., Brownlie, Principles of Public International Law, 5th ed., ch. 10 (continental shelf and EEZ); Jennings and Watts, Oppenheim's International Law, 9th ed., pp. 764-807 (continental shelf, fisheries and exclusive economic zones).

63 No article of the Convention on the Territorial Sea and the Contiguous Zone (1958) defines the breadth of the territorial sea and the Convention's drafting process reveals substantial disagreement in this area. Art. 6 of this Convention illustrates the irony of the lack of a precise definition of breadth, stating: “The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.” See generally, Churchill and Lowe, The Law of the Sea, 3rd ed., ch. 4 [includes historical developments], Jennings and Watts, ibid., pp. 611-13, Brownlie, ibid., pp. 185-6.

64 At an earlier stage the ‘cannon shot’ rule may have been interpreted so literally as to merely provide ownership of the ‘pockets’ of sea within the range of actual cannons. As explained by Churchill and Lowe, in ibid., at p. 77: “This 'cannon-shot' doctrine was probably not intended to support the establishment of a continuous belt of maritime territory along the whole coast, but rather to acknowledge the possibility of ‘pockets’ of control by actual cannon present at various places on shore, this being in accordance with Dutch and Mediterranean State practice of the day.” Contra: Jennings and Watts, ibid., p. 611: “It has always been accepted that the territorial sea is a continuous belt of even breadth as measured from the baseline.”

65 It is instructive to notice that neither Jennings and Watts, in ibid., at pp. 611-13, nor Brownlie, in Principles of Public International Law, 5th ed., at pp. 185-6, definitively assert that the 3-mile rule achieved customary status prior to the current 12-mile breadth.

66 The breadth of the exclusive economic zone is defined in Art. 57 of the United Nations Convention on the Law of the Sea (1982), as follows: “The exclusive economic zone shall not extend beyond 200 nautical miles from
acceptability of strait baseline delimitation methods, the increase in size of the territorial sea and the advent of the exclusive economic zone, the scope for sovereign ownership and control of areas of the sea has dramatically increased. Exclusive sovereignty over the continental shelf by default may extend to 200 nautical miles, and in certain geographic situations can extend up to 350 or more nautical miles from the coastal state's baselines. The significance of such changes is striking in light of the fact that previously waters falling outside of the territorial sea (i.e., beyond three nautical miles), were considered to be part of the high seas, and not subject to sovereign control.

Let us put these figures in context with some practical examples. For instance, the development of the law of the sea has meant that a tiny island state such as Barbados, which possesses land territory of 430 sq. km, could possess an additional territorial sea area of at least 505 sq. km if it claimed three nautical miles of territorial sea. Barbados thus could potentially possess a combined land and sea territorial area of roughly 935 sq. km, more than doubling its territorial size. If it claimed a 12 nautical mile territorial sea, Barbados' territorial sea area could

the baselines from which the breadth of the territorial sea is measured.” Several cases have established the customary international legal status of this zone. In the Continental Shelf Case (Tunisia v. Libyan Arab Jamahiriya), 1982 I.C.J. Rep. 18, at p. 74 (para. 100), the Court pronounced that “the concept of the exclusive economic zone ... may be regarded as part of modern international law.” In the Continental Shelf Case (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. Rep. 13, at p. 33 (para. 34), the Court stated that “the institution of the exclusive economic zone ... is shown by the practice of States to have become part of customary law.” In the « La Bretagne » Arbitration [Tribunal Arbitral Instituté par le Compromis du 23 Octobre 1985 Entre le Canada et la France: Differend Concernant le Filetage à l'Intérieur du Golfe du Saint-Laurent (Sentence du 17 Juillet 1986)Canada-France Arbitration on the Dispute Concerning Filleting within the Gulf of St. Lawrence (Award of July 17, 1986)], reprinted in French in (1986) 17 Revue Générale de Droit 831, at p. 860, the majority stated: « La troisième Conférence des Nations Unies sur le droit de la mer et la pratique suivie par les États en matière de pêches maritimes pendant le déroulement mème de cette conférence ont cristallisé et consacré une nouvelle règle internationale, selon laquelle, dans la zone économique exclusive, l'État côtier dispose de droits souverains aux fins de l'exploration et de l'exploitation, de la conservation et de la gestion des ressources naturelles. » [“The Third United Nations Conference on the Law of the Sea and the practice followed by States on the subject of sea fishing even while the Conference was in progress have crystallized and sanctioned a new international rule to the effect that in its exclusive economic zone a coastal State has sovereign rights in order to explore and exploit, preserve and manage natural resources.”] US President Ronald Reagan claimed a 200 nautical mile exclusive economic zone for the US in 1983 (even though the US was not a party to the 1982 Law of the Sea Convention): “US Proclamation of an EEZ” (March 10, 1983), (1983) 22 I.L.M. 461-65.

67 For calculations revealing the increase in size of territorial waters as a result of straight baseline delimitation methods (as opposed to simple low water mark delimitation methods), see: J.R.V. Prescott, The Maritime Boundaries of the World (London: Methuen, 1985), pp. 68-9.

68 Art. 76 of the United Nations Convention on the Law of the Sea (1982), sets out the complicated rules regarding delimitation of the continental shelf. Art. 76(1) establishes the default position. It allows a state to claim a 200-mile continental shelf, as measured from its baselines, even where the state's geographic features do not provide it with a continental shelf per se (i.e., “where the outer edge of the continental margin does not extend up to [the 200-mile] distance”). Art. 76(5) allows a state that has a continental margin extending beyond the 200-mile limit to claim additional continental shelf area, up to either 350 nautical miles from its baseline or up to “100 nautical miles from the 2,500 metre isolob, which is a line connecting the depth of 2,500 metres.” The latter rule could allow a state to claim areas of continental shelf beyond the 350-mile limit. However for most states the maximum continental shelf limit will not surpass the 350 nautical miles boundary: Art. 76(6), ibid.

69 Art. 24 of the Convention on the Territorial Sea and the Contiguous Zone (1958) allowed states to establish contiguous zones up to 12 miles from their baselines. Sovereign ownership did not vest over such waters however, as illustrated by Art. 1 of the Convention on the High Seas (1958), which states: “The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”
increase to at least 3,185 sq. km, giving it a new combined land and sea territorial area of 3,615 sq. km (an area over eight times the size of its original land territory and four times the size of combined land and sea territory). If it added a 200 nautical mile exclusive economic zone and a 200-mile continental shelf, the total sea and land area subject to some aspects of Barbadian sovereignty could amount to 458,672 sq. km (over one thousand times the size of its land territory alone). As this Barbadian example makes clear, numerous small island states will have dramatically increased the size of the territory subject to their sovereignty and sovereign powers as a result of changes in the law of the sea. Almost all sea-bordered states also will have increased the scope of their territorial sovereignty to a significant extent. These figures become even more interesting when we notice that out of the earth’s twenty smallest states, that sixteen (80%) are small island states. This means that changes in the law of the sea will have disproportionately increased the sovereign territorial area available to these small states. This point is illustrated by Figure 6.1, below.

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70 These figures are not exact by any means, as they use what may be described as a circular, single, isolated, non-archipelagic model of state territory. See footnote 73, below, for a full description of this model and its limitations. The Barbados calculations are based upon its land territory of 430 sq. km, from which a notional radius of 11.699 km was derived, i.e., using $\pi r^2 = 430$, or $r = \sqrt{\frac{430}{\pi}}$. To this radius were added the additional widths of each territorial sea claim (3 nautical miles = 5.556 km, and 12 nautical miles = 22.224 km, providing new radii of 17.255 km and 33.923 km, respectively). Using the combined land and sea radii I calculated new combined areas of 935.393 sq. km and 3615.31 sq. km, respectively. All of these steps could be expressed in the following formula: total area = ($\sqrt{(\text{land area}/\pi) + (\text{sea width})^2}$) x $\pi$. Subtracting the original land area from the new combined land and sea areas, I arrived at territorial sea areas of roughly 505 sq. km and 3185 sq. km, for the respective 3 and 12 nautical mile territorial seas. The land area measurement is taken from the Central Intelligence Agency’s World Factbook 2000. Barbados in fact claims a 12-mile territorial sea (from 1977) and a 200-mile exclusive economic zone (from 1978): Churchill and Lowe, Law of the Sea, 3rd ed., p. 464 (Appendix I).

71 Churchill and Lowe, in ibid., at p. 471, indicate that 136 states claim territorial seas with a width of 12 miles or more (121 of 12 miles breadth), and 102 states claim exclusive economic zones of various sizes (93 of 200 miles breadth) [statistics specified to be current to 1 January 1998].

72 Nineteen independent states were identified in Chapter 1 as having a territorial size of under 1,000 sq. km, and one as possessing 1001 sq. km of territory. The nineteen, with the size of their territorial area (including both land and internal waters), are as follows: Andorra, 468 sq. km; Antigua and Barbuda, 442 sq. km; Barbados, 430 sq. km; Dominica, 754 sq. km; Grenada, 340 sq. km; Kiribati, 717 sq. km; Liechtenstein, 160 sq. km; Maldives, 300 sq. km; Malta, 316 sq. km; Federated States of Micronesia, 702 sq. km; Monaco, 1.95 sq. km; Nauru, 21 sq. km; St. Kitts and Nevis, 261 sq. km; St. Lucia, 620 sq. km; St. Vincent and the Grenadines, 389 sq. km; San Marino, 60.5 sq. km; Seychelles, 455 sq. km; Tonga, 748 sq. km; Tuvalu, 26 sq. km. Sao Tome and Principe is just above the 1000 sq. km limit, possessing 1001 sq. km of territory. These statistics are taken from the Central Intelligence Agency (US), World Factbook 2000.
Figure 6.1: Potentially Disproportionate Territorial Gains for the Sixteen Smallest Island States When Claiming Three and Twelve Mile Territorial Seas, and Two Hundred Mile Exclusive Economic Zones

<table>
<thead>
<tr>
<th>State</th>
<th>Land Area</th>
<th>Total Territorial Area Including...</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>3-mile Territorial Sea</td>
</tr>
<tr>
<td>Antigua and Barbuda</td>
<td>442</td>
<td>953 [5.556 km]</td>
</tr>
<tr>
<td>Barbados</td>
<td>430</td>
<td>935 [5.556 km]</td>
</tr>
<tr>
<td>Dominica</td>
<td>754</td>
<td>1,392 [12.224 km]</td>
</tr>
<tr>
<td>Grenada</td>
<td>340</td>
<td>800 [3.556 km]</td>
</tr>
<tr>
<td>Kiribati</td>
<td>717</td>
<td>1,341 [3.556 km]</td>
</tr>
<tr>
<td>Maldives</td>
<td>300</td>
<td>738 [3.556 km]</td>
</tr>
<tr>
<td>Malta</td>
<td>316</td>
<td>763 [3.556 km]</td>
</tr>
<tr>
<td>Federated States of Micronesia</td>
<td>702</td>
<td>1,321 [3.556 km]</td>
</tr>
<tr>
<td>Nauru</td>
<td>21</td>
<td>208 [1370.4 km]</td>
</tr>
</tbody>
</table>

73 All areas are specified in square kilometres, with 1 nautical mile being converted to 1.852 kilometres for this purpose. A clear caveat must be issued about the figures presented in this table. They are only loosely connected with the reality of sea zone ownership and control for these states, since my calculations use a circular, single, isolated, non-archipelagic model of state territory. In other words, my calculations are based on a model that makes four assumptions that may not be matched by reality: (1) that each state is circular in shape (thus allowing us to provide minimum figures for sea areas), (2) that each state is made up of one land mass (several islands, each possessing its own territorial sea, contiguous zone, exclusive economic zone, etc., would significantly complicate the equation and attract a different sea area), (3) that this land mass is non-archipelagic (archipelagos allow more extensive sea claims), and (4) that each state exists in isolation (therefore removing the need to take into account the overlapping sea zones of neighbouring states, which would decrease the available territorial area). This fourth assumption is the one that will most affect Figure 6.1, as several of the states it describes are located in close proximity to other islands, thereby not allowing them to claim their maximum permissible sea areas (i.e., their full EEZs). J.R.V. Prescott graphically illustrates this situation in “Figure 14.1: Maritime Boundaries in the Gulf of Mexico and the Caribbean Sea,” in his text The Maritime Boundaries of the World (London: Methuen, 1985), at pp. 342-43. The statistics in Figure 6.1 were calculated in the following manner. From the known territorial area of each state is derived a notional radius—\( r = \sqrt{\text{area}/\pi} \)—to which is added the additional widths of each type of territorial sea or EEZ claim (3 nautical miles = 5.556 km, 12 nautical miles = 22.224 km, 200 nautical miles = 370.4 km). Then the new (combined) radius is used to produce the total land and sea area, i.e., \( \text{total area} = \left( \sqrt{\text{land area}/\pi} + \text{sea width} \right)^2 \times \pi \). I would like to thank Peter MacPherson for reminding me of the way in which such territorial calculations can be made. I would also like to thank Dean Mackie, both for explaining other methods of deriving territorial sea areas (using square and rounded rectangular models), and for confirming that the ‘circular’ model produces the most conservative figures for single-territory states. All errors related to application of the model, the expression of the formula, and the consequent calculations are the responsibility of the author.

74 The states listed in Figure 6.1 claim the following breadths of territorial seas and exclusive economic zones, respectively (date of claim in parentheses): Antigua and Barbuda, 12 (1982) and 200 (1982); Barbados, 12 (1977) and 200 (1978); Dominica, 12 (1981) and 200 (1981); Grenada, 12 (1975) and 200 (1978); Kiribati, 12 (1983) and 200 (1983); Maldives, 12 (1975) and 37-310 (Maldives has a polygonal EEZ which varies in size, 1976); Malta, 12 (1978) and 25 (exclusive fishing zone [EFZ], 1978); Federated States of Micronesia, 12 (1985) and 200 (1986); Nauru, 12 (1971) and 200 (EFZ, 1978; St. Kitts and Nevis, 12 (1984) and 200 (1984); St. Lucia, 12 (1984) and 200 (1984); St. Vincent and the Grenadines, 12 (1983) and 200 (1983); Sao Tome and Principe, 12 (1978) and 200 (1978); Seychelles, 12 (1977) and 200 (1977); Tonga, 12 (1978) and 200 (1978); Tuvalu, 12 (1983) and 200 (1983). Churchill and Lowe, The Law of the Sea, 3rd ed., pp. 463-72 (Appendix I). As seen in this list, two of these states claim exclusive fishing zones (EFZ), which are likely to provide more limited rights than an exclusive economic zone. See, e.g., ibid., pp. 284-5 [describing concept of exclusive fishing zone], and ch. 14 generally [laws applicable to fishing].

75 Note that the Maldives has an irregular EEZ (see the immediately preceding footnote), and so the figure produced here may diverge significantly from Maldives’ actual EEZ territorial area.

76 Malta has claimed a 25-mile exclusive fishing zone, which would yield a total territorial area of 9,968 sq. km.
As Figure 6.1 reveals, the smallest states—Nauru and Tuvalu—show potentially astonishing increases in the size of their combined land and sea area. By claiming a twelve mile territorial sea, for example, Nauru’s sovereign land and sea territory could become over ninety times the size of its original land territory; by claiming a two hundred mile exclusive economic zone it could exert sovereign powers over a territorial area nearly twenty one thousand times the size of its land. Tuvalu’s claim to a twelve mile territorial sea could yield an increase in the magnitude of seventy-six times the size of its original land territory, and its claim to a two hundred mile exclusive economic zone could yield nearly a seventeen thousand fold increase.

Such statistics, and the various changes in the attributes and powers associated with sovereignty mentioned earlier, show that these aspects of sovereignty are neither stable nor fixed. Rather, the attributes of sovereignty may vary significantly over time. In some areas sovereign powers have decreased, whereas in others they have increased. This means that a comprehensive list of sovereign attributes and powers is likely to be very difficult to create, if not impossible. In any event, because such a list would merely produce a ‘snapshot’ of sovereignty’s status at a particular moment, creating it would seem to be both unnecessary and unproductive. Having examined issues related to the source, locus, scope and attributes of sovereignty, let us now look at several of the roles played by sovereignty in international relations and law.

III. CHARACTERISTICS AND ROLES OF SOVEREIGNTY

A. INTERNATIONAL LEGAL STATUS

Perhaps the most important and easily identifiable role of sovereignty is that of being an *international legal status*. As such it provides a sovereign entity with access (at least formally, if not practically) to a significant bundle of powers, rights and responsibilities.77 As we have seen,
the precise content of this bundle changes and varies over time (a quality which, incidentally, preserves the relevance of sovereignty). Also no sovereign power, right or responsibility may be absolute or unlimited because each sovereign must respect the similar entitlements of other sovereigns. Such respect is formally required by the principle of sovereign equality and in most cases will be practically required by the realities of the international system (which generally does not accept substantial abuses of the sovereignty of one state by another). Sovereignty’s role as a general status also reveals why no single attribute of sovereignty can be substituted for the entire concept. Even though some writers, for example, have suggested replacing the concept of sovereignty with the term “independence,” such a substitution does not adequately address all of the aspects of sovereignty.

Sovereignty’s role as a status also reveals its descriptive and constitutive aspects. Sovereignty is ‘descriptive’ in the sense that we can use the term “sovereignty” as a short-cut to describe the basic bundle of powers and attributes usually possessed by a sovereign. These powers and attributes also may be possessed by non-sovereign entities, but by calling something “sovereign” we refer to a particular combination of them. But it may be said to be ‘constitutive’ of the attributes that may only be possessed by sovereigns. This point can be illustrated with the examples of two of the sovereign attributes mentioned above, namely, the abilities of the sovereign (1) to maintain a military and (2) to assert sovereign immunity from the jurisdiction of foreign national legal systems. Both of these attributes have been long associated with the concept of sovereignty, but only the latter is specific to it. Non-state actors such as narco-

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78 Fowler and Bunc, in ibid., at p. 157, summarise:

Because of its positive features, although certain outdated implications of sovereignty may well be cast aside, people are likely to continue to use the concept with great frequency, elasticity, and at times ambiguity. The term’s flexibility will help to ensure that sovereignty will remain alive and well. Indeed, one might say, the multiple uses of sovereignty over the ages attest to the concept’s procreative abilities.

79 This point is discussed at greater length in Chapter 7, below.

80 Force can be used lawfully at the international level by a limited number of entities, such as states, recognised belligerents and the UN Security Council acting under Chapter VII of the UN Charter. See e.g., Shaw, International Law, 4th ed., chs. 19-20.

Finally, sovereignty’s role as an international legal status not only creates or acknowledges attributes. It also \textbf{protects} them:

\begin{quote}
[The principle of sovereignty] protects the existence and the freedom of action of States, as limited by international law, in their international relations as well as with respect to their internal affairs. In particular, it protects their freedom of self-determination over their political, constitutional, and socio-
\end{quote}
economic systems and cultural identity, their territorial integrity and exclusive jurisdiction over their territory (land, maritime and air space), their personal jurisdiction over their citizens and juridical (legal) persons established under their jurisdiction as well as over matters with transfrontier connections which have reasonably close links with or effects upon the State's territory.86

The principles of sovereign equality and non-intervention combine to give sovereignty this protective role, as each sovereign is required to respect the status, powers and attributes of the other sovereigns, as well as is prohibited from interfering in their domestic affairs.87 Although in practice this protective function may be disregarded (and sometimes quite blatantly), it nonetheless retains a powerful hold on the international legal imagination. As discussed below, its power is at least partly derived from the strong, normative qualities of sovereignty.

B. Delimiter of the National and International

At a more abstract level sovereignty defines the nature of international discourse, and is the necessary condition for its existence. The meaning and content of sovereignty, although varying over time, have both helped to provide meaning for other foundational terms of international relations and international law, such as “statehood” and “international society.” What it means to be “sovereign” is at least partly dependent upon these other two terms, and the meanings of “statehood” and “international society” are each dependent upon sovereignty. Sovereignty, as highlighted by Jens Bartelson, lies in a “reflexive relationship to knowledge and political reality.”88 In fact, it can be argued that the terms “state,” “international society” and “sovereignty” are so intimately connected that each is largely meaningless when considered in isolation. To exist as a discrete entity, a state must be distinguishable from other entities; an international society requires several individual, identifiable components. Each concept needs to be demarcated from, yet requires, the other. Sovereignty fills this role, by both drawing the line between the state and international society, and yet simultaneously linking the two. As highlighted by Bartelson, sovereignty constitutes both spheres:

[A]s an essential step in the structurationist endeavour to split the ontological difference between the state and the international system, sovereignty is taken to be constitutive of both spheres, hovering somewhere between them, but residing in neither. Turned into the most basic constitutive rule of modern politics, sovereignty now carries the double burden of constituting two realms of politics simultaneously.89

87 E.g., Brownlie, Principles of Public International Law, 5th ed., p. 293.
88 Bartelson, A Genealogy of Sovereignty, p. 3.
89 Ibid., p. 46.
Sovereignty is therefore “both empirical and transcendental; it tells us how to differentiate between different domains of study, while at the same time being the condition of possibility of these domains.”

1. As Parergon

Such a dual role of sovereignty can be further explained with the Kantian aesthetic term “parergon.”91 This term is used to describe the role played by a frame or ornament in relation to a work of art and its background:

[A] frame, a line of demarcation, an ontological divide, or a geographical or chronological boundary all assert and manifest class membership of phenomena, but the frame or line itself cannot be a member of either class. It is neither inside, nor outside, yet it is the condition of both. A parergon does not exist in the same sense as that which it helps to constitute; there is a ceaseless activity of framing, but the frame itself is never present, since it is itself unframed.92

Sovereignty, like a parergon, separates and helps define the two categories of statehood and international society. Yet it is itself “not amenable to empirical political research.”93 Even while providing the dividing line between the international and domestic, the meaning of sovereignty remains elusive.94 But sovereignty plays such role at a cost: in doing so it tends towards theoretical instability.95

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90 Bartelson, ibid., pp. 50-51. At the first of these pages, Bartelson describes this link between sovereignty and political knowledge:

As soon as a field of knowledge is to be demarcated, conceptual oppositions are there to do the job by marking off what is present and foundational from what is supplementary or derivative; it is in this role that the concept of sovereignty becomes crucial both to the organization of political reality and to the organization of knowledge of this reality.

Central yet ambiguous, the concept of sovereignty not only assures a continuity between inside and outside, but a simultaneous continuity between knowledge and reality.

91 Bartelson uses this concept in his work A Genealogy of Sovereignty.


93 Bartelson, ibid., p. 52.

94 Bartelson, ibid., at p. 52, summarises:

[The discourse on sovereignty functions according to the same logic as the parergon, but what is constituted as inside and outside respectively, varies dramatically throughout the history of political ideas, and does so in strict interdependence with changes in knowledge. As I shall attempt to show, the juxtaposition of domestic and international as we know it today is a fairly recent and essentially modern construct, following from a specific parergonal function attributed to the concept of sovereignty by a likewise specific arrangement of modern knowledge.

95 As Bartelson, ibid., at p. 48, explains: “Sovereignty ends up being dialectically foundational both to the existence of a domestic inside and an international outside, and yet [is] itself unfounded; it is the condition of the possibility of itself.” This leads him to later conclude that “sovereignty has no essence” and that answers to questions regarding the source, locus and scope of sovereignty are “both ontologically unstable and sometimes also ideologically saturated.” Ibid., pp. 48 and 49, respectively. See generally, ibid., pp. 49-52.
C. ASPIRATIONAL QUALITIES

Sovereignty is aspirational in three different ways. Firstly, in the simplest sense it is an object of hope and desire for non-sovereign entities. National self-determination movements, for example, commonly aspire to sovereign statehood. Secondly, it is aspirational in the sense of articulating a common, transhistorical human desire, in the same manner as self-determination. Thirdly, it is aspirational in the more complex sense of simply being unattainable in any real manner. We see this in both the absolutist and contractarian versions of sovereignty. Absolutist conceptions of sovereignty are implausible for a variety of reasons, but perhaps their greatest weakness is found in the fundamental tensions between their internal and external descriptions of sovereignty. Internal sovereignty, it will be remembered, is identified with supreme power in the absolutist model. The absolute sovereign must be untrammelled in its domestic sphere, and can exert any level of force to protect and maintain its supreme status. Internationally, however, the absolutist sovereign is restricted in its dealings with other sovereigns, being unable to conquer them or interfere in their internal affairs. As a result, the absolutist model embraces an inherent contradiction. Absolute sovereignty exists internally; but only bounded or restricted sovereignty exists externally. This conflict is insoluble in theory and practice. As a theoretical matter, something cannot be “absolute” and “restricted” at the same time. As a practical matter absolute power simply cannot exist. Even working within the rigid parameters of the absolutist model, absolute power cannot exist domestically because the ‘domestic’ cannot be isolated from the ‘international.’ As explored in Chapter 2, above, the international processes of globalisation significantly impact upon several important features of statehood, including each state’s ability to control its economy, environment, culture, politics and even military affairs. Absolutist sovereignty therefore remains unobtainable because of this inherent tension between the internal and the international. Its ideal of self-sufficiency can only be aspirational, not realisable.

The contractarian model reveals similar difficulties because the social contract that serves to delegate power from the individual to the sovereign only exists at the domestic level.

96 Fowler and Bunck, in Law, Power, and the Sovereign State, at p. 16, illustrate my point by explaining that communities seek sovereign status because “[a]n entity that has achieved sovereign status is thought to be entitled to a substantial degree of deference from other sovereigns.” See also, ibid., p. 17 (discussing sovereignty as a goal for self-determination movements).


The aspirations that lie behind the concepts of both ‘sovereignty’ and ‘self-determination’ are so powerful, the concepts themselves so general, the claims made in the name of the concepts so fundamental and the historical fragments of meaning circulating through the concepts so diverse that any rendering of these ideas in terms of limited meaning is, virtually by definition, suppressive of deeply felt (and deeply felt to be legitimate) aspirations for freedom, equality and community. ‘Sovereignty’ and ‘self-determination’ (not unlike ‘human rights’) are the kind of all-encompassing, near totalizing conceptual rubrics that seek to explain and justify human existence itself. [Citations omitted.]
Individuals within all but the largest and most powerful states simply cannot have a
determinative effect upon international matters. The citizens of Belgium, for example, no matter
how boundless their enthusiasm for pacifism, simply will not be able to prevent wars from
occurring elsewhere around the globe. Nor will they be able to have a significant impact upon
many fundamental matters that affect their own lives—such as the international economy or
global environment. No option of contractarian ‘revolution’ will allow such individuals to ‘re-
possess’ these aspects of their sovereignty at the international level. Also, no ‘international
sovereign’ exists to help them, as no social contract has been, or is likely to be created, that will
unify the peoples of the globe. Contractarian sovereignty thus remains aspirational in the sense
that its model can never fulfil the ‘internal’ demands of those bound together by the social
contract in light of the contract-less nature of the international sphere.

D. NORMATIVITY

Finally, the concept of sovereignty plays several normative roles.98 The topic of legal
norms and normativity is too immense for any comprehensive coverage here, being linked to
more general understandings of the nature of legal obligation, of law and legal systems as a
whole.99 For present purposes, let me briefly highlight aspects Hans Kelsen’s work on the
concept of the ‘norm,’ as this will aid in our understanding of its relation to sovereignty.100

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98 E.g., Steinberger, “Sovereignty,” at p. 414, speaks about the “historical as well as the normative meaning
and practical importance of the concept of sovereignty in the modern international society of States.”

99 “Normative” is defined in the Oxford English Dictionary Online as: “1. a. Establishing or setting up a
norm or standard; deriving from, expressing, or implying a general standard, norm, or ideal.” The related
definition of “norm,” in ibid., is “1. a. A standard, model, pattern, type. (Common since c 1855.)” “Norm” is
defined at greater length in the Encyclopedia Britannica Online, as available at
http://search.eb.com/bol/topic?eu=57542&sctn=l (accessed 14 June 2001), as follows:

Norm - also called SOCIAL NORM, rule or standard of behaviour shared by members of a social
group. Norms may be internalized—i.e., incorporated within the individual so that there is conformity
without external rewards or punishments, or they may be enforced by positive or negative sanctions from
without. The social unit sharing particular norms may be small (e.g., a clique of friends) or may include
all adult members of a society. Norms are more specific than values or ideals: honesty is a general value,
but the rules defining what is honest behaviour in a particular situation are norms.

There are two schools of thought regarding why people conform to norms. The functionalist school of
sociology maintains that norms reflect a consensus, a common value system developed through
socialization, the process by which an individual learns the culture of his group. Norms contribute to the
functioning of the social system and are said to develop to meet certain assumed “needs” of the system.
The conflict school holds that norms are a mechanism for dealing with recurring social problems. The
Marxian variety of conflict theory states that norms reflect the power of one section of a society over the
other sections and that coercion and sanctions maintain these rules. Norms are thought to originate as a
means by which one class or caste dominates or exploits others. Neither school adequately explains
differences between and within societies.

100 Hans Kelsen envisaged law as being a hierarchy of norms, with each lower order norm being validated by
a higher order norm, leading eventually to a single, ultimate norm (the Grundnorm). See generally, Hans Kelsen,
Introduction to the Problems of Legal Theory [translation of the 1st ed. of the Pure Theory of Law (Reine
Rechtslehre, 1934)], idem., General Theory of Law and State (1st ed. 1945), and idem., Pure Theory of Law (Reine
1986). Note, however, that Kelsen’s theory ultimately rejects [absolutist] sovereignty as an organising principle:
However in doing so I must sound a clear note of caution, since Kelsen takes great pains in his work to critically denigrate and at points dismiss the legal relevance of the concept of sovereignty. In his General Theory of Law and State, for example, he asserts that “under international law, the States are not sovereign, or, what amounts to the same thing, the international legal order, by determining the sphere and the reason of validity of the national legal orders, forms, together with the latter, one universal order.” Kelsen sees a binary opposition as existing between sovereignty (linked to imperialistic tendencies) and international law (linked to pacifist tendencies), and rejects the former in preference for the latter. As a result, my use of Kelsen’s work in the present context may seem peculiar, to say the least.

Kelsen’s arguments, however, must be seen in the light of his broader rejection of dualist conceptions of the relation of international law and municipal law. More specifically, they must be seen in the context of his rejection of dualism in favour of a particular version of monism, one under which municipal law is subsumed within the broader normative order of international law. In making such an argument Kelsen’s particular target appears to be the

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Introduction to the Problems of Legal Theory, pp. 124-5 (§50(i)). Thus my use of Kelsen’s work in this section may be seen as inconsistent with his own project. See the following discussion.

101 Kelsen argued that sovereignty, at least in its traditional absolutist sense, was an ideological dogma that must be rejected by his Pure Theory. He summarises, in Introduction to the Problems of Legal Theory, at p. 124 (§50(i)): “The theoretical dissolution of the dogma of sovereignty, the principle instrument of imperialistic ideology directed against international law, is one of the most substantial achievements of the Pure Theory of Law.” See generally, ibid., pp. 111-125 (§50).


103 E.g., Kelsen, in Pure Theory of Law (2nd ed.), at p. 343, states: “Just as the primacy of international law plays a decisive role in the pacifist ideology, so the primacy of the national legal order, the sovereignty of the state, plays a decisive role in imperialist ideology. In both the ambiguity of the concept of sovereignty is an aiding and abetting factor.”


105 Kelsen’s attack on the dualist, absolutist conception of sovereignty is fixed on one of its central roles in international law, namely, as creating the fictional requirement of state consent for both the creation of international law and for the legal recognition of the existence of other states. Kelsen reveals the extremely problematic nature of such an approach, which does not allow for the existence of separate states or a system of international law, in Introduction to the Problems of Legal Theory, at pp. 111-25 (§50). He resolves such difficulties, in ibid., at p. 122 (§50(h)), by arguing that sovereign states are merely organs of the international community:

In the familiar personification, this legal system qua subsystem—the individual state—can be characterized as an organ of the international legal community. It is only as such that the individual state participates in creating international law.

In this way, as he explains in ibid., at p. 123 (§50(h)), states may legally relate to other states and are both empowered and circumscribed by international law:

The state qua organ of international law is simply a metaphor, standing for the state legal system that is linked to the international legal system and, mediated by the latter, to all other state legal systems, forging the chain of delegation whose structure was outlined above.

This chain of delegation establishes, in a thoroughly positive-law sense, the unity of the universal legal system. [References omitted.]
absolutist version of sovereignty. He does not dismiss all aspects of sovereignty, and in fact explicitly preserves the concept in his later writings. His description of the scope of competence retained by states under international law retains many of the non-absolutist aspects of sovereignty discussed in the present work. For example, after arguing that international law limits every state competence, even "the material sphere of validity of the state legal systems," Kelsen nonetheless concludes:

To be sure, the individual states remain—under international law, too—competent in principle to regulate everything, but they retain this competence only in so far as international law does not appropriate for itself an object to regulate, thus withdrawing the object from unconstrained regulation by the state legal system. If, then, one presumes international law as a supra-state legal system, the state legal system no longer has absolute sovereignty. It does have a claim to totality, however, subject only to the constraints of international law; that is to say, the state legal system is not limited at the outset by international law to [the regulation of] certain objects, which is the case with other legal systems or communities directly under international law, namely, those legal systems and communities constituted by treaty.

By using the term "chain of delegation" Kelsen is highlighting the way in which international law establishes a normative hierarchy which allows states (as links in that hierarchy), to legally regulate and control events within their own sphere. For example, in ibid., at pp. 121-22 (§50(g)), when writing about the principle of effectiveness (which allows "a government that comes to power by revolutionary means or a coup d'état ... to be regarded, in terms of international law, as legitimate if it is capable of securing continuous obedience to the norms it issues"), Kelsen explains:

When this principle of effectiveness, this basic principle of positive international law, is applied to state legal systems, it amounts to their authorization by international law. If establishing a norm-issuing power whose system is continuously effective for a certain area represents, in terms of positive law, the emergence of a lawmaking authority, it is because international law invests the authority with this property, which means that international law empowers the authority to make law. But with that, international law also determines the spatial and temporal sphere of validity of the state legal system formed thereby. The territory of the individual state, which is the spatial sphere of validity of the state legal system, extends—because of international law—as far as the legal system is effective. And international law guarantees this territorial sphere of validity by attaching its specific consequence (reprisal or war) to the unlawful act of an intrusion into the area under its protection. Separating the state legal systems from each other in their spheres of validity consists essentially—apart from certain exceptions—in permitting each state, on principle, to appear in its capacity as a coercive apparatus only within its own territory, that is, the territory guaranteed to it by international law. Or, speaking non-figuratively, such separation consists in the fact that the state legal system is to establish its own specific coercive acts only for the spatial sphere of validity granted to it by international law, and that only within this space can these coercive acts be brought about without violating international law.

106 See e.g., ibid., pp. 114-19 (§50(d)-(f)). See also the discussion of Kelsen's critiques of absolutism in Chapter 5, above.

107 Ibid, pp. 121-22 (§50(g)) (bracketed text in original, but emphasis added). Kelsen makes a similar statement in his Pure Theory of Law (2nd ed.), at p. 338:

Under the assumption of international law as a supranational legal order, the national legal order, then, has no longer an illimitable competence (Kompetenzhoheit). However, its competence is limitable only by international law but it is not restricted by international law from the first to definite subject matters. The national state, then, in its legal existence appears determined in all directions by international law, that is, as a legal order delegated by international law in its validity and sphere of validity. Only the international legal order, not the national legal order, is sovereign. If national legal orders or the legal communities constituted by them, i.e. the states, are denoted as "sovereign," this merely means that they are subject only to the international legal order.
In other words, states possess general sovereign competence subject to the rules of
international law. As a result, I would argue that Kelsen’s critique of sovereignty can be
narrowed to a critique of a particular absolutist variant of the theory, and is not aimed at other
variants that accept the legally-constructed and legally-regulated nature of sovereignty.108
This may be supported by a passage of Kelsen’s second edition of the Pure Theory of Law:

The sovereignty of the state—which is entirely excluded by the primacy of
international law—is something quite different from the so-called sovereignty
of the state restricted by international law. The former means: highest legal
authority; the latter: freedom of action for the state.109

In any event, by using particular aspects of this theory to help explain the concepts of
“norms” and “normativity,” I do not mean to embrace Kelsen’s Pure Theory in its entirety.
Let us turn to four normative aspects of sovereignty, namely, its (1) quality as a legal concept,
(2) which is located in a hierarchy of norms, (3) having an ‘objective’ compulsory quality,
and (4) which may be ‘subjectively,’ or ‘internally,’ accepted.

Sovereignty’s first normative quality arises simply from the way it is a legal concept.
The term “norm” here is used in its Kelsenian sense as the basic object of legal cognition.110 A

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108 This point is contentious because the general tone of Kelsen’s argument appears to be that sovereignty and
international law exist in binary opposition. This view is a consequence of his two monist visions of the relation of
international law and national law. One vision sees all law as emanating from the sovereign state (the solipsistic
view highlighted in Chapter 5, above), entailing a sovereign that is bound by neither domestic nor international
law. The opposing view sees all law as validated by international law, with sovereignty thereby being so
constrained by international law that it loses any title to [absolutist] sovereignty. See the passage from his General
Theory of Law and State reproduced in the text linked to footnote 102, above. However, Kelsen also appears to
acknowledge a third possibility, namely, a form of sovereignty that is limited by international law yet which
nonetheless can be labelled “sovereignty.” See the quotation in the text associated with footnote 109, below. I
would describe this latter version of sovereignty as one in which the sovereign is subject to international law, but
legally illimitable by another sovereign without its consent.

far the sovereignty of a sovereign state may be limited by the international law recognized by the state, can only be
answered on the basis of the content of international law, and cannot be deduced from the concept of sovereignty.
The [extent of] restriction of national sovereignty as the state’s freedom of action is not limited by positive
international law.”

110 Kelsen explains the normative nature of legal propositions in the context of distinguishing legal events
from factual events. Law is not reducible to factual events but brings with it an element of cognition. What makes
a factual event legal or illegal depends upon the application of a prior cognitive categorisation of such events, or in
other words, its normative quality. Kelsen explains this distinction in his Introduction to the Problems of Legal
Theory, at p. 10 (§4):

As elements of the system of nature, these [factual] events as such are not objects of specifically legal
cognition, and thus are not legal in character at all. What makes such an event a legal (or an illegal) act
is not its facticity, not its being natural, that is, governed by causal laws and included in the system of
nature. Rather, what makes such an event a legal act is its meaning, the objective sense that attaches to
the act. The specifically legal sense of the event in question, its own peculiarly legal meaning, comes by
way of a norm whose content refers to the event and confers legal meaning on it; the act can be
interpreted, then, according to this norm. The norm functions as a scheme of interpretation. The norm is
itself created by way of a legal act whose meaning comes, in turn, from another norm. That a material
fact is not murder but the carrying-out of a death penalty is a quality, imperceptible to the senses, that
first emerges by way of an act of intellect, namely, confrontation with the criminal code and with
criminal procedure.
norm is a particular form of ‘ought-statement’ which serves the role of connecting a factual event (the condition) with a legal consequence (e.g., a fine or imprisonment).111 “Ought,” in Kelsen’s usage, is disassociated from any moral meaning, and merely conveys a connection between an objectively determinable fact and its legal result. Norms are by their very nature legal, and law itself is simply a set of normative propositions. As Kelsen explains: “The thesis that only legal norms can be the object of legal cognition is a tautology, for the law—the sole object of legal cognition—is norm...”112 If sovereignty can be identified as a legal concept, then in this sense simply by being such it has a normative quality. It also may be normative in Kelsen’s more specific sense of the term as connecting a factual event with a legal consequence. The violation or infringement of any of sovereignty’s bundle of rights, obligations or powers entails a legal consequence. For example, the factual event of an invasion and attempted annexation of another state’s sovereign territory can entail such legal consequences as non-recognition by other states, invalidity of (the attempted) title, and the obligation to make reparation for harms caused.113

Secondly, and related to the first sense, sovereignty is normative because it is a legal concept fixed within a particular hierarchical normative order. In other words, since sovereignty is a legal concept it must fall within a larger legal order. For Kelsen, a legal system is a hierarchy of norms, each being validated by a higher order norm, with the apex of this hierarchy being occupied by the ‘basic norm’ or grundnorm, which validates the legal order as a whole.114

111 E.g., Kelsen, in ibid., at p. 34 (§16), in distinguishing his Pure Theory from simple ‘predictive’ views of law, explains: “Indeed, in stripping the positive law ‘ought’ of its character as a metaphysico-absolute value (leaving the ‘ought’ simply as the expression of the linking, in the reconstructed legal norm, of condition and consequence), the Pure Theory itself has cleared the way to the very viewpoint that yields insight into the ideological character of law” (emphasis added).

112 Ibid., p. 11 (§5, citations omitted).

113 See, e.g., the discussion of the Security Council’s reaction to Iraq’s attempted annexation of Kuwait, in Chapter 2 (dealing with the challenges to the state related to globalisation and international organisations).

114 E.g., Kelsen, Introduction to the Problems of Legal Theory, pp. 56-8 (§28-9). This view sees law as being made up of a chain of norms, with a basic norm at the apex. Using the example of a criminal norm, Kelsen explains, ibid., at p. 57 (§28):

Suppose one asks further why this individual [criminal] norm is valid, indeed, why it is valid as a component of a certain legal system. The answer is that this individual norm was issued in accordance with the criminal code. And if one asks about the basis of validity of the criminal code, one arrives at the state constitution, according to whose provisions the criminal code was enacted by the competent authorities in a constitutionally prescribed procedure.

If one goes on to ask about the basis of validity of the constitution, on which rest all statutes and the legal acts stemming from those statutes, one may come across an earlier constitution, and finally the first constitution, historically speaking, established by a single usurper or a council, however assembled. What is to be valid as norm is whatever the framers of the first constitution have expressed as their will—this is the basic presupposition of all cognition of the legal system resting on this constitution. ... [T]his is the schematic formulation of the basic norm of a legal system (a single-state legal system, which is our sole concern here).

basic norm is hypothetical, or presupposed, rather than actual, since it itself cannot be validated by any other legal norm.\(^{115}\) It is the “necessary presupposition of any positivistic interpretation of the legal material.”\(^{116}\) It is the “starting point of a norm-creating process,” rather than a general proposition from which all further norms could be deduced, in the manner that the law of negligence, say, might be deduced from the general proposition that one must “Love your neighbour.”\(^{117}\) Such a hierarchical system of norms capped by a basic norm is, according to Kelsen, the essence of every legal system. Interestingly, Kelsen also identifies the national level grundnorm as itself being validated by a kind of grundnorm at the international level, since in his view international and national laws fall within one unified legal system. In his earlier writings Kelsen identifies this international grundnorm as follows: “The basic norm of international law, then, and thus of state legal systems, too, whose powers are delegated to them by international law, must be a norm that establishes custom—the reciprocal behaviour of the states—as a law-creating material fact.”\(^{118}\) In his later writings Kelsen uses the principle of effectiveness to unite the two spheres of international and national law.\(^{119}\) He also more explicitly formulates the

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\(^{115}\) Kelsen, *Introduction to the Problems of Legal Theory*, at p. 58 (§29), states:

The Pure Theory of Law works with this basic norm as a hypothetical foundation. ... The basic norm is simply the expression of the necessary presupposition of every positivistic understanding of legal data. It is valid not as positive legal norm—since it is not created in a legal process, not issued or set—but as a presupposed condition of all lawmaking, indeed, of every process of the positive law.


\(^{117}\) Ibid., p. 114. The full passage, *ibid.*, reads:

The basic norm of a positive legal order is nothing but the fundamental rule according to which the various norms of the order are to be created. It qualifies a certain event as the initial event in the creation of the various legal norms. It is the starting point of a norm-creating process and, thus, has an entirely dynamic character. The particular norms of the legal order cannot be logically deduced from this basic norm, as can the norm “Help your neighbor when he needs your help” from the norm “Love your neighbor.” They are to be created by a special act of will, not concluded from a premise by an intellectual operation.

\(^{118}\) Kelsen, *Introduction to the Problems of Legal Theory*, p. 108 (§49(a)). In *ibid.*, at the same page (in §49(b)), Kelsen further explains that international laws have the same “norm” quality as national laws:

International law exhibits the same character as the law of individual states. Like the latter, it is a coercive system. And in the reconstructed legal norm of international law [i.e., as a ‘norm’ viewed in Kelsen’s sense of the word], as in the reconstructed legal norm of the state legal system, a material fact (regarded as harmful to the community) is linked with a coercive act, as condition with consequence. In international law, the specific consequences of an unlawful act are reprisal and war.

\(^{119}\) Kelsen, *General Theory of Law and State*, pp. 121-22. Kelsen explains that national legal orders contain the positive norm of effectiveness (“that a legal order must be efficacious [as a whole] in order to be valid”), which is itself a principle of international law. *Ibid.*, p. 121. As a result, if we conceive of international law as a legal order to which all national legal orders are subordinated, international law validates the basic norms of all national legal systems. Kelsen, in *ibid.*, at pp. 121-22, states:

It is this general principle of effectiveness, a positive norm of international law, which, applied to the concrete circumstances of an individual national legal order, provides the individual basic norm of this national legal order. Thus, the basic norms of the different national legal orders are themselves based on a general norm of the international legal order. ... Then the only true basic norm, a norm which is not created by a legal procedure but presupposed by juristic thinking, is the basic norm of international law.

See also, *ibid.*, pp. 366-68.
international legal *grundnorm*, stating that the "basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: 'The States ought to behave as they have customarily behaved."120 So at the apex of the legal hierarchy is the basic norm that the reciprocal behaviour of states creates legal custom, and this norm validates all lesser norms including the *grundnorms* of each national legal system. Kelsen is quick to point out, however, that the unity of national and international systems as envisaged in his Pure Theory is cognitive in nature rather than factually-based (as there is no world legal system or world state).121 Seen from this general perspective, the norm or norms that are encompassed by the term "sovereignty" also fall within the overall normative system of national and international law. Of more interest, as seen in the earlier discussion of sovereignty's *parergonal* role in international discourse, is the possibility that sovereignty may play a unique role in relating national and international levels of law. Sovereignty in fact may be located simultaneously in both legal orders (if they are related in a dualist manner), as it is embraced by both national and international legal systems.122 From a monist perspective, one which sees national and international laws as part of the same system, sovereignty still plays the *parergonal* role of framing and dividing each sub-topic, thereby helping to give form to both branches of a unified legal order.

Sovereignty is normative in a third sense in the way that it lends weight and formality to claims about international rights and duties. It does so both by making them into legal claims, as we have seen, and also by vesting them with an underlying moral purpose.123 This is the sense of 'normative' that Kelsen seeks to avoid with his theory, the sense in which a legal concept is connected with an absolute value in the same manner as morality.124 Kelsen understands this role, and he explains it clearly (before moving on to explicitly distinguish such a conception of norms from his own Pure Theory):

Indeed, if the law is viewed as norm, just as morality is, and if the meaning of the legal norm is expressed in an ‘ought’, just as that of the moral norm is, then something of the absolute value that is characteristic of morality does

120 Ibid., p. 369.

121 Kelsen, in *Introduction to the Problems of Legal Theory*, at p. 111 (§50(a)), surmises: “The only given is a cognitive unity of all law; that is, one can conceive of international law together with the state legal systems as a unified system of norms in exactly the same way as one is accustomed to regarding the state legal system as a unity.”

122 E.g., Steinberger, “Sovereignty,” at p. 414, speaks about sovereignty as itself being “embedded within the normative order of [international] law.”

123 Claims under the banner of “sovereignty” are often made for political purposes, with the term serving a rhetorical function. See, e.g., Fowler and Bunck, *Law, Power, and the Sovereign State*, pp. 20-24 (sovereignty and political rhetoric).

124 See, e.g., Kelsen, *Introduction to the Problems of Legal Theory*, pp. 35-6 (§17) [emphatically distinguishing his Pure Theory from “natural law ideology”].
attach to the concept of the legal norm and to the legal 'ought'. The judgment that something is legally regulated, that some [norm]-content is obligatory owing to the law, is never entirely free of the notion that for this to be so is good, right, and just. And in this sense, the conceptual characterization of the law as norm and as 'ought', offered by the positivist jurisprudence of the nineteenth century, does in fact retain a certain ideological element.\textsuperscript{125}

Sovereignty's normative status in this non-Kelsenian sense is tied to its absolutist, natural law origins. We see evidence of this role for sovereignty in the way that the term is used in political statements and legal argumentation. Rather than describe a legal right or obligation with exactness and precision before an international tribunal, for example, states make claims using the broader adjective "sovereign." For instance, a state will be more likely to make a claim alleging violation of its "territorial sovereignty" rather than describe the event with more specific wording, such as that alleging "an illegal entry (into State X)," or "non-innocent passage through the territorial sea (of State X)," or other such harm. Of course the use of such more general terminology may be due to a variety of factors, from strategic argumentative or rhetorical choices (i.e., alleging the general harm so as not to exclude the particular one, or using "sovereignty" as an emotive term for a national audience), to simple ignorance (the state's official not being familiar with a more specific international legal category). Also the effect of such phrasing may be negligible because the international tribunal used in the above example itself will have to ascertain the exact nature and extent of any substantive violation of a state's rights. Nevertheless, it is fascinating to observe the frequency with which representatives and leaders of states add the adjective "sovereign" to help bolster and add weight to their claims. In this sense sovereignty is normative because it is understood to carry with it a deeper sense of legal (and perhaps moral) obligation than other terms.

Finally, sovereignty is normative in what I will call its fourth, 'subjective' or 'internal' sense. This contrasts with the previous sense of normativity—which may be labelled as 'objective' because it focuses on the verifiable external manifestations of a practice, rather than upon actual beliefs about its content. To contrast the two, the term "sovereignty" when used in an objective normative sense can reflect purely strategic or instrumental purposes; however using the term "sovereignty" in its subjective normative sense involves an actual acceptance of, or belief in, the legitimacy of the claim. This latter normative quality is deeper because it combines an 'ought-statement' with personal, sociological values. Sovereignty's subjective normative sense may be more closely connected with natural law because it requires a kind of "justified

\textsuperscript{125} Ibid., pp. 22-23 (§11(a)) [bracketed term in original].
normativity.”126 Perhaps the best way of explaining this fourth, subjective normative sense of sovereignty is by using H.L.A. Hart’s ideas about the ‘internal point of view’ and ‘internal acceptance of rules’ analogously.127 These terms arise in Hart’s legal theory in the context of his criticism of formulations of the doctrine of sovereignty in Austinian terms of ‘habitual obedience.’128 A conception of law as being based upon mere habit, according to Hart, cannot explain such critical features of legal systems as the transfer of authority from one legislator to another, or the persistence of laws after the death of the responsible human law-maker.129 Hart also finds unconvincing a model of legal systems which envisages subjects as rendering habitual obedience to the sovereign, but the sovereign as rendering habitual obedience to no one.130 We have seen some of the ways in which the idea of a “legally unlimited and illimitable” sovereign is untenable in a previous Chapter.131 Hart’s response is interesting because he dismisses the simpler ‘habitual obedience’ model of law by appealing to a deeper understanding of law as social fact.132 This latter approach allows us to see that because law is tied to social practices, it requires an understanding of the view of those participating in such practices. Such an understanding is a hermeneutic one, “one which seeks to explain


One of the salient themes of hermeneutics is that description of distinctively human phenomena must involve understanding the situation described as it is apprehended by the agent whose behaviour is to be explained and understood. So it must make reference to the conceptual framework of the agent. The social phenomena whose structure is the concern of jurisprudence is paradigmatically normative. A central feature of Hartian analysis is that normative phenomena in general, and legal phenomena in particular can only be understood if reference is made to the attitudes of human beings towards their behaviour. If social behaviour is to be understood as normative then it must be grasped as being seen by at least some of its participants as conforming to, or deviating from, general standards of conduct. This ‘internal point of view’ is manifest in characteristic normative responses, in critical attitudes expressed in demands for conformity, criticism of deviation, acceptance of the legitimacy of criticism, and distinctive kinds of justification of action expressed in normative language.

128 Hart, in The Concept of Law, at p. 50, describes this “doctrine of sovereignty” as:

The doctrine asserts that in every human society, where there is law, there is ultimately to be found latent beneath the variety of political forms, in a democracy as much as in an absolute monarchy, this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one.

129 See ibid., pp. 51-66.

130 See ibid., pp. 66-78.

131 See Chapter 5, above. The phrase quoted is from Hart, The Concept of Law, at p. 51.

human actions, practices, etc. through an interpretation of the meaning they have for those who take part in the actions, practices etc.\textsuperscript{133} Because law is social fact, Hart explains,

if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an ‘internal’ aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record.\textsuperscript{134}

Using a chess game as an analogy, Hart explains that the internal aspect of law is a “reflective critical attitude” to a pattern of behaviour in which participants regard the behaviour as a standard for everyone, one meriting criticism and demands for conformity if breached by others, as well as allowing legitimate criticism and demands for conformity when breached by oneself.\textsuperscript{135} Neil MacCormick, a later commentator, has distinguished two components of this critically reflective attitude, namely, and element of cognition (“reflective”) and an element of volition or will which is not entirely “emotional” in nature (“critical”).\textsuperscript{136} This volitional element is the one I wish to highlight here, as it reveals an active form of acceptance by the participants in the practice.\textsuperscript{137} Sovereignty is ‘subjectively’ or ‘internally’ normative because participants in the practice regard sovereignty, and the claims made on the basis of sovereignty, as part of a communally accepted standard, one that merits criticism for breaches—both by others and themselves. This sense of sovereignty more deeply “normative” than the other senses since it actually conveys acceptance by the legal

\textsuperscript{133} Ibid., p. 29 (in footnote).
\textsuperscript{134} Hart, The Concept of Law, p. 56.
\textsuperscript{135} Ibid., pp. 56-7. At the latter page Hart distinguishes the internal aspect of rules from “feelings” or psychological compulsions of obedience, as follows:

But such feelings are neither necessary nor sufficient for the existence of ‘binding’ rules. There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion. What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’.

\textsuperscript{136} MacCormick, H.L.A. Hart, pp. 33-34.

\textsuperscript{137} MacCormick, in ibid., at p. 33, states: “The element of volition or will comprehends some wish or preference that the act, or abstention from acting, be done when the envisaged circumstances obtain.” In ibid., at p. 34, he adds: “[A] volitional element: a wish or will that the pattern be upheld, a preference for conforming to non-conforming conduct in relevant circumstances.” MacCormick uses these two elements, in ibid., at pp. 36-40, to distinguish three different aspects of rules: Hart’s ‘internal’ and ‘extreme external’ aspects, and MacCormick’s own ‘addition,’ a middle ‘external’ or ‘hermeneutic’ aspect. The ‘extreme external’ and ‘hermeneutic’ aspects are both concerned with someone who does not share the volitional element (although the latter still requires a full appreciation of it). Since neither of these latter two aspects raises the normative sense I wish to convey with respect to sovereignty, I will not explore them further here.
community. It incorporates human attitudes into an understanding of what is normative. I will return to this normative role of sovereignty in Chapter 8 when setting out a democratic conception of sovereignty because I believe that it creates a strong link between the two concepts. Both democracy and sovereignty are accepted in large part because they legitimate forms of power exercise and governance. As with the ‘internal acceptance of rules,’ both sovereignty and democracy require a critical reflective attitude, combining cognition and volition. Consequently, I will argue that the active and profound preference for democracy existing at present must have an equally profound impact upon our preferences regarding sovereignty.

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In sum, this Chapter has sketched the outlines of a modern theory of sovereignty, identifying various understandings of (and remaining difficulties related to) its source, locus, scope and attributes. It has examined several crucial roles played by sovereignty, including that of being an international legal status as well as that of being the dividing line between (or parergonal frame of) the national and international spheres. Finally, sovereignty is important because it has strong aspirational and normative roles. Let us turn to an examination of the relations of the three central concepts of sovereignty, statehood and democracy in the next Chapter, before attempting to sketch a ‘democratic conception’ of sovereignty in Chapter 8.

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138 E.g., MacCormick makes a similar point in ibid., at p. 25, when contrasting the approaches of Kelsen and Hart with respect to the idea of law as normative:

For Kelsen, as for Hart, law is intrinsically normative—it determines what ought to be done relatively to a certain form of social order, not what actually is done. As a follower of Kant, Kelsen takes this to mean that there is a separate category of human thought, the category of the ‘ought’, which is radically distinct from the ‘is’ and from that principle of causality which is presupposed in all our thought about natural processes. Hart disagrees. To understand the normativity of legal or moral or other social rules we need only reflect on human attitudes to human action. This we shall see [in later chapters]. Suffice it here to observe that in this respect Hart is a Humean where Kelsen is a Kantian. [Emphasis in original.]
This Chapter examines the relations between statehood, democracy and sovereignty. Each concept has been explored in previous Chapters in some depth. However, in the course of such explorations little attention was paid to the similarities and differences between the concepts, or the ways in which each might be related to the others. How are sovereignty and statehood related? How are democracy and sovereignty? Such questions are briefly addressed here, starting with an investigation of the relations of sovereignty and democracy, followed by those of democracy and statehood, and concluding with those of the most difficult pair of terms—sovereignty and statehood. Explaining the relations of the latter pair is more challenging because modern scholarship tends to gloss over any differences between them. In fact, many seem to identify sovereignty and statehood so closely that they could be considered as synonyms. A task of this Chapter is to distinguish them.

I. THE RELATIONS OF SOVEREIGNTY AND DEMOCRACY

Sovereignty and democracy are the easiest concepts to distinguish. Sovereignty is an international legal status, whereas democracy is a decision-making process (underpinned by substantive values). The two need not be related. Sovereign entities exist that are non-democratic; democratic entities exist that are not sovereign. But since the two terms are more often than not related in reality (with as we have seen, over two thirds of all sovereign states being either democratic or having restricted democratic practices), it is important to highlight several possible sources of tension related to their potentially contrasting views about the nature of authority. To use the terms employed in Chapter 6, tensions arise regarding their views about the source and locus of authority. Democratic forms of governance, particularly participatory ones, view the source and locus of authority as lying in the people. Legitimate power is traceable to the people (the source), and is exercisable by them by means of democratic decision-making processes (making them the locus). In contrast, under both the absolutist and

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1 The analysis of the relations of the three concepts of sovereignty, statehood and democracy in this Chapter may best be described as exegetical in nature, in the sense that it focuses upon relationships of meaning rather than relations of cause and effect. Max Weber's analysis takes this form, thereby allowing the study of current and simultaneous phenomena: Kronman, Max Weber, pp. 34-6.

2 See Chapter 3, the section entitled "The Dominance of Democracy," above.
contractarian models sovereignty moves away from the people. Under the absolutist model, the source of sovereignty is either God or the Monarchy and the locus either the Pope or King. Under the contractarian model the source of sovereignty is the people, but as a result of the social contract the locus shifts to the government. In such a manner, under both the absolutist and contractarian models sovereignty creates two classes of individuals: those wielding power and those subject to power. Sovereignty thereby potentially conflicts with the egalitarian impulses of democracy.

Tensions also may exist in terms of the differences in size of the respective units of democracy and sovereignty, as well as in the directions in which authority flows within each unit. Thus, “sovereignty” is often characterised as evoking ideas of statehood, descending power, and international relations based upon the will of state actors. “Democracy,” on the other hand, is often associated with smaller, sub-state constitutional orders, ascending power (i.e., periodic recall), and decision-making processes based upon equality and participation. If the two terms are viewed in such a manner, and become linked together in practice in a single state, then a dichotomy emerges between the sovereign state on the one hand, and the democratic populace on the other. Such a dichotomy is inherent in sovereignty if it is conceived of as indivisible (i.e., under the absolutist version) or where the locus of sovereignty is removed from the people (in both the absolutist and contractarian versions). This dichotomy creates more than an uneasy tension between the two terms. As highlighted by Jens Bartelson, the contrast between the two conceptions affects our understandings of the ‘domestic’ and the ‘international.’

This is because while sovereignty provides unity, democracy challenges unity, and the combination of the two threatens our ability to conceive of a unified state. We are torn between the discrete, sovereign state, on the one hand, and the multiplicity of democratic decision makers on the other. But if we cannot maintain the conceptual unity of the sovereign state, we also will be unable to conceive of the

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3 Bartelson, in *A Genealogy of Sovereignty*, at p. 29, explains:

[T]he self-presence of sovereignty is the prime source of the perennial tension between democracy and foreign policy. Rather than being the result of mere ideological inclinations, the ‘conservative’ bias in international political theory flows directly from its ontology; or more precisely, from the ontological incommensurability between external and internal sovereignty. To say that a state is internally sovereign is in the context of international political theory another way of saying that it is a unity, whose indivisibility hinges on the presence of a monopoly of legitimate violence, and which thus ideally speaks with one voice to its neighbours. To say that a state is internally democratic is in the context of classical political theory another way of saying that it is a divisible manifold, in which a plurality of voices should be listened to.

As a consequence, attempts to bridge this ontological gap are bound to be detrimental to the metaphysical unity of the state, and thus to the coherence of any empirical theory departing from it. Conversely, if we dare to approach this problem at the ontological core level, we shall find ourselves criticizing the inherited divide between the domestic and the international, and all that goes with it.
'international,' since the latter requires a collection of discrete units. Sovereignty and democracy, under such a view, are not only distinct, but are incompatible.

However, the accuracy of this dichotomous position may be challenged in two ways, namely, by questioning (1) the fictional unity of the state and (2) the fictional divide between the national and international. Firstly, because this position relies upon absolutist or contractarian visions of sovereignty—where either the source or locus of authority, or both, are removed from the people—it may be inapplicable to a vision of sovereignty in which the source and locus both remain with the people. If this latter vision is a democratic one, then the theoretical unity of the state inevitably will collapse as a result of the pressures of heterogeneous, democratic decision-making processes. The single ruler is transformed into the multiplicity of the demos. At the same time, however, a democratic vision of sovereignty still could allow us to hear a unified sovereign voice, since the democratic process is uniquely capable of yielding a single decision from a multiplicity of inputs. This unity will be recognisable as temporary, however, since it will only exist for a particular decision or set of decisions. As a result, we should face fewer temptations to theorise about unified and indivisible forms of sovereignty. Secondly, the ontological gap between sovereignty and democracy may disappear if the division between the national and international itself is weakened. As illustrated by our earlier analysis of the impact of globalisation upon the state (in Chapter 2), there are indications that this divide, if it ever truly existed, is fast crumbling. Recent studies, for example, indicate ways in which national factors can and do have an impact upon the international. We have seen evidence in Chapter 4, that democracies alone promote international peace. Such evidence is startling because it reveals that we cannot maintain a true division between the national and international spheres. The democratic nature of a state’s government will change its relations with other states. In addition, the presence of a great number of democratic states in the international community will tend to push non-democratic states towards democracy. As a result, democracy allows the national sphere to have an impact upon the international, and vice versa. Finally, I would argue that the theoretical clarity Bartelson achieves by juxtaposing unified sovereignty with pluralist democracy is illusory as a matter of fact. Democratic states are sovereign. Thus these two elements may be joined in a practical manner.

But Bartelson’s insights are important because they illustrate the ways in which unified and exclusive notions of sovereignty can be contradicted by counterclaims to authority from within a democratic population. Democracy therefore effectively challenges certain

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4 See the section describing the instrumental justification of democracy entitled “Legitimacy,” and the non-instrumental justification entitled “Normative Expectation of the International Community,” in Chapter 4, above.
II. THE RELATIONS OF DEMOCRACY AND STATEHOOD

Democracy and statehood need not be related, and could exist in tension. They need not be related because even though democratic statehood is nearly ubiquitous in practice, democratic processes can be used at almost any level, including sub-state and supra-state levels. Cities, municipalities and provinces may all be run democratically. The European Parliament is elected democratically and the General Assembly votes democratically (even if neither the European Union nor the United Nations is truly democratic overall).\(^5\)

_Procedurally_, therefore, democratic practices are compatible with, but need not be connected to, the state.

They have the potential to exist in substantive _tension_ because of what I will describe as the latent ‘imperializing’ tendency of democracy—its tendency to displace all incompatible institutional structures and decision-making processes. Such a tendency arises because, as we have seen in Chapter 4, democracy is a powerful human _good_, both at instrumental and intrinsic levels. As such, proponents of democracy naturally will seek to extend its reach to other areas of human existence, often promoting it _to the exclusion_ of other decision-making processes. The superiority of the democratic process may in fact lead its supporters to argue

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\(^5\) E.g., Marks, in _The Riddle of All Constitutions_, at p. 38, argues that a “democratic norm” at the level of international law would change notions of sovereignty:

The norm would also modify accepted notions of sovereignty. Instead of being tied solely to coercive power, sovereignty would become linked to political legitimacy, as it is in national contexts. In Fox’s words, ‘popular sovereignty’—sovereignty that resides with the citizens—would replace ‘state sovereignty’—sovereignty that resides with states, whether governed with the consent of citizens or not. [Citation omitted.]

\(^6\) Most decisions in the European Union are heavily influenced, if not dependent upon, the Council and the Commission, the former of which is made up of unelected representatives of states and the latter of independently appointed bureaucrats. See, e.g., T.C. Hartley, _The Foundations of European Community Law_, 4th ed. (Oxford: Oxford University Press, 1998), ch. 1. For analyses of issues of legitimacy and democracy in the European Union see David Beetham and Christopher Lord, _Legitimacy in the EU_ (London: Longman, 1998), and Paul Craig, “The Nature of the Community: Integration, Democracy and Legitimacy,” in _The Evolution of EU Law_, ed. P. Craig and G. de Búrca, 1-54 (Oxford: Oxford University Press, 1999). The non-binding character of General Assembly resolutions and the ever-present ability of the permanent members of the Security Council to veto any decision...
that democracy should be used for all public decisions, whether local, national, regional or international. This viewpoint underlies some of the writings in the ‘cosmopolitan democracy’ school, which have been very imaginative in proposing mechanisms for allowing democratic interaction at all levels. It also underlies John Hoffman’s eventual conclusion that democracy and statehood are incompatible. Hoffman argues this to be the case because democracy transcends the constraints of space and time, refusing to be pigeon-holed in any particular arrangement. Because it has this ‘unconstrained’ character, democracy can exist in a state of serious tension with the state. The latter, after all, is in part predicated upon constraint, since one of its roles is to claim a monopoly over legitimate force. In this way statehood and democracy have the potential to be contradictory, or even incompatible. If so, and if democracy is viewed by its advocates as the superior good, then it is easy to see how these same advocates may argue in favour of constraining, or even eradicating, the state. Such a position of ‘democratic supremacy,’ however, is problematic because it raises the same problems that we have seen arise from universal and uniform visions of democracy. Such visions are problematic because they discourage and perhaps even counteract some of the tolerant aspects of democracy. They also suppress the various possibilities that the institution of the state can encourage simply by allowing diverse political and social systems to exist. Statehood per se is not fundamentally connected to any specific political or institutional system and thus can provide the framework within which different societies can develop alternative forms of political decision making, or alternative institutional arrangements for democratic decision making. Since current conceptions of democracy are far from perfect, I have argued that such alternative possibilities must be encouraged and that democratic uniformity should be discouraged.

The imperializing tendencies of democracy also should be checked because those suggesting the replacement of the state with some form of global democratic system tend to rely exclusively upon what we have seen is the weaker form of democratic polity, namely, representative democracy. Representative democracy is the only form at present that can allow democratic processes in very large structures. At the global level the use of truly participatory forms of democratic decision-making would be difficult, to say the least. Modern internet and
telecommunications technology might alleviate some problems, but even then each individual would be required to dedicate a considerable amount of time to simply making political decisions.\(^{10}\) As a result, until we develop models of democratic decision making that will support face-to-face participatory democracy at global levels, abolishing the state in favour of some form of 'global democratic government' must entail the creation of a vast, unwieldy, 'representative' structure. A structure so vast, I might add, that it would be difficult to describe it as "representative," since individuals under such a structure would become even further alienated from power exercise. Global 'representatives,' after all, would have global constituencies, not local ones.

To counteract such difficulties scholars such as Robert Dahl have suggested an intermediate position, namely, that of selecting various "minipopulus"-type bodies to make democratic decisions at all levels.\(^{11}\) These bodies could be made up of representative samples of the various social groups within the given democratic unit (polis), and therefore bring a wider range of viewpoints into the decision-making process. They also could allow the kind of specialisation necessary for some kinds of decisions, since 'mini-populi' could be created for particular areas of decision making (i.e., one for environmental concerns, another for defence and strategic purposes, etc.). These bodies would not be truly participatory, however, as they still would involve representatives making decisions on behalf of a larger population. They also might fall prey to the same kinds of 'imperializing' tendencies suggested earlier, as they would allow the replacement of the normal organs of the state with various 'mini-populi,' thereby enabling democratic decisions to be made at all levels without the institutional structure of the state.

**A. Weberian Modernity, the Democratic State and Capitalism**

Perhaps the best way to avoid the Scylla of 'democratic imperialism' and the Charybdis of 'participatory reductionism' is to see the relationship of democracy and statehood as dialectical, with each checking certain tendencies of the other. This is where Max Weber's theory regarding the development of the modern state and its social forms can be of assistance. Let us pause and examine his theory because it helps to draw together several strands of this Chapter. Weber's analysis not only reveals the relations between

\(^{10}\) It will be recalled that referenda-type decision-making processes do not solve the problem because there is little, if any, element of participation. Participatory democracy is best able to yield flexibility and accumulate knowledge precisely because it provides the possibility of exchange and interaction that allows the 'give and take' necessary for mature, informed decision-making.

democracy and statehood; it also allows us to make further conjectures about the relations of both concepts with capitalism and sovereignty.

Weber’s argument that democracy and modern statehood can produce a kind of productive, dialectical tension, arises in a particular context, namely, in the context of his broader analysis of the problems of modernity. Weber diagnoses the problems of modernity as being those of bureaucratisation, rationality and specialisation. He prescribes democratic, capitalist statehood as the cure. Let us examine the nature of the ailment. According to Weber, bureaucratic problems arise because the modern state is legal-rational in form and therefore requires a high degree of specialisation and a complicated bureaucratic apparatus in order to administer its large territory and diverse resources. Bureaucratisation in turn encourages capitalism, due to the latter’s relative efficiency and predictability. All of this, however, comes at a cost. Bureaucratisation stultifies human creativity, innovation, and important anti-bureaucratic values such as leadership. In a more sinister manner, its rationality creates what Weber calls an ‘iron cage’—a trap of stifling, logically compelling routinization from which there is no escape. It prevents us from returning to the Renaissance ideal, where individuals had the possibility of achieving considerable breadth and did not need to become narrow specialists; such a humanist culture has been irretrievably lost by the bureaucratisation of the modern state.

The irony of modernity, which is not lost upon Weber, is that it is a problem of our own creation. We have constructed a rational world, where magic and divination are not required and all things can be mastered by our own rationality and calculation. Yet this very rationality brings with it an increased

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Weber’s deeply ambivalent attitude to legal domination and the rule-governed order of economy, politics and society which goes with it is very different from the enthusiasm of true believers in the libertarian catallaxy. Legal domination involves acceptance of rules because they are rules; not for their moral worth or political virtue. Thus the price of a thoroughly rational social order is a ‘disenchantment’ of the world in which routine replaces vision, in which what Weber calls an ‘iron cage’... envelops individuals who increasingly ‘need’ order and nothing but order, who become nervous and cowardly if for one moment this order wavers, and helpless if they are torn away from their total incorporation in it'....

13 Anthony Giddens, in Politics and Sociology in the Thought of Max Weber, at pp. 48-9, describes Weber’s pessimism about the ability of modern man to ‘escape from the cage’. Both conservatives and socialists shared the fallacy that we could return to a kind of ‘universal man’ of humanist culture, one not requiring the ‘fragmented specialisation’ of the capitalist division of labour. But, in Giddens’ words, “this culture is irretrievably destroyed by bureaucratisation.”

14 Kronman, in Max Weber, at p. 167, quotes Max Weber on the effects of the ‘intellectualist rationalization’ of the modern era:

"[It means that principally [in principle] there are no mysterious incalculable forces that come into play, but rather that one can, in principle, master all things by calculation. This means that the world is disenchanted. One need no longer have recourse to magical means in order to master or implore the spirits, as did the savage, for whom such mysterious powers existed. [Citing: Max Weber, “Science as a
specialisation and locks us into processes which, although human creations, have a logical inevitability which is impossible to escape.\footnote{Weber, in \textit{Social Writings}, pp. 75, for example, argues that bureaucracy is necessary for modern statehood:}

We know, for example, that we could understand the intricate workings of an automobile if we chose to. But most of us have neither the time or inclination to do so. Instead we depend upon an ever-increasing number of specialists to help us navigate a course through the difficulties of modernity. Worse, the legal-rationality of the bureaucratic state etches its dominance onto our very consciousness. The bureaucratic state is so difficult to challenge precisely because its rationality and efficiency make it self-sufficient and self-justifying.\footnote{Mommsen, in \textit{The Political and Social Theory of Max Weber}, at p. 114, comments that Weber evaluates bureaucracy “not only as a perfect instrument of administration and rule, but also as a potential threat to leadership and individual initiative and therefore as a danger to individual freedom.” Weber’s writing focuses heavily upon the difficulties associated with bureaucracy, at times suggesting that the process of bureaucratisation is irreversible.}

In order to check the smothering effect of bureaucratisation in the modern state, Weber advocates a kind of fruitful dialectic between democracy, bureaucracy and capitalism. \textit{Bureaucracy} is necessary because it provides the stable framework for capitalism and ordinary life in the large, modern state.\footnote{Weber, in \textit{Social Writings}, at p. 75, for example, argues that bureaucracy is necessary for modern statehood:}

But, as we have seen it is problematic because it is apt to discourage individual initiative and lead to ossification.\footnote{Weber, in \textit{Social Writings}, at p. 75, for example, argues that bureaucracy is necessary for modern statehood:} 

\textit{Capitalism} therefore becomes essential because it can challenge bureaucracy by encouraging innovation. Weber

\footnote{\textit{Ibid.}, p. 170.\}
\footnote{\textit{Roger Cotterrell, in Socioty of Law: An Introduction, 2nd ed. (London: Butterworths, 1992), explains at p. 156: Weber is quite explicit: under legal domination law is self-justifying. It requires no appeal to moral or political values for its legitimacy. Its own systematic logical structures provide its legitimacy. Law is accepted solely as a rational system of rules. [...] Thus, the autonomy of law takes on a sinister aspect. Law frees itself from the sources that could challenge its legitimacy. Its technical imperatives replace moral judgment. It provides the bars of the ‘iron cage’ in which life is turned into a routine of instrumental action; in which organisation means bureaucracy; in which values seem to cease to matter very much.\]
\footnote{Weber’s views about the increasing bureaucratisation of modern society are complex. In his \textit{Social Writings}, at p. 75, for example, argues that bureaucracy is necessary for modern statehood:}

\textit{It is clearly evident that the longer the large modern state endures, the more likely it is technically to absolutely require a bureaucratic basis. In similar fashion, the larger the state is, and, above all, the more it is regarded as a superpower, the more indispensable the bureaucratic basis becomes.\]
\footnote{And in \textit{ibid.}, at pp. 77-8, he goes on to argue that the systems of legal-bureaucratic rule are the most advanced ones available for governance of a modern, mass society:

\textit{The decisive reason for the development of bureaucratic organization has always been its purely technical superiority to every other form. A fully developed bureaucratic apparatus compares to other forms as do mechanical to non-mechanical modes of production. Precision, speed, clarity, accessibility of files, continuity, discretion, unity, strict subordination, avoidance of friction and material and personal expenses—all these attain an optimal level under bureaucratic, and especially monocratic forms of administration and by means of trained, individual officials compared to collegial or honorary and avocational forms of administration. Insofar as complicated duties are involved, paid bureaucratic work is not only more precise, but, in end effect, often even less expensive than is the formally unremunerated honorary position.}\]

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\footnote{Mommsen, in \textit{The Political and Social Theory of Max Weber}, at p. 114, comments that Weber evaluates bureaucracy “not only as a perfect instrument of administration and rule, but also as a potential threat to leadership and individual initiative and therefore as a danger to individual freedom.” Weber’s writing focuses heavily upon the difficulties associated with bureaucracy, at times suggesting that the process of bureaucratisation is irreversible.\]}
recognises capitalism as the best, and in fact only, economic system for rationalising economic activities on a purely formal basis. However at the same time he is fully aware of its dehumanising tendencies. In his writings Weber did not in fact advocate the formal rational, pure type of market economy that he described. Instead he emphasised the need to deviate from this model in certain situations. At such times, state intervention or changes in the legal and political parameters of economic activity may be necessary. Democracy, of Weber's demagogic variety, is necessary to shake up political systems and encourage real leadership. In advocating demagogic forms of democracy, Weber sought to check what he feared would be the long-run tendency of capitalism to itself become a rigidly monolithic, bureaucratic system. Because of this fear he rejected more egalitarian forms of democracy as being simply insufficient to check the creeping tendency of bureaucratisation in the modern large-scale state. For these reasons Weber argued that a combination of the three—


20 Mommsen, in *ibid.*, at pp. 69-70, sets out the Weberian pure form of capitalist market economy, in which "a maximum of formal rationality is attainable," as requiring:

1. 'Constant struggle between autonomous groups in the market-place';
2. the rational calculation of prices under conditions of unrestricted competition in the market-place;
3. 'formally free labour' (i.e. work performed on the basis of freely contracted wage agreements, as distinct from fixed salaries or the like);
4. 'expropriation from the workers of the means of production';
5. private ownership of the means of production. [Citations omitted.]


22 Mommsen, in *ibid.*, at p. 120, argues that Weber believes that "[a]n institutionalized combination of the two competing forces, namely charisma [represented in demagogic democracy] and bureaucracy, might—under modern conditions—come nearest to a solution to the problem of how to cope with the perennial danger of bureaucratisation and solidification of social systems."


24 E.g., Mommsen explains Weber's rejection of normal democratic processes in favour of demagogic ones in *ibid.*, at pp. 32-33 and 34, respectively:

In contrast to the formal basis of democratic domination in the consensus of the people who elect their legislators for the running of the state apparatus, Weber introduces the idea of competition among those who are capable of leadership and have the inner 'calling' to set objectives for the masses. In this process, the plebiscitarian techniques of demagogy and the emotional binding of the masses to the leaders constitute legitimate methods. In opposition, therefore, to the principle of legitimation of domination through a process of policy formulation from the bottom up, an alternative principle will assert itself to some extent, namely the legitimation of domination by virtue of personal authority based upon the special charismatic qualities of those who have the calling to lead and rule. [...] For Weber, at least in the modern mass state, this personal plebiscitarian form of establishing political authority and, with it, individually accountable domination was simply inevitable. Only under the conditions of small geographical areas like the Swiss cantons did Weber conceive of direct forms of political policy formulation from the bottom up as a practical possibility. [...] From a universal-historical perspective Weber saw in this form of democratic domination ['leaderless democracy' (Führerlos)] a serious danger for the continued existence of the independent and free structures in the Western world. By contrast, he regarded as comparatively negligible the danger that the democratic rule of the Führer, legitimated through personal plebiscite, could turn into a dictatorial (or
bureaucracy, capitalism and demagogic democracy—best maximises personal autonomy in a manner suitable to large-scale political entities (states). All three are necessary, and should be related in a competitive, antinomical manner.25

Weber has some misgivings about this combination, but he sees it as the best one possible under current conditions. Even though Weber recognises the potential for abuse in demagogic systems of democracy, he feels that earlier forms of participatory democracy are no longer possible in the large modern state, and in any event would discourage the emergence of leadership. Leadership is important to Weber and shaped his political views and much of his scholarship. In his inaugural lecture of 1895 entitled “The Nation State and Economic Policy,” for example, he expresses deep concern about the erosion of leadership in Germany and argues for ways in which this quality might be encouraged.26 Anthony Giddens argues that this concern with leadership pervades most of Weber’s subsequent writings.27 For

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25 Mommsen, in ibid., in ch. 2, argues that Max Weber’s thought is antinomical in nature (i.e., uses competing ideas), in large part as a result of his concern with the totalizing tendencies of bureaucracy and (formal) rationality. In ibid., at p. 29, he states:

Max Weber’s point of departure was the conviction that society was threatened in its basic elements by the universal process of bureaucratization and rationalization of all spheres of life. It was therefore necessary to preserve at all levels of social life a maximum of dynamic forces or to promote them with all means available. In a certain sense, Weber wanted to maintain as unrestricted as possible, even under the conditions of mass industrial society, the classic principle of competition, that is, the struggle between the various individuals and groups in society for their ideal or material interests.

At p. 36 of the same work Mommsen summarises that “[o]ne could say that for Max Weber the best chance for securing an open society with a maximum degree of freedom and an optimum degree of individual self-determination for all was to be found not so much in the mixture of alternative political principles of organization as in their dialectical combination.” In fact, Weber argued that the antinomical structures with which he was confronted could not be resolved by compromise or some materialist theory, but must be accepted as having such a character. As a result, it is up to each individual to attempt to deal with these conflicting values: ibid., pp. 42-3. According to Mommsen, in ibid., at p. 43, “[t]hus everything would again come down to the autonomy of the individual person, though having a moral obligation to rationality, was basically free to choose.” In positing such an antinomical theory Weber is therefore upholding the moral principle of individual autonomy.


27 Giddens explains, in ibid., at pp. 18-19:

The bulk of [Weber’s] subsequent political writings and actions can be interpreted as an attempt to stimulate the emergence of this liberal political consciousness in Germany. For Weber, this could not be achieved on ‘ethical’ grounds: there could be no question of refounding German liberalism upon a ‘natural law’ theory of democracy. He rejected, moreover, the classical conception of ‘direct’ democracy, in which the mass of the population participate in decision-making; this may be possible in small communities, but is quite irrelevant to the contemporary age. In the modern state, leadership must be the prerogative of a minority: this is an inescapable characteristic of modern times. Any idea ‘that some form of “democracy” can destroy the “domination of men over other men”’ is utopian. The development of democratic government necessarily depends upon the further advance of bureaucratic organisation.
Weber there is only the stark choice between, on the one hand, a demagogic, leadership-democracy with the bureaucratic apparatus of the state, and on the other, the impoverished, leaderless, soul-less democracy sickening Germany at the time of his writings.

It is questionable whether this stark choice remains our only one today. It is difficult to challenge Weber’s assumptions because many of the qualities of modernity he described continue to exist at present. However, his demagogic solution seems both unpalatable and unnecessary. It may be rejected if we embrace a different vision of democracy than that adopted by Weber, namely, the deliberative and participatory form of democracy elaborated in Chapter 3. The reason Weber adopted a form of democracy led by charismatic, demagogic leaders was to provide what for him was the most emancipatory form of political system.

According to Weber, the relationship between democracy and bureaucracy creates one of the most profound sources of tension in the modern social order. There is a basic antimony between democracy and bureaucracy, because the growth of the abstract legal provisions which are necessary to implement democratic procedures themselves entail the creation of a new form of entrenched monopoly (the expansion of the control of bureaucratic officialdom). While the extension of democratic rights demands the growth of bureaucratic centralisation, however, the reverse does not follow. The historical example of ancient Egypt gives an illustration of this, involving as it does the total subordination of the population to a bureaucratised state apparatus. The existence of large-scale parties, then, which themselves are bureaucratic ‘machines’, is an unavoidable feature of modern democratic order; but if these parties are headed by leaders who have political expertise and initiative, the wholesale domination of bureaucratic officialdom can be avoided. Weber saw the likelihood of ‘uncontrolled bureaucratic domination’ as the greatest threat of the hiatus in political leadership left by Bismarck’s fall from power. The development of representative democracy became for him the principal means whereby this could be avoided: ‘there is only the choice: leadership-democracy (Führerdemokratie) with the “machine”, or leaderless democracy—that is, the domination of “professional politicians” without a vocation, without the inner charismatic qualities that alone make a leader.’ [Citations omitted].

At the end of the second paragraph, in n. 13, Giddens reproduces the following statement from Weber: “In a democracy, the people choose a leader whom they trust; the leader who is chosen then says, ‘Now shut up and do what I say’” (citing: Marianne Weber (1950) pp. 664-5). This focus upon leadership also re-emerges in his lecture “The Profession and Vocation of Politics,” in which Weber sets out and advocates a demagogic, plebiscitary democratic vision of political leadership: Weber, “The Profession and Vocation of Politics [1919],” in Weber, Political Writings, pp. 309-69. Notice again however, that Weber’s view of the demagogic, plebiscitary democratic leader is not uncritical, as indicated when he states, in ibid., at pp. 350-51:

[When plebiscitary leaders are in charge of parties, this means a ‘loss of soul’ (Entseeelung) for the following, what one might call their spiritual proletarianisation. In order to be a useful apparatus in the leader’s hands, the following has to obey blindly, be a machine in the American sense, it must not be disturbed by the vanity of notables or by pretensions to individual opinions. ... That is simply the price to be paid for having a leader in charge of the party. [Notes omitted.]]

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28 It is difficult to speculate, but Weber himself might have changed his views if had had not died shortly before the Second World War. During the course or that conflict he would have been able to witness firsthand the excesses of populist, dictatorial demagogues like Hitler and Mussolini. See, e.g., Mommsen’s comments in The Political and Social Theory of Max Weber, at p. 42, in which he argues that an authoritarian or fascist meaning “was certainly not intended by Weber.” Mommsen also distinguishes Weber from Nietzsche, in ibid., at p. 172: “While [Weber] shared Nietzsche’s fear that the individual might be overpowered by the social forces of the modern age, he strongly disagreed with his anti-democratic bias and supreme disdain of the masses” (citations omitted). Mommsen further argues that although parts of Weber’s theory may have served as “stepping stones for the emergence of non-democratic views among the German intelligentsia,” that nevertheless “in substance” his theory had nothing in common with National Socialism, and in fact his “liberal convictions and steadfast adherence to the principle of rationality made his sociology unacceptable” to the intellectual climate prevailing under National Socialism. Ibid., pp. 178-9. Additionally, Weber’s vision of humanity was premised upon strong beliefs in fundamental equality and the need for respect for human autonomy—neither of which are suitable for fascism: cf. Kronman, Max Weber, chs. 2 and 8. See further the comments in footnote 31, below.
available, one that could counteract the evils of bureaucracy. But even in advocating such an viewpoint Weber attempted to balance demagogy, leader-led democracy with a parliamentary system (as a kind of political counterweight). Weber himself appears to have recognised that strong leadership can be antithetical to democracy, both at practical and theoretical levels. At present the pitfalls of demagogic democracy may be more apparent than they were in Weber’s time. Even the most benign, demagogic democratic leader raises the problems associated with ‘guardianship’ discussed in Chapter 3, and removes real participatory choice from the polis. Demagogic democracy also has the tendency to create the worst kind of representative government because it encourages campaigns based upon personality or charisma rather than upon an issue-based political platform. By distancing issues from the democratic forum this system gives voters little chance to pick a candidate with a well-developed agenda. Furthermore, Weber’s conception of legal-rationality itself embraces the kind of fundamental equality that we have seen underpins participatory democracy. Thus part of Weber’s own theory militates against demagogic or charismatic leadership. Legal-rational rule produces a kind of ‘formalistic impersonality’ for officials, since their authority is not based upon any personal characteristics, but rather on their

29 E.g., Mommsen, in ibid., at p. 68, summarises:

[For Weber] A formally democratic political system, led by far-sighted, energetic and skilled politicians with demagogic qualities, favoured a high degree of social mobility. Consequently, this system had indirect emancipatory effects upon the lower classes without ever breaking the rule that the actual exercise of power rests in the hands of small groups. Beyond this, it allowed the underprivileged, at least formally, the possibility of overcoming the disadvantages of their social condition by political means. Weber considered as utopian the socialist option (i.e. smashing the power of the state), formulated by Lenin and then put into practice. In the long term history has shown Weber, rather than Lenin, to be right. [Citation omitted.]

Weber argued that socialism had the potential to create an even more powerful, and thus more threatening, form of bureaucracy: ibid., p. 61.


31 Kronman, in Max Weber, at pp. 182-5, while elaborating some of the elements of Weber’s critique of modernity, points to the way in which true leadership (i.e., of the charismatic variety) may be fundamentally antidemocratic in nature. It is based upon a different view of the person, a non-egalitarian view where the leader is followed because she is superior, not due to the official, formal-rational authority of her position. Kronman argues that there is a fundamental contradiction between Weber’s categorisation of the modern state as formal-rational (and egalitarian), and his demand for true leadership: “There is, in this regard, something in Weber’s writings that can almost be described as an intellectual (or moral) schizophrenia, an oscillation between irreconcilable perspectives that helps to explain why he has found supporters as well as detractors on both the Left and Right.” Ibid., p. 185. However, I would argue that instead of revealing an uncertainty in Weber’s view of personhood, this contradiction represents another example of the way that Weber uses incompatible institutions purposefully (antinomical structures), to balance the negative tendencies of each (i.e., demagogic democracy balancing the tendencies of bureaucracy). See further Mommsen, “The Antinomical Structure of Max Weber’s Political Thought,” in Mommsen, The Political and Social Theory of Max Weber, pp. 24-43.

independently established, rule-empowered role. In this way legal-rational authority presupposes a fundamental form of equality, since any person can become an official. As a result, demagogic democracy appears increasingly problematic, even from within Weber's framework.

It also may be unnecessary today, as some of the factors motivating Weber to adopt a demagogic form of democracy may be less prevalent, or no longer exist. Current scholarship indicates a weakening, if not a break, in the 'iron cage' of legal-rational domination. Increases in discretionary regulation, mechanical regulation (i.e., strict liability, tariff systems), and particularised regulation (laws directed to particular persons or limited groups), have upset the formal rationality of the modern legal system. According to Roger Cotterrell, "the concept of the generality of legal rules is attacked on two fronts by modern developments. Discretionary regulation threatens to dissolve away rules altogether in favour of administrative freedom to implement policy, while particularised regulation threatens to reduce rules to specific directives, like the contents of a detailed manual of bureaucratic or technical practice." Thus some of the general tendencies of bureaucracy have affected the formal rationality of modern law. This has created new problems, with such challenges likely contributing to the crisis of legitimacy facing many modern states. But as the 'iron cage' of

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35 Ibid., p. 166.

36 For analyses of the crisis of legitimacy facing modern states see, e.g., Eugene Kamenka and Alice Erh-Soon Tay, "Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology," in Feudalism, Capitalism and Beyond, ed. E. Kamenka and R.S. Neale, 126-44 (London: Edward Arnold, 1975) [arguing that the current 'crisis' in law is one of legitimacy, originating in clashes between Gemeinschaft, Gesellschaft and Bureaucratic-Administrative conceptions of society], and O'Hagan, The End of Law?, ch. 6 [arguing for a new form of Rechtsstaat that could deal with the increasing complexity of modern statehood]. Interestingly, the progression of this crisis may in many ways be measurable—something that Weber did not contemplate in his discussions of the cathartic, but unpredictable, possibilities of charismatic revolution. Roger Cotterrell, for example, in Sociology of Law: An Introduction, 2nd ed. (London: Butterworths, 1992), at p. 170, makes this point when comparing Weber's theory with that of Jürgen Habermas:

Whereas for Weber a crisis of legal domination could not be predictable but merely occurs with a 'charismatic outburst' upsetting the established order, for Habermas crisis can occur on several levels as a result of failure of elites to 'manage' effectively. Economic crises rarely occur in pure form for the same reason that class conflict does not—because economic questions come to be seen as administrative-managerial matters. Thus the first significant level of crisis is that of 'rationality crisis'—an inability of the state to cope with these matters. This can worsen to a 'legitimation crisis' involving the possibility of mass withdrawal of political loyalty. The final level is that of 'motivation crisis' in which the commitment of the population to the normative order of advanced capitalism is reduced or threatened. Habermas' concepts do not provide the basis for predicting specific crises but they recognise that legitimacy is not an all-or-nothing matter that there are levels of commitment and gradations in seriousness of challenges to that commitment. His theories also recognise explicitly that legitimacy is both a matter for system analysis and a matter of the subjective reactions of individual citizens.
formal rationality weakens, so too may our need for the extreme forms of demagogic democracy that were suggested as the cure.

Of course it is difficult, if not impossible, to predict a causal progression from the crisis faced by the formal-rational legal system, on the one hand, to the demise of demagogic democracy as a dialectical ideal, on the other. However I would suggest that certain qualities inherent in deliberative democracy enable us to use as a replacement for demagogic leadership. Although normal democratic processes may be slower than the decisions of a single resolute dictator, they can produce equally creative solutions to the problems of bureaucratic inertia. Moreover, as seen in Chapters 3 and 4, democratic decisions are more likely to be correct, and can more readily adapt to changing circumstances. In addition, deliberative democracy has creative and empowering aspects that are compatible with the values of autonomy and equality that underlie Weber’s own theory—a compatibility not possessed by demagogic democracy. Finally, Weber’s deterministic view of the necessity of capitalism may be subject to criticism. Although capitalism has clearly triumphed over one vision of socialism, many modern capitalist democracies strike balances between the demands of the market and the need for non-market structures, such as social welfare systems and related guarantees. Thus if capitalism itself is becoming less extreme today, we may use a less extreme form of democracy to check its tendencies.

In sum, Weber’s understanding of the complex relations of statehood and democracy allows us to see how the conflicts between the two may be viewed in a dialectical manner. Both are necessary, and each can check and balance the negative tendencies of the other. Statehood allows large-scale organisation, but requires formal-rational legal systems and bureaucratisation. Democracy allows egalitarian participation in decision-making, and checks some of the ossifying tendencies of formal-rationality and bureaucracy. I also have argued

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37 See generally, Kronman, Max Weber, ch. 2.

38 Wood, in “Chapter 5: History or teleology? Marx versus Weber,” in Democracy Against Capitalism, at pp. 146-78, contrasts Marx and Weber in terms their explanatory power in describing the origins of capitalism. Wood argues that Marx was superior in this regard because Weber presupposed capitalist economic forms even when attempting to explain the origin of capitalism:

Weber’s Protestant ethic ... cannot account for the ‘spirit of capitalism’ without, again, already assuming its existence. The idea of the ‘calling’, the values of asceticism, even the glorification of hard work in themselves have no necessary associations with capitalism. What makes the work ethic capitalist is not the glorification of work itself but its identification with productivity and profit maximization. Yet that identification already presupposes the subordination of labour to capital and the generalization of commodity production, which in turn presuppose the subordination of direct producers to market imperatives.

Ibid., p. 164. Such a fundamental presupposition on the part of Weber, if true (a point about which I have some doubts), does not detract from the explanatory power of his theory regarding the dialectical relation of capitalism and democracy. But it could lead to a weakening of Weber’s ‘iron cage,’ if it allows us to see one ‘bar’ (capitalism), as less substantial than previously assumed.
that Weber’s demagogic form of democracy is both undesirable and unnecessary today and that it may be replaced by a participatory one.

III. THE RELATIONS OF SOVEREIGNTY AND STATEHOOD

Sovereignty and statehood tend to be related in three different ways in scholarly writing. Either (1) the two terms are perceived as identical (one equated with the other), or (2) sovereignty is seen to be no more than an aggregate of state claims, or (3) sovereignty is considered to be merely a particular attribute or characteristic of statehood, namely, “independence.” Each of these formulations is problematic.

A. EQUATION OF SOVEREIGNTY WITH STATEHOOD

It is fascinating to notice how claims to sovereign status over the last fifty years have been gradually restricted to states. States claim to be, and are recognised as, sovereign. Most other entities wish to become sovereign states. The obverse is also true. Almost everything labelled as a ‘state’ is now presumed to be sovereign, no matter how politically or economically marginal that state’s powers may be. Tiny Barbados, for example, with its 430 sq. km of land territory, mere 274,540 citizens, insignificant military and naval power, and small and restricted economy (including a currency pegged to the US dollar, a telecommunications sector monopolised by a foreign multinational corporation, and a $2.9 billion GDP of which 79.5% is produced in the service sector), is considered as fully sovereign a state as any other, and may properly enter into nearly any treaty as well as join regional and international organisations.39

This double linkage of sovereignty with statehood is striking in light of the fact that historically sovereignty was not necessarily associated with the state. Rather, under absolutist theory it was for periods associated with Papal authority and the Catholic Church (as the representatives of the true Sovereign God). Also, as explored further below, up until fairly recently a variety of entities have been called “states” that could not be, and were not, considered fully sovereign. As a result, the incredible standardisation of sovereignty with respect to statehood in recent times should not

39 All statistics are from the Central Intelligence Agency (US), World Factbook 2000. The population figure is specified as being a July 2000 estimate, the GDP a 1998 estimate (at purchasing power parity, listed in US dollars). Barbados’ dollar is fixed at roughly $0.50 US and its telecommunications are run by Cable and Wireless BARTEL and Cable and Wireless BET, both subsidiaries of Cable and Wireless Plc., the huge, London-based multinational parent corporation. Barbados’s GDP (1997 figures) was based upon agriculture (4.9%), industry (15.6%) and services (79.5%): ibid. A small Royal Barbados Defence Force exists (including Ground Forces and a Coast Guard), which is mandated to fulfill both self-defence and other (external) functions. The latter function includes its ability to provide assistance to other Member States within the Regional Security System, which is made up of itself, Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines. One medium sized naval vessel, the HMS Trident, is maintained by the government. Barbados is an active Member in several regional and international organisations including the Organisation of Eastern Caribbean States, the Caribbean Community and Common Market, the Association of Caribbean States, the African, Caribbean and Pacific grouping of states, the Organisation of American States and the United Nations.
obscure the fact that the two concepts were distinct earlier. As such, it should be emphasised, they could become distinct again in the future.

The equation of sovereignty with statehood may in large part be attributable to the dramatic, juridical standardisation of statehood after the decolonisation period. Almost every entity entitled “state” today is legally, even if not actually, independent. The few remaining overtly dependent entities are not called “states.” They are variously described as “territories” (e.g., American Samoa [USA], Ashmore and the Cartier Islands [Australia], Bouvet Island [Norway]), or “overseas” or “dependent territories” (e.g., British Virgin Islands and Cayman Islands [UK]), or “overseas départements” (e.g., Martinique and Clipperton Island [France]), or “overseas territorial collectivities” (e.g., Mayotte and Saint Pierre and Miquelon [France]). As a practical matter, therefore, the equation of statehood and sovereignty may be based upon the gradual development of the juridical uniformity of territorial entities at the international level. It also may be reflected in the formal independence of these states, as well as the general terminological trend of moving away from the use of the word “state” to describe other international entities. Finally, the linkage of “statehood” and “sovereignty” may be heightened by the powerful political developments that led to decolonisation and the creation of the New International Economic Order (NIEO). Both of these movements clearly emphasised the importance of the political and legal equality of all “states,” regardless of their economic capacity or political ideology.

At a more theoretical level the close identification of statehood and sovereignty may be due to a kind of intellectual laziness on the part of international lawyers. Although few scholars explicitly say that sovereignty is identical to statehood, their ‘state-centric’ arguments often imply such an equation. In addition, the two terms may be undifferentiated because the

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40 These examples are drawn from the Central Intelligence Agency (US), World Factbook 2000.
41 See e.g., Jennings and Watts, Oppenheim’s International Law, 9th ed., pp. 282-95 (self-determination movement) and 335-39 (economic rights and duties of states).
42 E.g., Brownlie, in Principles of Public International Law, 5th ed., at p. 106, after cautioning the reader about how an understanding of various state powers “are obscured by the liberal use of omnibus terms like ‘sovereignty’ and ‘jurisdiction,’” goes on to distinguish between the two terms as follows:

The normal complement of state rights, the typical case of legal competence, is described commonly as ‘sovereignty’: particular rights, or accumulations of rights quantitatively less than the norm, are referred to as ‘jurisdiction.’ In brief, ‘sovereignty’ is legal shorthand for legal personality of a certain kind, that of statehood; ‘jurisdiction’ refers to particular aspects of the substance, especially rights (or claims), liberties, and powers. [Emphasis added, citations omitted.]

In doing so, Brownlie unnecessarily binds sovereignty to statehood. Note that Jennings and Watts, in ibid., at p. 456, express the relation between sovereignty and jurisdiction in a causal manner, but do not simply equate sovereignty and statehood: “Jurisdiction is not coextensive with state sovereignty, although the relationship between them is close: a state’s ‘title to exercise jurisdiction rests in its sovereignty’” [citations omitted].

43 For critiques of state-centred approaches to sovereignty and international legal theory as a whole, see e.g., Carty, Decay of International Law, chs. 1 and 3. Feminist theorists also have taken such approaches to task. See, e.g., Knop, “Re/Statements: Feminism and State Sovereignty in International Law,” see generally, Hilary
international sphere (for the above reasons) does not at present require the development of further, subtler distinctions. In contrast, international relations theorists and political scientists have focused more closely on the changing relation of the two terms, commenting, for example, on the way that globalisation has lessened the ‘sovereign’ aspects of statehood (by which they mean its ‘absolutist’ and ‘strictly independent’ tendencies). However, even these latter theorists make no attempt to conceptually separate the two terms. States may be becoming less sovereign, semi-sovereign, et cetera, however the subject of such changes—the thing being affected by them—remains the state.

At the formal theoretical level two lines of argument, or perhaps more accurately two assumptions, further support this kind of undifferentiated approach to statehood and sovereignty. The first assumption, surprisingly infrequently articulated, is that sovereignty can only be possessed by states. This assumption creates a kind of absolute limitation for sovereignty. Strictly interpreted, this view would only allow the term sovereignty to be applied to states. All of the possible meanings of ‘sovereignty’ would be reduced to a single application: state sovereignty. The second, very similar assumption creates a partial, but still significant, limitation for sovereignty. This is that the criteria for statehood are determinative when considering whether an entity can be sovereign. Definitions of sovereignty making this assumption may be recognised through their unreflective use of the Montevideo Convention criteria. These criteria, it will be remembered, specify that in order for something to be a state it must possess (a) a permanent population, (b) a defined territory, (c) (effective) government and (d) the capacity to enter into relations with other states. When sovereignty is defined exclusively by using these criteria, then it inevitably becomes equated with statehood. If a sovereign entity by definition


44 See generally the discussion of the effects of globalisation in Chapter 2, above.


46 E.g., Hannum, Autonomy, Sovereignty, and Self-Determination, p. 15 (“only states may be sovereign”), Farley, Plebiscites and Sovereignty, pp. 6-7 (distinguishing nationhood from statehood, with the latter only being able to possess sovereignty). But see also, Macklem, “Distributing Sovereignty,” p. 1346 (“Although it has been said that ‘only states can be sovereign,’ international law does not view sovereignty as a criterion of statehood”).

47 Convention on the Rights and Duties of States [Montevideo Convention] (1933), Art. 1. The Montevideo Convention and its four criteria are discussed in Chapter 1, above.

48 This second assumption is subtler because it allows a wider range of possibilities for sovereignty. The criteria for statehood, for example, could be viewed as necessary but not sufficient in describing sovereignty. This would allow sovereignty to remain a more complex notion than statehood. Nevertheless, I would argue that because sovereignty is
must satisfy these criteria alone then it becomes difficult to distinguish between ‘states’ and ‘sovereign states.’ The two terms again collapse into one.

Such arguments unreflectively merge the definitions of sovereignty and statehood. Statehood, from this kind of viewpoint, automatically entails sovereignty, and sovereignty cannot be conceived of outside of the context of the state. Such an understanding may be formulated in two different ways: (1) that only states can be sovereign and (2) that all sovereign entities must be states. Both formulations are seductively simple, and are likely to attract intuitive acceptance from those working in the contemporary international legal tradition. However, I would argue that neither is merited. There is no strict causal connection between the two terms “statehood” and “sovereignty.” As illustrated later in this and the following Chapter, historical examples exist of (1) non-state sovereigns, (2) non-sovereign states, (3) divided sovereignties, and (4) coexisting sovereignties. As discussed further in Chapter 8, current examples of the first anomaly (sovereign, non-state entities) also may be found in aboriginal claims to self-determination. Thus it is submitted that a simple equation of sovereignty with statehood is reductivist and should be avoided.

B. SOVEREIGNTY AS AN AGGREGATE OF STATE CLAIMS

A second type of argument equating sovereignty and statehood views sovereignty not as statehood per se, but rather as an aggregate of state claims. In other words, this argument suggests that if we merely add up all of the claims to competence of states, over both international and domestic matters, we will be able to describe sovereignty. J.L. Brierly is an advocate of this view, and he summarises it as follows:

[F]or the practical purposes of the international lawyer sovereignty is not a metaphysical concept, nor is it part of the essence of statehood; it is merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states.49

Ingrid De Lupis expresses this with a similar phrase, calling sovereignty “a term used to denote the collection of functions exercised by a state.”50 This kind of argument appears attractive

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49 Brierly, Law of Nations, p. 48. Verzijl, in International Law in Historical Perspective, vol. 3, at pp. 12-13 describes territorial sovereignty in a similar manner, but refers to “competencies” rather than to “claims” or “rights”:

[T]erritorial sovereignty would seem to be adequately defined as being—not so much the sum total of an aggregate of various separate rights, as—the plenitude of exclusive competencies appertaining to a State under public international law within the boundaries of a definite portion of the globe....

50 De Lupis, International Law and the Independent State, p. 3. Perhaps the most sophisticated phrasing of this type of view is that of Ian Brownlie, when he refers to sovereignty as existing in the relations between states:
because it focuses simply on state claims or practices. We need merely look at the kinds of claims that states make, or what they actually do, in order to define sovereignty. It therefore appears to have the potential of bringing scientific certainty into the definition of sovereignty. By noting the claims made by all states at any moment we could map out the exact parameters of sovereignty. An aggregative definition also would allow us to track changes in the meaning of sovereignty over time by comparing earlier and later sets of claims. Finally, this kind of definition of sovereignty would allow a clear understanding of why sovereignty has become associated most frequently with a few ‘core’ functions of states, for the simple reason that these functions have been relatively stable over time. However, even though this ‘aggregate of state claims’ view of sovereignty may be helpful in some ways, overall I would argue that it is inadequate as a complete theory of sovereignty. It is too limited to express all of the roles and functions of sovereignty explored in the previous two Chapters. It also focuses exclusively upon statehood, which is only one of a variety of international legal persons that might possess sovereignty. Finally, its overall weakness is that it presupposes the existence of the very standard—the ‘typical case’ of sovereignty—that it attempts to describe. Let me illustrate such difficulties by describing four problems that will arise from this model.

1. Aggregating Different Inputs

The first problem relates to the sheer complexity of inputs that the model is supposed to aggregate. The numerous states existing at present are so dramatically different that it would be difficult if not impossible to establish a common list of powers claimed or actually exercised by them. Regardless of which set of functions or claims one uses to define sovereignty, a large proportion of states simply will not possess it. One merely needs to imagine the different lists of

If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.

Brownlie, Principles of Public International Law, 5th ed., p. 289 (emphasis added). Since the relations between states are expressed in the form of claims, Brownlie’s definition fits within the ‘aggregate’ view. The same author also refers to notions of sovereignty “as discretionary power within areas delimited by the law.” Ibid., p. 290.

The broader version of this argument relies upon “claims” and the narrower one on “functions” or “practices,” because states may claim competences that few, if any, possess. However, as the following discussion reveals, the difference is negligible because whichever version is chosen the range of claims or functions is so varied that any definition based upon either formula becomes meaninglessly broad or indeterminate.

De Lulis, in International Law and the Independent State, at pp. 3-4, links sovereignty with three core rights or incidents of statehood: equality, independence and self-determination. She posits a causal connection between equality and independence: because all states are equal they enjoy the right of independence. This connection, interestingly, was made earlier through the Treaty of Westphalia: Farley, Plebiscites and Sovereignty, pp. 7-8.

Brownlie, for example, in Principles of Public International Law, 5th ed., at p. 106, seems to fall prey to this problem when attempting to distinguish between the concepts of “jurisdiction” and “sovereignty.” He states: “[l]he normal complement of state rights, the typical case of legal competence, is described commonly as ‘sovereignty’: particular rights, or accumulations of rights quantitatively less than the norm, are referred to as ‘jurisdiction’” (citation omitted).
claims to sovereign powers that might be made, for example, by such states as Canada and China, on the one hand, and such recent arrivals at the United Nations as Eritrea, Monaco, and Andorra, on the other. If we did manage to put together a set of common claims that all sovereign states could be said to be capable of making, this set would have to be so small as to be irrelevant. As a result, the ‘aggregate of claims’ model reveals practical weaknesses because of the enormous variability in the nature of claims that can be made by states.

2. Quality of Inputs

A related problem is one of the importance of the claims, or more accurately, of the importance of the states that make them. When aggregating claims should we give those made by certain states greater weight? For example, should a claim by twenty nuclear weapon possessing states that they are “legally entitled to use such weapons in self-defence” automatically merit substantial attention in our aggregative calculations when deciding the scope of sovereignty? Such a claim, after all, would be made by some of the most powerful states on the planet regarding a subject matter of tremendous legal importance, one with which they have a substantial connection. If we allow such a claim to influence our definition of sovereignty, then by virtue of being sovereign all states must possess this entitlement. Notice as well that the corollary of this position is that claims by small states, or even claims about rare or pedestrian matters, will not merit serious attention.

Some might argue that such difficulties should not arise because the doctrine of sovereign equality allows us to reject such qualitative factors as being determinative when describing sovereignty. If ‘sovereign equality’ is a fundamental part of sovereignty, then vast inequalities should be irrelevant to the task of defining sovereignty. This argument has its appeal at a formal level, but is weaker at the practical level. If the ‘aggregate of claims of states’ method is chosen to describe sovereignty, a facile dismissal of the real inequalities existing between states and of the manner in which those inequalities will affect their claims must lessen one of its most appealing features. It loses its ability to provide a scientific, rational and realistic basis for the definition of sovereignty. But if this method embraces the view that the practice of

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54 This argument parallels the controversy surrounding the importance of ‘great states’ in the creation of customary international law. Shaw, in International Law, 4th ed., at pp. 62-3, argues that the significant influence of such states in this field cannot be ignored:

[I]t is inescapable that some states are more influential and powerful than others and that their activities should be regarded as of greater significance. This is reflected in international law so that custom may be created by a few states, provided those states are intimately connected with the issue at hand, whether because of their wealth and power or because of their special relationship with the subject-matter of the practice, as for example maritime nations and sea law. Law cannot be divorced from politics or power and this is one instance of that proposition. [Citation omitted.]

55 Cf. Brownlie, Principles of Public International Law, 5th ed., p. 289 (arguing that the “sovereignty and equality of states represent the basic constitutional doctrine of the law of nations”).
particular states can be more important in the formation of sovereignty then it contradicts the principle of sovereign equality.

3. Determining the Moment of Transition

A third difficulty with this view, foreshadowed in the analysis of the changing nature of sovereign attributes in the previous Chapter, is simply the problem of determining when a claim becomes, or ceases to be, part of what it means to be sovereign. This is what may be called the problem of transition, namely, the difficulty of ascertaining whether, or when, a change has in fact occurred. This problem is not insurmountable. In fact, similar problems are faced and resolved on a continual basis by international lawyers when they attempt to determine whether a new rule of customary international law has emerged. However, the difficulties associated with transition are more significant when they arise in the context of describing sovereignty than they are in the context of determining the existence of a rule of customary international law. This is because two important underlying factors that contribute to the resolution of problems of determining the existence of custom do not exist in the context of describing sovereignty. The first is the underlying negative, or passive, view that such determinations take of the scope of international law; the second is the role played by sovereignty itself in undergirding this latter view. By the ‘negative’ or ‘passive’ viewpoint of the scope of international law I refer to the way in which international lawyers when determining the existence of a new rule of international law always have available the default position of the non-existence of a particular rule. If before an international tribunal a state claims that new rule “X” applies to a particular situation, the tribunal may simply decide that no such rule exists at present. In an area of international law already well established and rule-filled, this position is of little consequence. However, in an area in which no clearly applicable previous rules exist, this would seem to leave open the possibility of a legal vacuum. By holding that “no rule of X quality has yet emerged,” a tribunal would seem to open up the possibility of a gap or lacuna in international law. The possibility of such a gap in the

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57 For example, in a case of real uncertainty as to the existence of sufficient practice or opinio juris (the two ingredients required for custom), a proposed rule of international law will be held not to exist. See, e.g., the Case of the S.S. “Lotus” (France v. Turkey), 1927 P.C.I.J. Rep., Series A, No. 9 (insufficient practice and opinio juris to support a rule of exclusive jurisdiction under the flag state rule); and the Fisheries Case (U.K. v. Norway), 1951 I.C.J. Rep. 116 (practice of states not justifying the formulation of a general rule of law of a maximum distance of 10 miles for straight baselines).

58 A lacuna is the term used to refer to gaps in international law that may be found, for example, when a new matter arises that has never been dealt with before. The existence of a lacuna in the law means that there effectively is no law to govern the question. For a brief discussion of such matters, see Higgins, Problems and Process, p. 10.
area of customary international law is avoided, however, by the second factor, namely, the role played by sovereignty itself in undergirding customary international law. The concept of sovereignty fills any spaces left by lack of rules. Where international law does not prohibit behaviour, sovereignty allows states to engage freely in such behaviour.\footnote{Cassese, in \textit{International Law in a Divided World}, at pp. 169-70, when describing the development of customary and treaty-based international law, states:}

The resulting picture justified the principle propounded since the late 1890s by the positivist school whereby in the international community 'all that was not prohibited was by this mere fact permitted.' This is merely another way of saying that freedom of States (or sovereignty) was the fundamental feature of the international community. ... As I shall show ... this legal regime is still largely valid today.

In \textit{ibid.}, at p. 171, Cassese also summarises a similar argument by the Italian member of the Advisory Committee of Jurists appointed by the Council of the League of Nations to draft the statute for the Permanent Court of International Justice:

The Italian member Ricci-Busatti put forward a powerful argument based on a consistently positivist approach. He noted that the fear of a non \textit{lacet} (that is, a declaration to the effect that the Court could not pass judgment upon a dispute for want of legal rules relevant to the matter) was imaginary; he argued that since 'that which is not forbidden is allowed', the lack of a positive rule allegedly prohibiting a certain State from behaving in a given manner simply meant that that form of behaviour was permissible. It could therefore be said that in a way, the law regulated the matter, for it implicitly authorized a form of conduct which one of the disputants wrongly deemed unlawful. [Citations omitted.]

\footnote{\textit{Case of the S.S. "Lotus,"} (France v. Turkey), 1927 P.C.I.J. Rep., Series A, No. 9, pp. 18-19.}

nuclear weapons in any circumstance permitted under international law?"62 The majority of the Court 'answered' this question in a complicated manner in the final, dispositif paragraph of the judgement.63 To summarise, the Court decided that although there was no customary or treaty-based law authorising, or prohibiting, threat or use of nuclear weapons ( paras. 105(2)(A) and (B) ), that nevertheless any such threat or use must comply with certain existing rules of international law, including those regarding use of force and self-defence under the United Nations Charter ( para. 105(2)(C) ), and the laws of armed conflict, including international humanitarian law ( para. 105(2)(D) ). In addition, the Court held that there exists a general obligation upon all states to pursue and achieve nuclear disarmament ( para. 105(2)(F) ). The most interesting part of the dispositif is paragraph 105(2)(E), in which the Court 'decided' that although the threat or use of nuclear weapons "would generally be contrary to the rules of international law," that nevertheless it could not "conclude definitively" whether such a threat


63 The majority of the Court states, in ibid., at pp. 265-7, in paragraph 105 [I omit the voting position of each judge]:

105. For these reasons,
THE COURT, [...] (2) Replies in the following manner to the question put by the General Assembly:
A. Unanimously,
   There is in neither customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons;
B. By eleven votes to three,
   There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;
C. Unanimously,
   A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;
D. Unanimously,
   A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;
E. By seven votes to seven, by the President's casting vote,
   It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
   However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;
F. Unanimously,
or use "would be lawful or unlawful in an extreme circumstance of self-defence." This statement amounts to an acknowledgement by the Court that it cannot find a rule of law either allowing, or disallowing the use of nuclear weapons in such a circumstance. I cannot deal with the many fascinating implications of this part of the judgement in the present work. For instant purposes it is sufficient to notice that paragraph 105(2)(E) acknowledges the existence of a gap, or lacuna, in international law. In her dissenting opinion this leads Judge Rosalyn Higgins to argue that paragraph 105(2)(E) amounts to a non liquet, since the Court effectively did not decide the issue raised.64

Such a position is only tenable in the context of an international legal system underpinned by sovereignty, since any 'gap' can be filled by the legal rights of the sovereign. Seen in this way, paragraph 105(2)(E) of the Legality of the Threat or Use of Nuclear Weapons opinion amounts to an endorsement by the Court of the ability of sovereign states to threaten or use nuclear weapons "in an extreme circumstance of self-defence" as long as they comply with the existing rules of international law contained in the United Nations Charter, the laws of armed conflict and international humanitarian law.65 Sovereignty therefore underpins international law as a whole by ensuring the completeness of the international legal system.

A consequence of this general line of argument is that any attempt to apply the 'aggregate of claims of states' definition to sovereignty must fall prey to theoretical circularity. If sovereignty is defined in terms of the claims made by states, an analysis of these claims will fall prey to indeterminacy because of the widely varied nature of the claims, the varied nature of

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There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

64 Ibid., at pp. 589-92 (paras. 27-39). Higgins, in ibid., at pp. 591 and 592 (paras. 36 and 38-9), is deeply critical of the majority opinion in this regard:

36. It is also, I think, an important and well-established principle that the concept of non liquet - for that is what we have here - is no part of the Court's jurisprudence. [...] 38. This unwelcome formulation ignores sixty-five years of proud judicial history and also the convictions of those who went before us. Former President of the International Court, Judge Elias, reminds us that there are what he terms "useful devices" to assist if there are difficulties in applying the usual sources of international law. In his view these "preclude the Court from pleading non liquet in any given case" (Elias, The International Court of Justice and Some Contemporary Problems, 1983, p. 14).

39. The learned editors of the 9th Edition of Oppenheim's International Law remind us:

"there is [not] always a clear and specific legal rule readily applicable to every international situation, but that every international situation is capable of being determined as a matter of law" (Jennings and Watts, Vol. I, p. 13).

the claimants, and the difficulties associated with determining when a claim has become, or ceased to be, part of the aggregate with which we define sovereignty. Yet any attempt to resolve such indeterminacy by using mechanisms similar to those by which we determine the existence of a rule of customary law (analogously), must in turn fail because such mechanisms assume the default position of sovereign freedom. As a result, each claim to sovereignty ultimately becomes justifiable only in terms of sovereignty. The aggregative conclusion pre-supposes itself.

C. SOVEREIGNTY AS AN ATTRIBUTE OF STATEHOOD: “INDEPENDENCE”

The final, most complex argument that equates sovereignty and statehood is one that views sovereignty as an ‘attribute’ of statehood: “sovereignty is an attribute of statehood, and ... only states can be sovereign.”66 To make such an argument more concrete, even though sovereignty could be considered to encompass a number of different meanings and still be an attribute of states, I will scrutinise the most common form of this argument, namely, the form that assumes that “sovereignty” can be equated to “independence.”67 This equation is fairly common in both judicial and scholarly writing. At times the term “independence” has been suggested to be an exact replacement for sovereignty. Peter Malanczuk, for example, writes:

When international lawyers say that a state is sovereign, all that they really mean is that it is independent, that is, that it is not a dependency of some other state. They do not mean that it is in any way above the law. It would be far better if the word ‘sovereignty’ were replaced by the word ‘independence’. In so far as ‘sovereignty’ means anything in addition to ‘independence’, it is not a legal term with any fixed meaning, but a wholly

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66 Hannum, Autonomy, Sovereignty, and Self-Determination, p. 15. See also: D’Entreves, “The State,” p. 315 (describing Bodin’s coinage of the name “for that particular element which, from the legal angle, was the distinctive attribute of the modern state”), and p. 316 (“the fact remains that sovereignty in Hobbesian terms is still the basic attribute of the State to the present day”).

67 “Independence,” as will be discussed at greater length below, can be divided into two spheres: legal and non-legal (political). The latter, actual form of independence cannot be said to exist except in the most trivial areas of state competence. Farley, in Plebiscites and Sovereignty, at pp. 7-8, discusses the legal meaning of the term “independence” in relation to the Peace of Westphalia:

Under the Westphalian formula, sovereign states have three absolute prerogatives: independence, equality, and unanimity. Independence means a state is completely free to organize any system of government, proclaim an official religion of its choice, and structure its economy as it sees fit. No outside state, as in pre-Westphalian times, has any right to interfere in these strictly internal matters.

Notice that Farley does not equate sovereignty with independence, and actually sees the latter as a prerogative of the former. Fowler and Bunck, in Law, Power, and the Sovereign State, at p. 7, usefully distinguish between sovereignty’s role as a status and the related concept of independence (political and legal). The latter, according to these authors, is merely an ingredient that may help us establish sovereign status: “the principal focus of this book is upon sovereignty as a particular status and [this book] will take de facto and de jure independence to be its constituent parts.” As a result Fowler and Bunck are careful to explain that neither de facto autonomy (including de facto internal and external independence), nor de jure independence are essential pre-requisites for sovereignty: ibid., pp. 36-57. Sovereignty can exist without these ingredients. International recognition and acceptance are more important in this regard: “Such [international] acceptance may be derived from a strong showing of de facto or de jure independence, or ideally both, but it is ultimately the international community that determines whether a particular political entity qualifies as a sovereign state.” Ibid., p. 62 (citations omitted).
emotive term. Everyone knows that states are powerful, but the emphasis on sovereignty exaggerates their power and encourages them to abuse it; above all, it preserves the superstition that there is something in international cooperation as such which comes near to violating the intrinsic nature of a 'sovereign' state.68

The advisory opinion regarding the Customs Régime Between Germany and Austria provides further examples. Judge Anzilotti, for instance, states in his separate opinion:

[T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (suprema potestas), or external sovereignty, by which is meant that the State has over it no other authority than that of international law.69


Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

For other equations of sovereignty with independence, see e.g., Higgins, Development of International Law, pp. 26-7 (and n. 74), Brownlie, Principles of Public International Law, 5th ed., p. 76 (stating that the "term 'sovereignty' may be used as a synonym for independence..."), Georg Schwarzenberger, A Manual of International Law, 5th ed. (London: Stevens and Sons, 1967), p. 643 (in the section entitled 'Glossary of Terms and Maxims,' stating "Sovereignty: legal independence"). Contra: Brierly, Law of Nations, pp. 121-22 (arguing that independence cannot even be considered a fundamental right of states, being rather "a descriptive term; it has no moral content"). A current movement in international legal scholarship takes this analysis a step further by dismissing the whole notion of 'sovereignty' in favour of another notion, 'autonomy.' See, e.g., Hannum, Autonomy, Sovereignty and Self-Determination, ch. 19 (Conclusion), Lars D. Eriksson, "The Disintegration of the Nation-State," p. 248. This latter development, however, appears to represent little more than a shift in terminology and I argue that it therefore has the potential to maintain the same basic equation of sovereignty with independence.

69 Customs Régime Between Germany and Austria (Protocol of March 19th, 1931), Advisory Opinion, 1931 P.C.I.J. Rep., Series A/B, No. 41, p. 37, at p. 57. The dissenting opinion, ibid. at p. 77, defines the term as follows:

A State would not be independent in the legal sense if it was placed in a condition of dependence on another Power, if it ceased itself to exercise within its own territory the summa potestas or sovereignty, i.e. if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails.

The majority of the Court, ibid. at p. 45, uses similar terminology but avoids directly relating the term to sovereignty:

[!] Irrespective of the definition of the independence of States which may be given by legal doctrine or may be adopted in particular instances in the practice of States, the independence of Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.
This statement in the Customs Régime Between Germany and Austria case is especially interesting because, strictly speaking, use of the term “sovereignty” was not required for that decision. The question posed for the Court’s consideration and the relevant wording of the three treaties only raised issues related to the meaning of the term “independence.” The meaning of the word “sovereignty” was not raised directly. This illustrates the deep-rooted links thought to exist between the two concepts.

1. Meaning of “Independence”

The Customs Régime Between Germany and Austria case illustrates the difficulties involved in equating sovereignty with independence. The important feature of this case is that it sheds light upon the judicial meaning ascribed to the latter term. It does so by testing the limits of “independence” in the particular context of a state’s treaty-making powers and its related abilities to enter into economic relations with another state. The conflict in the case involved the possible incompatibility of a proposed 1931 Austro-German ‘customs régime’ arrangement with Austria’s pre-existing treaty commitments (one of the latter preventing Austria from alienating or compromising her independence). The central issue was whether Austria could enter into the customs arrangement with Germany without violating these treaties. The majority of the Court and Judge Anzilotti (in a separate opinion), concurred in holding that the particular proposed customs régime violated Austria’s obligations under the earlier treaties by ‘compromising’ or ‘endangering’ Austria’s independence. The dissenting minority held that the customs régime did not do so. The split in the Court resulted mainly from diverging views about what it means to “compromise” Austria’s independence. All of the opinions agreed that “alienation” of independence required subjugation of one state to another.

Although differing in their interpretations of the term “compromise,” the three main opinions in the case used the term “independence” in an almost identical manner. They defined it primarily in a negative sense since the question before the Court was whether

The majority opinion does include “sovereignty” in its definition of “alienation,” which is described at p. 46 as meaning:

By ‘alienation’, as mentioned in Article 88, must be understood any voluntary act by the Austrian State which would cause it to lose its independence in that its sovereign will would be subordinated to the will of another Power or particular group of Powers, or would even be replaced by such will.

70 The treaties involved were the Austro-German Protocol of March 19, 1931 (customs union treaty), the Treaty of Peace concluded at Saint-Germain on September 10, 1919 (article 88), and the related Protocol No. 1 (October 4, 1922). Ibid. pp. 42-44.

71 Ibid., pp. 46 and 52 (majority judgement definition of alienation, and its finding that the treaty régime does not alienate Austria’s independence, respectively); ibid., pp. 58 and 66-7 (separate opinion of Judge Anzilotti defining “alienation,” and holding that the régime does not have such an effect); ibid., pp. 77 and 86-7 (dissenting judgement’s definition of “alienation” and its conclusion that the régime was compatible with independence).

72 There is a fourth, short opinion in the case, ibid., at pp. 53-4, that concurs with the majority but holds that, additionally, the customs régime would violate article 88 of the Treaty of Saint-Germain.
Austria’s independence would be violated by the proposed customs regime. “Independence” was held to mean the continued existence of a state within its frontiers, with the sole right of judgement and decision in all matters economic, political financial or other, and a lack of subordination to the will or authority of another state or group of states.\(^{73}\) Importantly, the term was held not to preclude such things as the subordination of a state to international law, de facto dependence between countries, or restrictions upon a state’s liberty (whether through the ordinary workings of international law, agreements, contractual arrangements or treaties, “however extensive or burdensome those obligations may be”), as long as those restrictions did not deprive the state of its “organic powers” or all of its sovereignty.\(^{74}\) The anomaly arising from this non-preclusive list is that it allows de facto dependence. It seems peculiar that one might be ‘independent’ and at the same time ‘de facto dependent.’ Such a distinction can only be made if we can separate legal and factual dependence. The permissibility of de facto dependence entails the distinction between law and fact. I would argue, however, that such a distinction causes the concept to blur considerably around its margins.\(^{75}\)

2. Indeterminacy of “Legal Independence”

The need for a distinction between legal and factual independence is not surprising when one considers that no state is truly factually independent from all other states. But this distinction becomes deeply troubling in the Customs Régime Between Germany and Austria case, especially in its formulation and use by Judge Anzilotti. Judge Anzilotti unsuccessfully attempts to maintain a strict separation of fact and law. His decision continually blurs, and at times seems to deny the possibility of making, such a distinction. For example, in the context of speculating as to whether a transition from de facto dependence between Austria and Germany to illegal (de jure) dependence would occur as a result of the customs régime, Judge Anzilotti relies upon political and historical, rather than specifically legal, evidence. He examines evidence of (1) the political movement existing in Germany towards unification of the two countries, (2) the differences in economic strength of the two countries, and (3) the way that economic union would “influence” the two countries towards eventual political union.\(^{76}\) By using such criteria, Anzilotti’s evaluation of legality becomes primarily one of evaluation of fact, and legal independence itself seems to become an issue of fact. Consequently, it becomes

\(^{73}\) This phrasing is an amalgamation of the statements in the three judgements, located in ibid., at pp. 45-6 (per the majority), 57 (per Judge Anzilotti), and 77 (per the dissent).

\(^{74}\) This is an amalgamation of statements in ibid., at pp. 52 (per the majority), 58 (per Judge Anzilotti), and 77 (per the dissent).

\(^{75}\) Such a ‘blurring’ is evident in Judge Anzilotti’s need to simultaneously rely upon, and then obscure, the distinction between questions of fact and law in order to determine whether or not the customs régime ‘endangered’ or ‘alienated’ Austria’s independence: ibid., pp. 67-8.
increasingly difficult to maintain the distinction between the term’s legal and factual meanings in the case, as both collapse into the latter. The dissenting judges notice this difficulty, and explicitly criticise Judge Anzilotti’s decision for having moved into the political realm.\(^{77}\)

The point here is not merely that Judge Anzilotti was unsuccessful in maintaining a distinction between law and fact in a case which implicated gravely troubling political issues.\(^{78}\) Rather, the central point is that precisely by using “independence” as a synonym for “sovereignty” it becomes nearly impossible to maintain a separation of factual and legal independence. Sovereigns are never truly factually or legally independent. As illustrated in Chapter 2, the processes of globalisation no longer permit any sovereign entity to be factually isolated from the rest of the world. Sovereign states, for example, are economically dependent upon each other and international institutions. Even their most closely-guarded capacity—the maintenance of a military—requires co-operation from other states and even foreign corporations. Sovereigns also cannot be legally independent, strictly speaking. The concept of sovereignty is itself a product of international law (both in terms of its creation and continuity), and sovereign states are made legally dependent upon one another as a result of the rules of customary international law and countless bilateral and multilateral treaties.\(^{79}\) Also, any ‘legal’ action by a sovereign requires an international legal community to characterise it as such, and such a community pre-supposes some form of interdependence. As a result, arguments for ‘legal independence’ can only be maintained by using the latter term in its most formal and abstract sense, namely, by arguing that legal dependence that is accepted with the consent of the state itself does not constitute ‘dependence.’ Such arguments are not convincing. Because the concept of sovereignty is so intricately interwoven into the fabric of international law and

\(^{76}\) Ibid., pp. 70-71.

\(^{77}\) The dissenting judges take Judge Anzilotti to task for this move from law to fact/polities: ibid., p. 75 (the Court should not be concerned with political considerations), and pp. 81-3 (the Court is not allowed to base its judgement on speculations about possible consequences of régime, and must rely only upon treaty documents and the actual evidence before it).

\(^{78}\) All of the members of the Court must have been disturbed, if not affected, by the political implications of the case. Germany’s intentions with respect to Austria must have been abundantly clear at the time of the Court’s proceedings, and factions in Austria had persistently advocated a union between the two states since the end of the First World War. E.g., “Austria: The First Republic and the Anschluss,” in Encyclopaedia Britannica Online, as available at http://search.eb.com/bol/topic?article=109735&seq_nbr=12&page=p&isctn=3&pm=1 (accessed 27 June 2001). The later annexation of Austria by Germany in 1938 (legitimated as an Anschluss), contributed to the start of the Second World War. E.g., “Austria: Anschluss and World War II,” in ibid. Interestingly, for a time thereafter it was widely accepted that this annexation actually extinguished the legal existence of Austria: Jennings and Watts, Oppenheim’s International Law, 9th ed., p. 207 [Austria’s existence as a separate state was considered to have ended as a result of the Anschluss, and only after the outbreak of the war did opinion change regarding the effect of this act (i.e., becoming null and void)].

\(^{79}\) Note as well that even the stronger form of “independence” used in the Island of Palmas case referred to above, has limitations. Judge Huber makes this clear when emphasising that sovereigns also have a clear restriction on their independence: an obligation to “protect within their territory the rights of other States.” Island of Palmas Case (Netherlands v. U.S.), Permanent Court of Arbitration (1928) No. XX; 2 R.I.A.A. 829, p. 839 (emphasis added).
international society (with their complex associations of fact and law), it becomes further removed from its ordinary meanings the more we try to compress it into the term "independence."

3. Independence Not a Formal Condition for Statehood

A final problem with this 'attribute' view of the relation of sovereignty and statehood is caused by the formal omission of such a relation in the definition of statehood. The Montevideo Convention, for example, does not list "independence" among its four requirements.\(^80\) Even if we read the term into the broad requirement for "capacity to enter into relations with other states," its practical import has been limited.\(^81\) Thus, in the context of examining the application of these Montevideo Convention criteria in Chapter 1, we saw that any requirement for independence for the purposes of statehood is limited to the entity (1) not needing the assistance of foreign troops to assert control over its territory, and (2) not having given up its sole right of decision or subordinated its sovereign will to another state.\(^82\) A state’s independence in this context is not affected by obligations imposed by international law, no matter how extensive they may be, or even by de facto, or factual dependence (as illustrated a moment ago in the Customs Regime Between Germany and Austria case). In light of the elasticity of the term "independence" when used in the context of statehood, its status as a formal 'requirement' for statehood would seem to be exaggerated. This may be supported by the existence of the controversial category of dependent states under international law. Even if this latter category is deemed not to exist, the length and complexity of arguments used to explain its non-existence indicate why independence should not be a formal requirement for states.

a. Illustration of the Difficulty: The Question of "Dependent States"

Let me briefly illustrate the latter assertion by using as an example Ian Brownlie’s complex and obscure analysis of the two terms “dependent states” and “sovereignty” in his most recent edition Principles of Public International Law.\(^83\) Brownlie’s analysis moves sequentially through ten steps or stages. He starts with the proposition that independence is a


\(^{81}\) Ibid., Art. 1(d).


\(^{83}\) Brownlie, Principles of Public International Law, 5th ed., pp. 71-75 and 76-77.
criterion of statehood [1]. Legal independence is the primary test [2]. Factual dependence is not irrelevant, however, and may in some cases vitiate legal independence [3]. But the international community tends to ignore such issues when assessing statehood [4], so long as the external interference causing this factual dependence is not permanent [5], or even if permanent, occurs under the title of international law [6]. This line of reasoning leads Brownlie to assert enigmatically that “the incidents of personality [must be] sufficiently distinguished from its existence.” In simpler terms, he appears to be arguing that the particular powers possessed by a state are distinct from the existence of that state [7]. Brownlie attempts to explain this distinction by using specific categories of dependence, and illustrates the latter with real examples. However upon closer scrutiny these categories

84 Brownlie, in ibid., at p. 71, states that “[i]ndependence has been stressed by many jurists as the decisive criterion of statehood,” and argues that this criterion may fall under the ‘capacity’ requirement of the Montevideo Convention. Although not identifying himself as one of these jurists, Brownlie clearly considers independence to be at least one of the criteria for statehood. Brownlie also equates independence and sovereignty. E.g., in ibid., at pp. 73 and 76, respectively, he makes the following statements: “[t]he category of independence (or sovereignty used synonymously)” and “[t]he term ‘sovereignty’ may be used as a synonym for independence, an important element in statehood considered already.”

85 Brownlie, in ibid., at p. 72, explores the meaning of the term “independence” by referring us to Guggenheim’s two “quantitative” tests of statehood, namely, that the state must (i) possess “a degree of centralization of its organs not found in the world community,” and (ii) be “the sole executive and legislative authority” in a particular area. But he qualifies and refines the latter part of this test, stating “[i]n other words the state must be independent of other state legal orders, and any interference by such legal orders, or by an international agency, must be based on a title of international law.” Ibid. Brownlie therefore adopts the position that statehood requires specifically legal independence.

86 Brownlie, in ibid., warns us that “there is no justification for ignoring evidence of foreign control which is exercised in fact through the ostensibly independent machinery of the state.” Such foreign factual control over important matters on a “systematic and permanent basis” can threaten legal independence.

87 Brownlie, in ibid., points out that “[t]he practice of states has been to ignore—so far as the issue of statehood is concerned—various forms of political and economic blackmail and interference directed against the weaker members of the community.” Although factual dependence can affect legal independence, the practice of the international community is to ignore such issues in relation to a state’s status as a state.

88 Brownlie, in ibid., asserts that it is important to distinguish between “agency and control, on the one hand, and ad hoc interference and ‘advice’, on the other.” As a result, his dominant criterion for dependence at this point appears to be the permanency of the external interference.

89 When explaining the category of “dependent states” Brownlie argues that even permanent interference will not create dependence so long as it is internationally lawful. In ibid., at pp. 72-3, he posits that “[f]oreign control of the affairs of a state may occur under the title of international law,” and provides the example of Allied control over Germany at the end of the Second World War. Such examples, he explains, provide “no formal difficulty in saying that the criterion of independence is satisfied.” Ibid., p. 73.

90 Brownlie is irked by the fact that “[u]nfortunately writers have created confusion by rehearsing independence as an aspect of statehood and then referring to ‘dependent states’, which are presented as an anomalous category”: ibid. (citations omitted). The failure of such writers is that “the incidents of personality are not sufficiently distinguished from its existence”: ibid.

91 Brownlie, in ibid., lists the following six “situations” or categories of dependence (my paraphrasing):

(i) absence of statehood (complete subordination),

(ii) statehood which has “in some sense ceased to be sovereign” (i.e., through extensive concessions regarding jurisdiction and administration),

(iii) statehood where wide legal powers of agency have been delegated to another state over foreign affairs matters,
prove to be mutually contradictory [8]. In fact, in positing 'sovereignty as independence' Brownlie's dichotomies self-implode: law cannot be separated from fact, permanence and impermanence of interference become irrelevant, and 'incidents' cannot be separated from 'existence' [9]. The dramatic consequence is that the excessive delegation of a state's legal powers will destroy its independence (sovereignty) and even the state itself (its existence) [10]. 'Incidents' become indistinguishable from 'existence.'

(iv) 'client' statehood in which the state suffers interference from another 'patron' state, but is not under complete and permanent control,

(v) legal personality of a special type, appearing only for certain purposes (mandated and trust territories, protectorates), and

(vi) statehood not deemed "independent" under a particular instrument.

Technically, only categories (i)-(iv) and (vi) could represent 'dependent states,' since category (i) refers to non-state entities and (v) to entities with mere legal personality. Since Brownlie equates independence with sovereignty, the second category would seem to merit especial attention. But instead of analysing it further, Brownlie simply provides examples of situations amounting to dependence in any of his six senses.

Brownlie's examples only serve to break down his conceptual categories. This is illustrated by his comments about the U.S. Nationals in Morocco case, in *ibid.*, at p. 74, which simultaneously portrays several of his senses of dependence:

A protected state may provide an example of international representation which leaves the personality and statehood of the entity represented intact, though from the point of view of the incidents of personality the entity may be 'dependent' in one or more of the senses noted above. In the case of U.S. Nationals in Morocco the International Court, referring to the Treaty of Fez in 1912, and the creation of a French protectorate, stated: 'Under this Treaty, Morocco remained a sovereign State but it made an arrangement of contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco'. It should be pointed out that a common opinion is that the evidence supported the view that the relation was one of subordination and not agency. [Emphasis added, citations omitted]

The example set out in the previous footnote reveals how by blending several of his categories in a mutually contradictory way Brownlie obliterates his own distinctions. Brownlie starts by saying that a protected state might possess "personality and statehood" but still be dependent if the "incidents of [its] personality" are limited. This would describe an entity falling under category (iii), or possibly category (v), above. The passage from the *U.S. Nationals in Morocco* case supports this since Morocco is identified as a "sovereign State" and France merely is seen to be exercising "certain sovereign powers" (or 'incidents of personality'), if we use Brownlie's terminology. But his final comment identifies the relationship as one of "subordination and not agency." Such a relationship cannot fall under either of the previously mentioned categories, but rather would fall under either category (i), describing an absence of statehood, or possibly category (ii), describing statehood without sovereignty. Either possibility completely contradicts the passage from the *U.S. Nationals in Morocco* case. As a result, the six categories and the distinction between 'incident' and 'existence' both fail when practically applied.

Brownlie never resolves the contradictions revealed in his analysis, even when he later revisits the *U.S. Nationals in Morocco* case when examining sovereignty as a possible legal criterion of statehood. After reiterating that "[t]he term 'sovereignty' may be used as a synonym for independence," he attempts to root out a source of confusion in the use of the term, namely, its incorrect use in referring to "a state which has consented to another state managing its foreign relations, or which has granted extensive extra-territorial rights to another state, [as] not 'sovereign'." *Ibid.*, p. 76. This type of confusion leads Brownlie to warn us: "If this or a similar content is given to 'sovereignty' and the same ideogram is used as a criterion of statehood, then the incidents of statehood and legal personality are once again confused with their existence." *Ibid.* In other words, we should not confuse the delegation of legal powers with a loss of statehood. Yet immediately after reminding us of the same passage in the *U.S. Nationals in Morocco* case, Brownlie adds at p. 77:

But it would be possible for a tribunal to hold that a state which had granted away piecemeal a high proportion of its legal powers had ceased to have separate existence as a consequence. Obviously it may in law and fact be difficult to distinguish granting away of capacities and the existence of agency or representation.
The failures of Brownlie’s complex analysis help to illustrate the way in which theoretical formulations that use independence and sovereignty synonymously as an attribute of statehood are inherently unstable. Such formulations have a tendency to self-destruct when faced with the real difficulties of distinguishing between legal and factual independence, ‘incidents’ and ‘existence.’ I have examined Brownlie’s position in some detail because he attempts to set out such a theory in a fairly sophisticated manner, but other examples could be found. Peter Malanczuk, for instance—quoted above for suggesting that “sovereignty” should be replaced by “independence” because of the former term’s emotive qualities—nevertheless admits that there is “no fixed dividing line between independence and loss of independence; even ‘independence’ shares some of the emotive qualities of the word ‘sovereignty’.” As we have seen, the Permanent Court of International Justice in the *Customs Régime Between Austria and Germany* case had equal difficulties. In fact the Court would seem to have diminished the meaning of ‘legal independence’ so significantly as to be nearly irrelevant. Finally, the category of “dependent states” itself significantly challenges the possibility of independence being a formal requirement for statehood. ‘Independence’ may be an important component of statehood but it is neither a prerequisite for it, nor a synonym for sovereignty.

**D. EXAMPLES OF NON-SOVEREIGN STATES**

Let us finally attempt to differentiate statehood from sovereignty by looking at some historical and current examples of states which are *not sovereign*. The existence of many such states is readily acknowledged as a historical matter, and present writers continue to

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In other words, excessive delegation of legal powers may destroy the independence of a state (its sovereignty), as well as its very existence. ‘Incidents’ and ‘existence’ in such extreme cases become indistinguishable.


57 Even though this case concerned the unusual situation in which a state (Austria) was prevented from being able to alienate or compromise its independence by treaty, the judgements strongly supported the right of all other states to do so. E.g., *Customs Régime Between Germany and Austria (Protocol of March 19th, 1931)*, Advisory Opinion, 1931 P.C.I.J. Rep., Series A/B, No. 41, p. 37, at pp. 48-9 [majority opinion, speaking of the way in which the Covenant of the League of Nations binds states but “contains neither any undertaking on the part of States not to alienate their own independence, of which they alone are in principle entitled to dispose, nor any undertaking not to seek economic advantages calculated to compromise the independence of another State which is free to dispose of it as it pleases”]. According to Judge Anzilotti, in *ibid.*, at p. 59, states are free to alienate both their independence and existence: “According to ordinary international law, every country is free to renounce its independence and even its existence.”

58 See, e.g., Hannum, *Autonomy, Sovereignty and Self-Determination*, pp. 16-18 (categories of states, including ‘dependent states’ and other international entities); Briefly, *Law of Nations*, pp. 121-22 (discussing ‘dependent’ and ‘independent’ states and arriving at the conclusion that “independence cannot be a fundamental right of states as such,” the term being “merely a descriptive term; having no moral content”); and the decision of Judge Anzilotti in the case regarding the *Customs Régime Between Germany and Austria (Protocol of March 19th, 1931)*, *ibid.*, at p. 57 (using ‘dependent’ states as an example in his argument, although qualifying them as being “exceptional, and to some extent, abnormal”).

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accept the possibility of the existence of non-sovereign or only partially sovereign states. The existence of less than fully sovereign states, it must be emphasised, reveals that sovereignty is divisible, a point which is heedly denied by absolutist theories of sovereignty. Let us look at these non-sovereign states under two categories, namely, (1) federal states with international personality, and (2) states under protection.

1. Federal States With International Personality

The idea of federal statehood creates conceptual difficulties in sovereignty theory because in its earlier meaning both the federal state (as a whole) and each federal unit possess sovereignty. Absolutists, thinking in terms of indivisible sovereignty, choose to deny the sovereignty of the sub-federal units as a result. Secessionists, on the other hand, reject the sovereignty of the federal unit. More flexible theorists have been able to accept the implications of federal statehood, seeing the totality of sovereignty as being divided between the federal state and its units. Thus Jennings and Watts, for example, comment:

Since a federal state is itself a state, side by side with its member states, sovereignty is divided between the federal state on the one hand, and, on the other, the member states; competence over one part of the objects for which a state exists is vested in the federal state, whereas competence over the other part remains with the member states. Full sovereignty is vested in neither unit alone, but only in the federal state as a whole. As a result, sub-federal units, if recognised as states, are not fully sovereign. Rather, they possess

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99 E.g., Jennings and Watts, Oppenheim’s International Law, 9th ed., pp. 123-4 (states less than sovereign). Note that these authors do not consider neutralised states as falling within such a category, stating that “a neutralised state is as fully sovereign as any non-neutralised state.” Ibid., p. 319 (n. 1).

100 Jennings and Watts explain in ibid., at p. 124:

The distinction between full sovereign states and partially sovereign states implies that sovereignty is divisible, so that the powers connected with sovereignty need not necessarily be united in one hand. But some writers have maintained that sovereignty is indivisible, a state being either sovereign or not. ... The controversy is somewhat theoretical. It is a fact that partially independent states exist, and are accepted as such by the international community in general. It accordingly seems preferable to maintain the practical, though abnormal and possibly illogical, view that sovereignty is divisible. [Reference omitted.]

101 The original adjectival use of “federal” (now obsolete) was “Of or pertaining to a covenant, compact, or treaty”: Oxford English Dictionary Online [definition of “federal, a. and n.” section 1. a.]. Its subsequent (non-theological) adjectival sense, the one being used here, is: “2. a. Of or pertaining to, or of the nature of, that form of government in which two or more states constitute a political unity while remaining more or less independent with regard to their internal affairs.” Ibid. The same text notes its first use in such a manner as being in 1707, citing: “1707 SETON Sp. in Sc. Parl. in Parl. Hist. VI. App. 142 Sweden and Denmark were united by a federal compact under one monarch.”

102 E.g., Lansing, Notes on Sovereignty, pp. 34-7 (arguing that each federal unit must give up its external sovereignty to the federal state, effectively making only the latter sovereign in the international sense). See generally Chapter 5, above.

103 Jennings and Watts, Oppenheim’s International Law, 9th ed., p. 249 (notes omitted).
some aspects of international personality. In this way such sub-federal entities may properly fall under the category of 'non-sovereign states.'

Various federal and confederal arrangements have allowed sub-state units to exercise sovereign powers without necessarily deeming them to be 'sovereign states' for the purposes of international law. Even if one does not accept that the sub-federal units of Switzerland and Germany were, or are, sovereign (as suggested in the next Chapter), one must acknowledge that they possessed, and may still possess, sovereign competences. Brownlie, for example, summarises:

In the constitutions of Switzerland and the German Federal Republic component states are permitted to exercise certain of the capacities of independent states, including the power to make treaties. In the normal case, such capacities are probably exercised as agents for the union, even if the acts concerned are done in the name of the component state. However, where the union originated as a union of independent states, the integral relations retain an international element, and the union may act as agent for the states [Switzerland is identified as such]. The United States constitution enables the states of the Union to enter into agreements with other states of the Union or with foreign states with the consent of Congress.

Member states of a federation have exercised a wide variety of sovereign powers. They have been permitted to conclude treaties, to have international law applied to their disputes, to be granted immunities in foreign countries, to send representatives abroad (similar to diplomatic agents), and to have rights over portions of adjacent continental shelves. Two of the federal units of the former USSR—the Ukrainian SSR and the Belorussian SSR—had well-recognised separate personality on the international plane, leading Shaw to designate their status prior to their independence as internationally recognised "non-sovereign state entities."

The continuing international status of some sub-federal units may even be evidenced by their practice of representing themselves abroad (independently of federal representation). Quasi-diplomatic missions increasingly are being sent to international fora as well as to the political and trade capitals of the world by sub-federal member states or provinces in order to

104 Jennings and Watts, in ibid., at p. 249, comment about the member states of a federation that "while they are not full subjects of international law, they may be international persons for some purposes."

105 Brownlie, Principles of Public International Law, 5th ed., pp. 59-60 (citations omitted). See also, Jennings and Watts, ibid., pp. 245-55 (examining the status of federal states generally, and more particularly looking at Germany, Switzerland and the United States), Shaw, International Law, 4th ed., p. 157 (referring in addition to "compacts" between American states and foreign states or component units).

106 Jennings and Watts, ibid., pp. 249-52.

107 Shaw, International Law, 4th ed., p. 193. See also, Brownlie, Principles of Public International Law, 5th ed., pp. 74-5 (noting that the two republics could conclude treaties on their own behalf as well as were members of the United Nations); accord Shaw, ibid., p. 156, Jennings and Watts, Oppenheim's International Law, 9th ed., pp. 249-50 (n. 7).
draw attention to their specific capabilities and needs. This is graphically described by Ivo Duchacek:

These [sub-state] contacts involve not only immediate neighbours across sovereign frontiers—such as northern Swiss cantons, the West German Land of Baden-Württemberg, and French Upper Alsace (Regio Basiliensis)—but also distant centres of industrial or investment power. In 1985, for example, twenty-nine US states had fifty-five permanent offices in seventeen foreign countries (eighteen US states had their separate missions in Tokyo) while only four states had overseas representation in 1970. ... In addition, eighteen US port authorities and cities had their representatives in Europe, ranging from Alabama’s Port of Mobile to the Texas Port Authority of Corpus Christi. Six Canadian provinces (Alberta, British Columbia, Nova Scotia, Ontario, Quebec, and Saskatchewan) have established forty-six permanent missions in eleven foreign countries....

Agreements also are being concluded between the member states of different federations as well as between sub-federal units and foreign states. ‘Informal’ agreements between sub-state units are being sought because existing state-to-state mechanisms do not work effectively. Moreover formal agreements, such as the 1982 Agreement on Acid Precipitation, between the state of New York and Quebec, are being concluded with greater frequency. In this light, Duchacek identifies eight-hundred odd such agreements, noting how they combine a formal display of respect for the federal entities with a “matter-of-fact description of how the agreement pertains to both sides of the border.” Such agreements have promoted an increase in “rudimentary co-operative frameworks astride sovereign boundaries.”

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108 Ivo D. Duchacek, “Perforated Sovereignties: Towards a Typology of New Actors in International Relations,” in Federalism and International Relations: The Role of Subnational Units, ed. H.J. Michelmann and P. Soldatos, 1-33 (Oxford: Clarendon Press, 1990), p. 1. For a similar, earlier piece see Ivo D. Duchacek, “Multicommunal and Bicommunal Polities and Their International Relations,” in Perforated Sovereignties and International Relations: Trans-Sovereign Contacts of Subnational Governments, ed. I.D. Duchacek, D. Latouche and G. Stevenson, 3-28 (Westport, CT: Greenwood Press, 1988). As noted by Jennings and Watts, in ibid., at p. 252 (n. 13), “some of the provinces of Canada, and states of Australia, maintain representative offices in London; and Quebec in particular does so in a number of other countries.” The latter authors highlight that such representative offices tend to focus particularly on trade and tourism related matters.

109 As highlighted by Ivo Duchacek, in “Perforated Sovereignties,” ibid., at p. 7: “On 11 October 1985, while signing a nine-page charter between six US states and two Canadian provinces (Ontario and Quebec) on the subject of preservation of the Great Lakes water resource against future raids by the water-hungry south, the chairman of the meeting, the Ohio governor, Richard R. Celeste, correctly noted: ‘Most of our tools of government do not fit the problems we have today.’” See also, Hans J. Michelmann’s “Conclusion” to Federalism and International Relations: The Role of Subnational Units, ed. H.J. Michelmann and P. Soldatos, 299-315 (Oxford: Clarendon Press, 1990) [identifying and summarising the reasons and motivations for this intensification of sub-state interaction].

110 Jennings and Watts refer to this Agreement, in Oppenheim’s International Law, 9th ed., at p. 250 (n. 8) [citing: (1982) 21 ILM 721].


112 Duchacek, ibid., at p. 24 states: “The result [of transborder and regional para-diplomacy, networks and co-operative interaction] is the contemporary emergence of rudimentary co-operative frameworks astride sovereign
necessitated by, and at the same time reflect, the processes of globalisation highlighted earlier in Chapter 2. Interestingly, according to Duchacek they do not seem to be challenging state sovereignty *per se*. Rather than replace state sovereignty, he suggests that these sub-state relations will likely lead to new kinds of constructive "co-operative/competitive segmentation" between federal states and their sub-state units.113

2. States Under Protection

A second category of states that are not sovereign, or not yet sovereign, can be classified under a host of different terms, from "states under protection," to "protectorates," to "vassal states." I use the first term to describe the general category, since it is the broadest one, but subdivide the following specific examples under the terminology used by the authors of the texts from which they were culled.

a. Vassal States

In the 19th and early 20th Centuries there existed a number of states described as "vassal states" because of the similarity of their relation to that of feudal vassals and lords.114 Charles Fenwick, in a confidential document of the U.S. Department of State, lists such entities as Bulgaria, Eastern Roumelia, Romania, Serbia, Crete, Egypt, Transvaal, Outer Mongolia and Outer Tibet as variously falling under this category.115 These states varied in their level of subordination, ranging from (1) mere nominal subordination to the suzerain State while moving towards complete independence, to (2) nominal subordination to the suzerain State while in fact under the protection of a third power, to (3) those maintaining "the formal relations of vassal and sovereign."116 The kinds of burdens and restrictions placed upon such states included the requirements of paying tribute to the suzerain state,

boundaries, a subcategory of international regimes which, paradoxically, combine respect with disrespect for territorial sovereignty. These transborder configurations reflect and implement the imperatives of regional interdependence between two or more territorial segments of contiguous sovereign national systems." Duchacek breaks down these various forms of 'diplomatic' interaction into three categories: (1) transborder regional paradiplomacy [i.e., between bordering entities], (2) transregional (or macroregional) and paradiplomatic contacts [i.e., between non-bordering entities within a region], and (3) global paradiplomacy [i.e., between entities separated across the globe]: *ibid.*, pp. 15-16. He also identifies interaction specifically aimed at promoting a secessionist agenda (i.e., some of Quebec's initiatives), as being forms of "protodiplomacy": *ibid.*, p. 27.

113 *Ibid.*, pp. 29 [co-operative/competitive segmentation]. In *ibid.*, at p. 30, Duchacek argues that sovereign states will remain relevant and that this process is more one of rational segmentation than fragmentation:

[I]t should be added that segmentation of foreign policy in terms of its various and simultaneous targets and the means to attain them, as imposed by the international environment and requiring multiple expertise, does not mean actor fragmentation; the various functional and geographic divisions, sections, and desks in any ministry of external affairs are signs not of chaotic fragmentation, but of rational segmentation.

114 Fenwick, *Wardship in International Law*, pp. 21-28. Note that Jennings and Watts argue that vassal states "normally had no separate international position" from the suzerain state, and thus employ the broader term "states under protection": *Oppenheim's International Law*, 9th ed., p. 267.


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guaranteeing the protection of minorities, and continuing the capitulation regimes that provided immunities and privileges for foreigners. Other requirements included their mandatory succession to treaties of commerce and navigation and to contractual obligations (e.g., related to railroads), as well as subjection to the political and military authority of the suzerain. Vassal states might also be unable to impose transit duties on international commerce and could be forced to destroy existing fortresses in their territories. But at the same time they might possess such international capacities as those of being able to declare war, to conclude peace arrangements, and to direct their own internal affairs and administration. They might possess the international rights to enter into treaties with foreign states as well as the suzerain state (possibly limited by the latter’s veto), to contract foreign loans, to attend and participate in international conferences as well as the right of legation. Bulgaria, the least encumbered vassal state, was even able to attend the first Hague Peace Conference, to vote independently, and to sign conventions in the face of protest from its suzerain state, Turkey.118

b. Protected States

Several small states were so closely connected to a neighbouring power in the early 20th Century as to be designated as “protected states” by Fenwick. Although internationally described as “states,” they possessed international personality of such a limited nature as to make it difficult to consider them sovereign. Writing immediately after the First World War, Fenwick describes the status of the “diminutive States” of Andorra, Liechtenstein, Monaco and San Marino under the title “Protected States” as follows:

The Republic of Andorra is under the joint suzerainty of France and of the Spanish Bishop of Urgel. It has no diplomatic relations with other States, and its personality as a State is almost entirely absorbed in that of its rulers. The principality of Liechtenstein is nominally a sovereign State, but is substantially under Austrian protection and like Andorra does not send and receive diplomatic agents. The principality of Monaco, under the nominal protection of Sardinia since 1815, may now be regarded either as a full sovereign State, or as a protectorate of France in consequence of its entrance into the French customs control and into the French postal and coinage system. The

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116 Ibid., p. 22.
117 Compiled from Fenwick’s analysis of these states in ibid., at pp. 22-28.
118 Fenwick, in ibid., at p. 24, describes this striking situation:

Even more significant of the completely autonomous position of Bulgaria is the fact that in 1889 it sent delegates to the Peace Conference at The Hague. In spite of the protest of Turkey the Bulgarian delegates were admitted, and although seated after Turkey nevertheless voted independently of Turkey, signing without reservation conventions which Turkey signed with reservation.
Republic of San Marino is an independent State under the formal protection of Italy.\textsuperscript{119}

All of these states, it should be noted, became Member States of the United Nations between 1990 and 1993, and can now be categorised as sovereign.\textsuperscript{120}

c. States Emancipated Under the Protection of Another State

Another category suggested by Fenwick is that of ‘states emancipated under the protection of Another State.’ He provides the example of the Republic of Cuba, during its early period of independence, as being “emancipated under the protection” of the United States.\textsuperscript{121} Gaining independence from Spain in December 1898 under the Treaty of Paris, Cuba was occupied and administered by the U.S. from 1899 to 1902, and became an independent state on May 20, 1902.\textsuperscript{122} However, in order to obtain independence from the U.S. Cuba was required to subscribe to the terms of the ‘Platt Amendment,’ a US legislative act imposing significant conditions upon Cuba.\textsuperscript{123} Under its terms Cuba was placed under restrictions regarding its treaty-making powers, cessionary powers and its ability to incur public debts, as well as was required to uphold certain sanitary conditions and to sell or lease lands to the U.S. for military purposes.\textsuperscript{124} Additionally, under the terms of the Platt Amendment, “a right [was] reserved by the United States to intervene in Cuba for the ‘maintenance of a government adequate for the protection of life, property, and individual liberty.’”\textsuperscript{125} The onerous obligations imposed by the Platt Amendment, combined with its

\textsuperscript{119} Ibid., p. 15.


\textsuperscript{121} Fenwick, Wardship in International Law, pp. 18-20.

\textsuperscript{122} “Cuba,” in Encyclopaedia Britannica Online, as available at \url{http://search.eb.com/bol/topic7artcm17378&seqnbr=7&page=n&iscnt=3&pm=1} (accessed 4 July 2001).

\textsuperscript{123} This amendment is described in “Platt Amendment,” in \textit{ibid.}, as follows:

Platt Amendment—rider appended to the U.S. Army appropriations bill of March 1901, stipulating the conditions for withdrawal of U.S. troops remaining in Cuba since the Spanish-American War, and molding fundamental Cuban-U.S. relations until 1934. Formulated by the secretary of war, Elihu Root, the amendment was presented to the Senate by Sen. Orville H. Platt of Connecticut. By its terms, Cuba would not transfer Cuban land to any power other than the United States, Cuba’s right to negotiate treaties was limited, rights to a naval base in Cuba (Guantanamo Bay) were ceded to the United States, U.S. intervention in Cuba “for the preservation of Cuban independence” was permitted, and a formal treaty detailing all the foregoing provisions was provided for. To end the U.S. occupation, Cuba incorporated the articles in its constitution. Although the United States intervened militarily in Cuba only twice, in 1906 and 1912, Cubans generally considered the amendment an infringement of their sovereignty. In 1934, as part of his Good Neighbor policy, Pres. Franklin D. Roosevelt supported abrogation of the amendment’s provisions except for U.S. rights to the naval base.

\textsuperscript{124} Fenwick, Wardship in International Law, p. 19.

\textsuperscript{125} Ibid., p. 19. As indicated above, the U.S. exercised its right to intervene in Cuba twice, in both 1906 and 1912.
formal incorporation into a treaty between the two states on May 22, 1903, make the status of Cuba during the period of its application (1901 to 1934) difficult to determine. Cuba’s sovereign status would seem to have been either greatly restricted, or negated, as a result.

Fenwick, however, argues that because the amendment was incorporated into a treaty, its conditions did not diminish Cuba’s independence since such conditions, “being thus placed upon a voluntary contractual basis ... need not be regarded as infringing upon the theoretical independence of the new State.”126 In fact, he argued that Cuba possessed complete statehood during this period, noting that it maintained diplomatic relations with other states and attended the Second Hague Peace Conference of 1907.127 Needless to say, it would nevertheless be difficult to consider Cuba fully sovereign, in the normal sense of the term, when facing such extreme restrictions.

d. States Under Protection/Protectorates

Jennings and Watts, employ the terms “states under protection” and “protectorates” to describe entities similar to Fenwick’s “vassal states” and “protected states.”128 States under protection are characterised by having surrendered by treaty to the protection of a strong state, with the latter thereby being transferred the competence to manage and conduct their international affairs and relations.129 This category of states is to be distinguished from colonies, which do not possess separate statehood or sovereignty.130 Examples of protectorates included, at various points in time, the Principality of Monaco, the Free City of Danzig, San Marino, the Republic of Andorra, Cuba, Panama, the Dominican Republic, Haiti, Nicaragua, Tunis, Morocco, the Tangier Zone (Tangier), Bahrain, Kuwait, Qatar, the Trucial States, the Malay States (Johore, Tahang, Negri Sembilan, Selangor, Perak, Kedah, Perlis,

126 Ibid.
127 Ibid., p. 20.
128 Jennings and Watts, Oppenheim’s International Law, 9th ed., pp. 266-74. The authors prefer not to use the term “protectorates” because of the lack of legal precision associated with the term, as well as its association with the “British protectorates' formerly exercised over certain African tribes” which “possessed no international legal status at all.” Ibid., pp. 268-9. At points when they do use the term “protectorates,” I believe they mean to refer to “states under protection.”
129 Ibid., p. 268.
130 Jennings and Watts, in ibid., at p. 275-6, summarise:

In general, while protected states possess in varying degrees some element of separate statehood and are essentially foreign states over which the protecting state has extensive powers of control, particularly as regards foreign relations, colonies and similar dependent territories possess no separate statehood or sovereignty: it is the parent state alone which possesses international personality and has the capacity to exercise international rights and duties. The parent state may, and often does, grant a colony a degree of internal autonomy, and even certain powers in external affairs, but from the parent state’s point of view this is a revocable delegation of the exercise of part of the parent state’s sovereign powers. Parent states have varied and even annulled the constitution they have previously granted to a colony, as the United Kingdom did in respect of British Guiana in 1953, Southern Rhodesia in 1965, and Anguilla in 1971. [Citations omitted.]
e. Dominions

A final type of state potentially falling under the present category of non-sovereign states is the "dominion." The self-governing dominions of the Commonwealth, in their transitional stage between colonial status and full independence, possessed most if not all of the attributes of statehood and exercised significant aspects of sovereignty. Especially after the enactment of the Statute of Westminster of 1931, such self-governing dominions as Canada, Australia, New Zealand and South Africa exercised considerable internal and

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131 Ibid., § 83, pp. 271-5 (nn. 1-10). Note that the authors point out that others would describe the protectorates lying within the Caribbean and the Americas as more properly classifiable as being "quasi-protectorates": ibid., p. 273 (n. 3) [referring to Kunz, Staatenverbindungen (1929)].

132 Ibid., p. 269.

133 Jennings and Watts, in ibid., at p. 269, state that "it is a characteristic of a protectorate that the protected state always has, and retains, for some purposes, a position of its own as an international person and a subject of international law" (citations omitted). The international capacities listed in the following sentences have been extracted from the examples in ibid., at pp. 269-74.

134 Ibid., p. 271 (citations omitted).
external independence, making their status, in the assessment of Jennings and Watts, “indistinguishable from that of full international persons, despite some anomalies at times.”

Although such a complex topic is beyond the scope of the present work, the ‘fit’ of such dominions within the instant ‘non-sovereign state’ category at different points between the First and Second World Wars at least needs mention.

E. ASSESSMENT

To sum up, what can be said about the relation of the three terms “statehood,” “independence” and “sovereignty”? Statehood does not always require independence, as illustrated by the above examples, but most states today are in fact and at law relatively independent. Sovereignty helps ensure independence, and most sovereign entities, at least at present, are states. However the two terms “sovereignty” and “independence” cannot be completely equated, no more than can “statehood” and “independence.” Instead, perhaps independence could be seen as a kind of conceptual link between the two terms. Two writers have made this kind of argument, seeing independence as a prerequisite to, and sovereignty a consequence of, statehood:

A distinction [between independence and sovereignty] should be made, however, as independence is an essential requirement for a claim to statehood and successful attainment of it. It is, therefore, a prerequisite, whereas sovereignty is a right that follows from its statehood.

Such an argument may help us to understand the frequent linkages that arise between the three terms. Strictly speaking, however, it overstates the connection, since non-sovereign states (and as will be discussed in the following Chapter, non-state sovereigns), have existed and may yet exist at international law. In this context it must be emphasised that the linkages between independence, statehood and sovereignty are neither necessary, nor simple causal ones. Not all states need be independent, nor need they be sovereign. A better way of expressing this connection might be to say that there is a rebuttable presumption for independence of states, and a similar presumption that such independent states will be

135 Ibid., pp. 258-9. See also, Ibid., pp. 256-66. Geoffrey Marston, in “Note: The British Acquisition of the Nicobar Islands, 1869: A Possible Example of the Abandonment of Territorial Sovereignty” (1998) 69 Brit. Yrbk. Int’l L. 244-65, at p. 262, comments in passing that the Government of India (then under dominion status), itself took possession of the islands in question, thereby providing “an example of the prerogative annexation of a new territory by an entity other than the central Imperial authority.”

136 For an in-depth examination of the legal status of the colonies and of commonwealth and colonial law generally, see e.g., Sir Kenneth Roberts-Wray, Commonwealth and Colonial Law (London: Stevens and Sons, 1966).

137 Williams and de Mestral, Introduction to International Law, p. 46.
sufficient. But even here one must remain cautious, as rebuttable presumptions perhaps too easily shift the onus of proof away from the claimant entity.

In any event, I argue that this third equation of statehood and sovereignty, that involving sovereignty (independence) as an attribute of states, also fails to adequately address the relations of the three concepts. "Independence" cannot be used as a synonym for sovereignty without itself becoming indeterminate, and "sovereignty" cannot be neatly compressed into, or encompassed by, either of the terms "independence" or "statehood." Rather, these three concepts are related in a more complex manner, one that cannot be expressed in the form of simplistic equivalents. Sovereignty, statehood and independence, although most commonly found together, must remain conceptually distinct.

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To sum up, this Chapter has examined the relations of sovereignty and democracy, democracy and statehood and sovereignty and statehood. Sovereignty and statehood are linked so closely that a large part of the Chapter was dedicated to showing weaknesses in any equation of the two terms. Clearly they can exist together; the challenge is to understand how they can exist independently. In the following Chapter this analysis is supported with examples of non-state sovereigns and divided and coexisting sovereignties. The challenge in examining the relations of sovereignty and democracy and democracy and statehood, respectively, has been to understand how the two pairs of concepts may conflict, and yet at the same time interact productively. Similar underlying tensions exist for both pairs, but these tensions may be productively harnessed if they can be used to serve as checks and balances and thereby prevent any extreme and totalizing formulations of one concept at the expense of the other. In this way sovereignty can serve as a check against the imperializing tendencies of international democracy, which if allowed to follow its natural progression would push in the direction of absolute democratic uniformity. Statehood allows the possibility of large-scale democracy, enabling the demos to make decisions regarding a greater range of issues that will meaningfully affect human life. Democracy plays the dual roles of enabling participation at all levels (challenging the exclusivity of the sovereign), and

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138 Professor De Lupis, in International Law and the Independent State, at p. 23, states this clearly:

There is a presumption in favour of the full sovereignty of a state over its territory unless a title or rule can be shown under which international law would restrict the sovereignty.... The legal implications of this statement are obvious in proceedings before an international court: it then becomes a question of burden of proof. The onus is on the one who claims restrictions of sovereignty to show a legal title, either by treaty or by customary international law or by general principles of law.

139 Cf. Brownlie, in Principles of Public International Law, 5th ed., at p. 291, who cautions us against adopting the statement in the Lotus case that "restrictions upon the independence of States cannot be presumed." Instead, he argues that the burden of proof might be "described in terms of the duty to establish a restriction on sovereignty on the part of the proponent of the duty."
of checking the twin evils of bureaucratisation and specialisation that are associated with the modern state.

Having examined the relations of these three concepts, let us now turn to the task of setting out a tentative, democratic conception of sovereignty.
Chapter 8: A Democratic Conception of Sovereignty

Having examined the concepts of statehood, democracy and sovereignty in some depth, including the relations of the three terms, let us turn to the potential for a 'democratic conception of sovereignty.' To my knowledge, no such full-fledged conception exists at present, either in practice or theory. In practice, decisions at the international level are rarely democratic and the bodies to whom power has been delegated tend to work undemocratically. It is unusual for such bodies to be accountable in a democratic manner. In theory, the ideas of ‘popular sovereignty’ or the ‘sovereignty of the people’ at most indicate a different understanding of the source of sovereignty. As seen in our examination of contractarian theories, such an understanding may have little or no implication for the actual locus of sovereignty. As a result, the overwhelming majority of individuals inhabiting the nearly 200-odd states around the globe at present possess no real ability to be informed about, let alone determine, international policies and decisions. Such abilities remain firmly in the hands of the executive bodies of each state, and this tends to be the case regardless of whether the state is democratic or autocratic in form. Individuals are unable to participate in day-to-day decisions at the international level, let alone do so democratically. In addition, state executives tend to be either completely unaccountable to the public (i.e., appointed bureaucrats), or if elected, are only accountable in the most infrequent and tangential manner. They may, for example, only face the possibility of re-election once every four years or so, and even then are generally assessed on the basis of an entire term’s performance, rather than per particular issues. The power of state executives is especially important because the state remains the central mechanism for interaction at the international level. It is no longer the sole actor, as we saw in Chapter 2, but is still the dominant one. Democracy in the international sphere remains difficult in such a situation. Even the new and competing forms of international actors offer little improvement, as most are neither democratic in form nor in nature. International and regional organisations, NGOs, ‘transsovereigns’ (such as the Catholic Church and the environmental movement), and transnational ethnic, religious and criminal entities all tend to work non-democratically. Only transgovernmental actors that happen to work through elected officials have any real possibility of being checked by democratic processes (and even then, only through re-election pressures). In sum, international law and international practice offer few, if any, examples of real combinations of democracy and sovereignty. Moreover, there remain many serious impediments to such a conception.
Keeping these difficulties in mind, this Chapter will trace the outlines of such a democratic conception of sovereignty. The two central challenges facing such a conception are firstly, that of extending democracy to the international sphere, and secondly, that of extending sovereignty so as to be able to better support democratic practices. As a result, the first two sections of this Chapter reconsider democracy and sovereignty, respectively. The first briefly raises some of the basic questions surrounding the application of democracy, namely, questions related to the people, the demos, the polis and the polity. These questions may be answered in new ways in the context of a democratic version of sovereignty, particularly with respect to the polis and polity, both of which can be dramatically reconceptualized at the international level. The second section similarly 'opens up' sovereignty by deepening the arguments against any necessary connections between sovereignty and statehood. Various examples of non-state sovereignty, as well as divided and coexisting sovereignties, are highlighted. The third section attempts to combine these elements to form a rough model of democratic sovereignty. Such a model must remain tentative, both because the practice supporting it, and our understandings of democracy, are as yet underdeveloped. But the egalitarian and humanistic implications of a democratic form of sovereignty should strongly encourage us to support its further development.

I. DEMOCRATIC POSSIBILITIES

In Chapter 3 we examined some of the important features that distinguish democracy from other systems of governance, including its principled qualification of the meaning of the "people," robust understanding of the demos, and the various possibilities it presents for the polis and polity. Let me briefly review the conclusions of that Chapter. The question of what body may constitute the "people," or group subject to democratic decision-making, is by and large a matter external to democracy, since democratic theory pre-supposes the existence of a unit within which democratic processes may occur. But at least two of the fundamental principles that underlie democracy—equality and non-discrimination—can and should be applicable to such questions. Thus, for example, excluding individuals or groups from being part of the people on the basis of systems of apartheid or slavery, or upon racist or sexist rationales, is unacceptable. The demos, or subgroup of the people entitled to participate in democratic decision-making, should be nearly the same as the entire people. In other words, almost all of those subject to democratic decision-making must be able to participate in the decision-making process. This argument is founded upon the three understandings that (1) every individual has intrinsically equal moral worth, (2) the good or interests of each person must be given equal consideration, and (3) each person is best qualified to make decisions
regarding her or his good or interests. Consequently, the only persons that can be excluded from the *demos* are children, adults proved severely mentally defective, and transients. The exclusion of these categories of individuals is justifiable only because of their lack of personal autonomy, lack of political competence, and lack of requisite moral understanding or moral capacity to participate fully in the democratic decision-making process. Transients, meaning those persons either temporarily resident or merely passing through the territory, may be excluded because they are not *morally* qualified to participate in democratic decision-making, since they are not subject to the effects of their decisions (such as the consequent laws or policies). Foreigners more permanently resident, however, should be entitled to participate in democratic processes. In sum, the "demos must include all adult members of the association except transients and persons proved to be mentally defective."¹ The ideal size of the democratic unit, or *polis*, when considered as a discrete geographical entity, should remain close to that of the modern state. However, since statehood comes in an incredible variety of sizes, both in terms of population and territorial area, the scope of the *polis*, practically speaking, will be very broad. Finally, the acceptable forms of democratic governance (types of *polity*), should remain nearly unrestricted. This is for two reasons. Firstly, such a broad scope helps to encourage considerable variety in the forms of democratic government, including parliamentary and presidential systems, unicameral and bicameral legislatures, various levels of direct democracy (i.e., through referenda), and influence from pressure groups.² Encouragement of a variety of models is necessary if we wish to further develop democracy. Secondly, the forms of polity should remain relatively unrestricted because neither of the dominant existing democratic models is sufficient. Although participatory democracy is superior to representative democracy in several ways, representative forms of democracy (including elected officials or even randomly selected representative deliberative groups), remain important because they allow decision-making in large, well-populated units (including most sovereign states).³ As a result, a 'middle position' between representative and participatory democracy is preferable. This is the position of accepting representative

¹ Dahl, *Democracy and Its Critics*, p. 129 (emphasis omitted).

² For a nearly comprehensive analysis of the variety of forms of democracy see, e.g., Lijphart, *Patterns of Democracy*.

³ E.g., Hoffman, in *Beyond the State*, at p. 207, explains why representative and participatory forms of democracy are both necessary:

Even in the most direct democracy some individuals must be mandated to act on behalf of others, so that the real challenge facing democrats is one of establishing voting as a more 'participatory' process. Representatives should be more accountable, assemblies more representative, voters more readily mobilized and the political impact of economic inequalities reduced — through the exercise (for example) of popular control over pension funds and employee control over company profits. The point is that an agenda for democratization requires concepts of representation and participation which mutually reinforce one another. [Citations omitted.]

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democratic governance as a “necessary evil,” but at the same time constantly seeking to inject participatory, face-to-face deliberative elements into democratic decision-making.

A. **RE-EVALUATING THE POLIS AND POLITY**

Of these four features, the latter two—the polis and polity—require significant revisiting in the context of a democratic conception of sovereignty. Democracy at the national level traditionally has been viewed as requiring a bounded territorial unit for its polis, whether in the form of a city, large municipal area, province, or state. Bounded units are desirable because they help us identify such things as the people who can make, or who can be subject to, democratic decisions, as well as the things which may be governed by those decisions (i.e., land, moveable property, resources, etc.). Democratic processes at the international level tend to replicate and enforce these domestic boundaries. Votes taken in the General Assembly of the United Nations, for example, are votes on behalf of Member States, each of which is a territorially bounded entity. Polities at the international level, if democratic, almost invariably tend to be of the representative form. Decisions at the international level are made by bureaucrats, diplomats, or elected representatives, rarely by ordinary citizens. The only exceptions that come to mind are those of the rare (but important), referenda or plebiscites that have been taken in the context of self-determination (including both colonised peoples voting on independence and independent peoples voting on issues such as membership in regional organisations).4

This is why bringing a more robust vision of democracy into the international sphere is important. Re-thinking such questions as whether the polis and polity require territorial demarcation is the first step. In other words, does democracy at the international level need to be connected solely to territorially based entities? Of course the continued existence of certain territorially-based entities is helpful, and for some things necessary. Democracy, after all, does not deal with every aspect of human existence. It will remain useful, for example, for those making democratic decisions to be able to rely upon a territorial administration for such things as the maintenance of roads and other aspects of civil infrastructure, the regulation of land use, the operation of police and defence forces, et cetera. Some features of the territorial state are clearly important for modern human existence. Keeping that in mind, it should nevertheless be acknowledged that there are no categorical reasons against allowing the democratic participation of individuals in decisions on a non-territorial basis. Within states non-territorial democracy is common. Many individuals are members of groups and organisations that conduct their affairs

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democratically but that do not themselves possess territory. Religious organisations, labour unions and political parties all provide examples. Such examples show that democratic processes can be used for decision-making in almost every form of human social organisation. Also, as will be remembered from Chapter 2, the processes of globalisation already have eroded the ability of territorial entities to control the things taking place in their borders. Economic decisions in a neighbouring state, for example, may substantially determine and limit the choices available to a state. The question arising, then, is that if the effects of decisions continually cross territorial boundaries, why should not decision-making also be transnational in nature?

It could be. Nevertheless, such transnational democratic decision-making should not be unrestricted because democratic rights must be linked with democratic responsibilities. Just as we exclude those persons either temporarily resident or merely passing through the territory (transients), from inclusion in the demos so too must we exclude from participation in transnational forms of democracy those who will not feel the consequences of their decisions. Transients are excluded as morally unqualified to participate in decision-making since they will not be subject to the effects of their own decisions. Foreigners more permanently resident, on the other hand, are entitled to participate in democratic processes because they will feel their effects. In this way it can be argued that one of the important criteria used to construct the democratic demos—that decision-making capability must be connected to responsibility—itself both requires, and limits, the extension of democracy beyond current territorial boundaries. Putting this argument in its ideal form, individuals from any region of the world should be entitled to participate democratically in all of the decisions that directly affect them, provided that they will be subject to the consequences of their decision-making.

Let us consider this proposition, which will likely appear to be extreme since it has been formulated in ideal, rather than pragmatic, terms. Clearly, serious difficulties would need to be overcome before such widespread participation would be practical, or even possible. Two main difficulties come to mind. Firstly, there would have to be agreement on the criteria used to determine whether an individual is ‘directly affected’ by an issue (and thereby entitled to participate in the democratic process). This would not be easy. Some relevant judicial precedents exist in European Community law, where locus standi is given to individuals regarding decisions that are of “direct and individual concern” to them. Other analogous

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example might be found in *locus standi* rules for other bodies that allow limited individual access.

A second difficulty is the more basic one of figuring out how to tally billions of votes from around the world. If the only remaining superpower on the earth is incapable at times of accomplishing such a task the difficulties should not be underestimated. However, judicious use of modern internet and telecommunications technology, as opposed to paper ballots, might make some such decisions feasible. Even though these technological innovations realistically would allow merely the simplest referenda-type processes, ones in which the individual is limited to vote for one, or a few, pre-categorised choice(s), they still provide some hope. Certainly, the difficulties involved in transnational, non-territorial democratic decision-making are immense. Nevertheless, practical, acceptable solutions could be arrived at which would permit some such forms of decision-making. This process might best work incrementally. We could start with a few subject areas and then gradually extend the scope of democratic coverage. It should be noted, moreover, that democratic procedures *themselves* should be used to make most, if not all, such decisions. This is because democratic processes possess important abilities to self-correcting and to help produce knowledge (both practical and moral knowledge, as suggested earlier in Chapter 4).

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. […]

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.


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B. Potential Approaches

Precisely because of the difficulties involved in extending democracy to the international level, the most far-sighted democratic theorists have tended to accept partial, incremental solutions that could be used alongside current structures. This method is advocated here as well. Democratic processes should be extended to the international sphere whenever and wherever possible, and incrementally. States remain important. But just as they are no longer the sole actor at the international level, they also should no longer be the sole locus of democratic decision-making. For democracy to fulfil its potential, individuals must be able to participate in democratic processes at local, national, transnational and international levels.

Some suggestions about how forms of democracy could be extended and improved, both nationally and internationally, were briefly examined in Chapters 1 and 3, above. Let us recall these different models. Robert Dahl suggests the use of mini-populi—small deliberative bodies composed of individuals representing different social groupings—to make decisions in various areas. Carlos Nino suggests decentralising the polis into small face-to-face decision-making groups. David Held suggests such things as the creation of new regional parliaments, the implementation of transnational referenda, the further entrenchment and enforcement of human rights, the creation of an accountable international military, and the creation of a new, democratised and effective UN General Assembly. Daniele Archibugi advocates 'world citizenship rights,' to be realised in part through the creation of an “Assembly of the Peoples of the United Nations.” The latter entails the creation of a parallel, directly-elected, supervisory organ to act alongside the current General Assembly (loosely modelled after the European Parliament and its relation to the Council of Ministers). Richard Falk suggests that four new seats be added to the UN Security Council to help represent the global civil society. Each of these initiatives could prove fruitful, even if none provides a perfect model for fully implementing participatory democracy at the international level.

The best option might be to combine several of these models in hopes of gradually and incrementally raising democratic consciousness. A particularly innovative combination would

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11 Richard Falk, in “The World Order between Inter-State Law and the Law of Humanity: the Role of Civil Society Institutions,” in Cosmopolitan Democracy: An Agenda for a New World Order, ed. D. Archibugi and D. Held, 163-79 (Cambridge: Polity Press, 1995), at p. 177, suggests that these four new UN Security Council seats should include: (1) a “permanent seat for a moral superpower” (as designated by a panel of Nobel Peace Prize winners), (2) a seat for a representative of the most economically deprived states (as determined by reference to UNDP indices), (3) a seat for a representative of global civil society (as selected by a panel of alternative Nobel Peace Prize winners), and (4) a seat to represent the world assembly of indigenous peoples.”
be one applying the suggestions of both Nino and Dahl. Following Nino, deliberative democracy could be deepened within each state through the creation of a multiplicity of face-to-face deliberative bodies at local levels. These could make decisions about local matters as well as form preliminary opinions about national issues. Designated members could then carry these preliminary opinions to larger deliberative bodies for further deliberation, and so on. Dahl’s idea of the creation of mini-populii is a necessary addition at this point, however, because certain issues would require either speedy decisions or long term involvement on the part of the participants (i.e., in specialised areas). By using Dahl’s idea of the ‘minipopulus’ for such issues, representative samples of the entire demos could be selected for smaller, topic-based deliberative bodies. Such bodies could then work and interact with Nino’s deliberative bodies, with each supplementing the other.

A further question arises, however, in the context of such a vision of overlapping and interrelated decision-making bodies. This is the practical one of how to determine which entity has the right to participate in, or even make, a particular decision? Such a question might be dealt with in advance by carefully delimiting the functions of each decision-making body, as happens in many federal states today. Any new or unforeseen problems also could be dealt with on the basis of functional efficiency. This is the solution advocated by David Held for his vision of ‘cosmopolitan democracy.’ Held argues that each type of problem could be analysed in terms of the range of its effects (such as whether it directly affects local, regional, state-wide or international groups), as well as in terms of the capability of the each particular decision-making body to deal with the problem effectively. More complex problems may require co-ordinated decisions and policies by a whole range of entities, from the local to the international.

12 Held, in “Democracy and the New International Order,” at p. 113, explains this process in some detail for each level of decision-making:

The issues and policy questions which rightly belong to local or city levels are those which involve people in the direct determination of the conditions of their own association — the network of public questions and problems, from policing to playgrounds, which primarily affect them. The issues which rightly belong to national levels of governance are those in which people in delimited territories are significantly affected by collective problems and policy questions which stretch to, but no further than, their frontiers. By contrast, the issues which rightly belong to regional levels of governance are those which require transnational mediation because of the interconnectedness of national decisions and outcomes, and because nations in these circumstances often find themselves unable to achieve their objectives without transborder collaboration. Accordingly, decision-making and implementation belong to the regional level if, and only if, the common interest in self-determination can be achieved effectively only through regional governance. By extension, the issues which rightly belong to the global level are those involving levels of interconnectedness and interdependence which are unresolvable by local, national or regional authorities acting alone. Decision-making centres beyond national borders are properly located when ‘lower’ levels of decision-making cannot manage and discharge satisfactorily transnational and international policy questions. [Emphasis added.]

13 E.g., Held, in ibid., at pp. 113-14, provides the example of environmental problems, which will require different actions at a variety of levels, from the local to the regional, to be adequately addressed.
Precisely how such models could be implemented is a matter that can be further elaborated by others. The essential point is to see that a wide variety of possibilities exist for increasing democratic processes at the international level, and that some of these possibilities do not require a strict, territorially-based polis. It is also important to see that it is possible to bring participatory democracy of some form into the international sphere.

II. SOVEREIGN POSSIBILITIES

Having widened the scope of democratic possibilities for the international level, let us examine the similar potential of sovereignty. Immediately, however, it should be noted that unlike democracy, sovereignty is almost invariably tied to a territorial base. A few exceptions to this rule exist, and they will be discussed below.14 But the most interesting possibilities are those in which sovereign powers, although tied to territory, are possessed by unusual entities, or in an unusual manner. Thus sovereign non-state entities exist, as well as territories in which sovereignty is divided between, or coexists in, two or more sovereign entities. As a result, it is submitted that even though sovereignty most often requires some form of territorial base, the size or character of the territory, as well as the different forms of sovereignty that may be exercised over it, can vary considerably.

Before examining the new possibilities for the source, locus, scope and attributes of sovereignty under a democratic version, one preliminary matter must be clarified. This is that a ‘democratic conception of sovereignty’ is unlikely to be compatible with a ‘world government,’ in the common understanding of the latter term. This is because, to put it bluntly, the vehicle for democratic sovereignty must remain sovereign. In contrast to a universal global government, sovereignty, it will be recalled, plays the important role of simultaneously delimiting the local/national from the international. Sovereign entities can be conceived of as such only if they can be distinguished from each other. An international society only can exist when several nations exist. The prefix “inter,” as used in the adjective “international,” denotes “between or among other things or persons; between the parts of … something.”15 In this sense the existence of ‘the international’ and ‘the sovereign’ are interdependent. A democratic model based upon

14 See especially the sections dealing with the Holy See and the Sovereign Order of Malta.

15 “Inter (prefix),” Oxford English Dictionary Online [emphasis added]. The full definition, in ibid., is: “I. 1. a. Denoting ‘Between or among other things or persons; between the parts of, in the intervals of, or in the midst of, something; together with; between times or places, at intervals, here and there…..” The adjective “international” is defined in the same source as “A. 1. a. Existing, constituted, or carried on between different nations; pertaining to the relations between nations.” This usage originated with Jeremy Bentham, as illustrated in the first quotation reproduced in ibid.: “1780 BENTHAM Princ. Legist. xvii. §25 The law may be referred to the head … of international jurisprudence. Note. The word international, it must be acknowledged, is a new one; though, it is
sovereignty is not compatible with a single, comprehensive global government because the former assumes the continuance of both (1) a variety of units with international personality and (2) some distinction between the national and international spheres. A world government, by establishing a unified, superior legislative and enforcement authority, would erase any distinction between the local and the international, and consequently, any real sense of the international. The rationale for favouring sovereignty rather than a single global government is not merely pragmatic (such a world government being unlikely to exist in the near future); it is also based upon the understanding that a single global democratic government would be undesirable at this stage of human development. This is for the simple reason that such a government would likely stifle cultures, languages and other forms of social difference. Importantly, it could end the possibility of further experimentation with different forms of democracy. This would be a grave matter because democratic practices are nowhere near to being perfect at present. Until they are, it is crucial to encourage the different kinds of ‘experiments in living’ that might yield superior democratic models. The existence of numerous, distinct, relatively independent entities at the international level, or in other words, the existence of sovereign entities, should be maintained.

Let us now briefly return to the questions about sovereignty which were raised in Chapter 6, namely those regarding its source, locus, scope and attributes, and apply them to the democratic version.

A. Source

As with contractarian theories, a democratic theory of sovereignty views the source of sovereignty (in the sense of the source of its validity), as being in the people. We are familiar with this idea from exposure to phrases like ‘popular sovereignty’ or ‘sovereignty of the people.’ But notice that a deeper appreciation of democratic theory enables us to see more

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16 Note that Bartelson, in A Genealogy of Sovereignty, at p. 247, concludes his work with the possibility that sovereignty itself will expire as a result of the increasing breakdown of this national/international dichotomy:

[S]overeignty does not merely mean different things during different periods, function differently within different epistemic arrangements, or that it is something altogether different from time to time; rather, the topic of sovereignty—the concept of sovereignty as opened to definitional change across time—is so rigorously intertwined with the conditions of knowing, that we could inductively expect a change in the former to go hand in hand with a change in the latter even in the future, if indeed there is one.

If this is true, and even if we take due caution against overinterpreting, we could perhaps expect the imminent dissolution of our topic. If the foundations of modern knowledge today appear as shaky as political reality itself, and are questioned from many points simultaneously, we should not expect sovereignty to remain unaffected in its ability to organize modern political reality into the two distinct spheres of the domestic and the international. By the same token, we should not expect modern political science to be able to deal consistently with a political reality in which the parergonal divide between the domestic and the international spheres is increasingly blurred.

17 E.g., Reisman, in “Sovereignty and Human Rights,” at p. 869, summarises: “Although the venerable term ‘sovereignty’ continues to be used in international legal practice, its referent in modern international law is quite
clearly the rationale for these phrases. 'Sovereignty of the people,' for example, is justifiable on the basis of the fundamental equality of individuals. Let me briefly set out this justification. It will be recalled that earlier, when concluding that nearly all individuals should be able to participate in democratic decision-making (i.e., we should have a nearly universal demos), three propositions were established: democratic decisions should be made by nearly every individual because of each person's (1) equal moral worth, (2) equal entitlement to consideration of interests, and (3) superior ability to judge her or his interests. What should be noticed now is that these principles not only support a particular variant of decision-making. Like most of the substantive values underpinning democracy, these principles provide a strong, egalitarian view of the morally autonomous individual. Such a view of the morally autonomous individual has important consequences for authority structures, both political and legal, including sovereign ones. Authority, in its crudest sense, is the power to compel obedience to a decision. Sovereignty is a concept that recognises final (ultimate) authority within a state, as well as upholds freedom from interference by external actors (thereby protecting the internal authority). In this context the morally autonomous individual not only must be seen as capable of participating in decision-making, but also, necessarily, in governance itself.

Sovereignty, seen in this light, is merely an expression of this idea of individual self-governance on a large scale. Sovereignty enables morally autonomous individuals to gather together so as best to achieve individual and collective goods on a large scale. Internally it creates the presupposition of the existence of an ultimate and final legal and political authority. Such a final source of decision-making is necessary to support the unity of a decision-making system. In order for a group of morally autonomous individuals to run their lives on the basis of concrete decisions there must be some final mechanism by which decisions can be made. In other words, the decision-making process has to stop at some point to produce a decision, a concrete result. This result can later be the subject of subsequent decision-making processes, or be appealed through other mechanisms, such as a legal system. But it must represent a concrete, determinate, binding result in the first instance in order to ensure the stability of the system. In order for there to be this kind of finality in a society there must be an ultimate decision-making authority. To use a Kelsenian model, at the top of the ascending hierarchy of norms must exist a norm which validates all lower order norms different. International law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty."

18 See the brief discussion of the demos above, at p. 280, or more generally, in Chapter 3.

19 E.g., "Authority" is defined in the Oxford English Dictionary Online as: "1. a. Power or right to enforce obedience; moral or legal supremacy; the right to command, or give an ultimate decision."
without itself being validated by another (legal) norm. Internally, then, sovereignty is merely the expression of the legal finality of a unified legal system made up of morally autonomous individuals. Externally, sovereignty represents the assertion of the moral equality of the legal and political system of the sovereign entity. The multiplicity of individuals within the sovereign structure—each being of equal moral worth, equally entitled to have her or his interests considered, and each possessing superior ability to judge those interests—together assert their autonomy through the external aspect of sovereignty. This autonomy is the ability not to be subject to the decision-making of other sovereign groups of individuals. In this way, in saying that the source of sovereignty lies in the people, the democratic perspective reflects the profound value placed upon the individual. It respects the individual’s decision-making abilities and the social, political and legal products of those decisions.

A final point about the democratic understanding of the source of sovereignty is that it has clear evaluative implications. In other words, just as when adopting a particular vision of democracy we may use that vision to evaluate actual examples of democratic systems—being able to conclude that some are more democratic than others—in a similar manner we may evaluate applications of sovereignty with a democratic vision. This evaluative function is not unique to a democratic conception of sovereignty, since the absolutist form of sovereignty that traced its source to the divine also had evaluative implications. From the latter absolutist viewpoint, sovereignty held and exercised in a manner that respects the will of the divine must be superior to sovereignty that ignores or contradicts it. From the democratic perspective, on the other hand, sovereign entities which respect democratic principles and practices are more sovereign than entities not democratically oriented. Dictatorships and other systems not enabling democratic participation in government, for example, can be said to be less sovereign. In extreme cases their sovereignty might be denied completely.

20 See the discussion of Hans Kelsen’s hierarchical normative theory of law in Chapter 6, above. See generally, Kelsen, Introduction to the Problems of Legal Theory, pp. 55-75 (§27-31) and 107-25 (§49-50), Kelsen, General Theory of Law and State, pp. 115-62 and 366-70. See further, Raz, “The Purity of the Pure Theory,” pp. 94-7. The democratic theory may make more palatable one aspect of Kelsen’s theory that has drawn criticism from legal scholars, namely, the ‘presupposed’ character of the grundnorm, or ultimate norm. The grundnorm must be presupposed (an imaginary, theoretical construct), because it cannot be validated by any other legal norm. But this does not mean that it is not validated by non-legal norms. As seen under the democratic theory the legal system itself is merely a mechanism by which to render determinate and enforceable certain decisions made democratically by morally autonomous individuals. Thus, the grundnorm, as seen under a democratic view, is validated by the moral and political norms of democracy in its broad social context. Note, however, that Kelsen’s theory itself was not based upon democratic understandings, and certain other aspects of this work, such as the importance of the principle of effectiveness, would not be compatible with the vision set out here. See generally, Kelsen, General Theory of Law and State.
This latter point raises difficult implications, and again reveals the potential tension that may exist between democracy and sovereignty (as understood in the traditional sense). But as discussed earlier in Chapters 4 and 7, and as further argued in Chapter 11, below, it is important to resist the latent imperializing tendencies of democracy and any resulting arguments towards democratic uniformity. The democratic and sovereign aspects of a democratic conception of sovereignty must be balanced with one another. Precisely because the democratic perspective places such importance upon the moral autonomy of the individual, and because sovereignty prioritises the resulting social, cultural, economic, political and legal choices of that individual in solidarity with other individuals, the evaluative aspect of the democratic conception of sovereignty must be slightly restrained. For both pragmatic and jurisprudential reasons it is important not to rashly deny the sovereignty of non-democratic entities at a time when our own understanding of democracy is still developing. Some cases will be so clearly non-democratic, or even anti-democratic, that even the most divergent understandings of democracy would be in agreement about their non-democratic status. Such cases might properly be criticised, and even judged as non-sovereign, under the democratic conception. But the vast majority of sovereign entities existing today use some democratic processes and practices. As a result, I would argue that in order to best encourage democratic improvements (in both senses of improving society, and improving democratic theory), a democratic conception of sovereignty should be cautious about too quickly (and too simplistically) evaluating sovereign entities. It should err in favour of protecting (as sovereign), less democratic entities, rather than zealously and single-mindedly championing the most democratic ones.

B. Locus

Just as the source of sovereignty is the people under a democratic conception of sovereignty (stemming from the moral autonomy of the individuals expressed collectively), so too must the locus of sovereignty be in them. Sovereignty and sovereign powers lie in the hands of the people and must be exercised by them. This contrasts with the contractarian perspective, for example, which allows a near-complete transfer of decision-making authority (even though calling it “delegation”). Under a democratic form of sovereignty, because of the need for public

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21 See the section of Chapter 4 dealing with the instrumental democratic justification of “Peace,” the section of Chapter 7 on the relations of democracy and statehood, and the section of Chapter 11 dealing with the threat of uniformity.

22 See the section describing the dominance of democracy in Chapter 3, above, which describes the percentage of states with democratic and 'restricted democratic' practices as being 70.8% in the year 2000.
participation in decision-making, delegation, if it occurs, can never be permanent. Also, any such delegation always would remain subject to heightened scrutiny, with closer checks being placed upon both the form and extent of delegation. Such a restrictive understanding of the permissibility of delegation arises under a democratic conception of sovereignty because the latter relies upon participatory, rather than representative, democratic models. Representation, it will be remembered, raises a variety of concerns. It is acceptable only in the sense of being a ‘necessary evil’ that enables us to create large social and legal structures like the state. Thus, a leitmotif throughout the discussion of democracy in the present work has been the importance of bringing more, and more frequent, participatory democracy into all sovereign structures. A democratic conception of sovereignty, in preferring more active and participatory forms of democracy, thereby places great value upon keeping decision-making power with the demos itself. Although government of some form, with its administrative structures and personnel, will remain necessary, it is important to see that any form of sovereignty premised upon real and effective democratic practices must allow a greater number of decisions to be taken by the people themselves. Government officials, under such a view, are mere agents of the people, charged with carrying out and implementing the instructions of their principal (the demos). Of course not every decision can, or need be, made democratically. The various detailed practicalities involved in implementing decisions, for example, can be left to officials. But even here the deliberative, democratic consensus should guide all actions.

Unfortunately, however, many of the difficult questions regarding the locus cannot be solved by a democratic conception of sovereignty. All of the perplexing problems involved in

23 It is interesting to note that Marsilius of Padua, writing during the High Middle Ages, set out a similar view. Quentin Skinner, in “The Italian City-Republics,” in Democracy: The Unfinished Journey, 508 BC to AD 1993, ed. J. Dunn, 57-69 (Oxford: Oxford University Press, 1993), at pp. 62-63, offers the following description: When a body of people, acting through a ruling council, agrees to the election of executive and judicial officers, this does not necessarily involve the abandonment of any rights of sovereignty. As Marsilius puts it, the universitas or body of citizens remains the Legislator at all times, ‘regardless of whether it makes the law directly by itself or entrusts the making of it to some person or persons.’ If follows that those whom we elect to govern us ‘are not and cannot be the Legislator in the absolute sense, but only in a relative sense and for a particular time and in accordance with the authority of the primary Legislator.’ [Emphasis added, citing: Marsilius of Padua (156), The Defender of Peace, trans. and ed. A. Gewirth (New York), p. 45.]

24 This position can be distinguished from that taken by Nino, in The Constitution of Deliberative Democracy, at pp. 146-7 and 171. Nino allows government officials to “continue the discussion the citizens have begun,” thereby assigning them a secondary, but potentially independent, deliberative role. I believe that a stronger version of democracy should attempt to constrain officials from engaging in such further deliberations so as to prevent their usurpation of the deliberative role of people. This distinction must be made even though, as a practical matter, there is always a possibility that the interpreter’s views may be substituted (since the implementation of any decision will require interpretation). Democracy, it should be added, is uniquely positioned to deal with such substitutions. Democratic processes always allow reconsideration of previous decisions (and therefore also of the implementation of those decisions), and therefore any harm done may subsequently be corrected.
deciding whether sovereignty is ‘unitary’ or ‘pluralist’ in nature will continue to arise. In fact, such problems may become even more pronounced at the theoretical level under a democratic model. This is because sovereignty, on the one hand, enables an entity to appear as a discrete unit at the international level, but the democratic decision-making process, on the other, reveals the almost chaotically pluralist nature of that sovereign’s authority (each decision being produced by a majority made up of different individuals). Unitary and pluralist conceptions are joined in one theory. Nevertheless, the practical implications of such difficulties may be mitigated under a democratic model by the unparalleled ability of democratic processes to produce single choices from a multiplicity of inputs. This would suggest that a democratic conception of sovereignty is pluralist in nature, but able to present a single voice through its democratic processes.

The democratic conception does definitively answer one final question related to the issues of source and locus, namely, that of sovereignty’s divisibility. In Chapter 7, in the context of looking at examples of non-sovereign states, it became clear that the mere existence of partially sovereign entities implied the divisibility of sovereignty. This point is confirmed by the further examples of divided sovereignty in the next section of the present Chapter. In this context a democratic conception of sovereignty helps us better understand why sovereignty is divisible. It is divisible because both the source and locus of sovereignty rest in the people, which after all, is divisible into its individual members. If we recognise that sovereignty resides in the people, then it is less of an imaginative stretch to see that any sub-grouping of the people can possess an amount of sovereignty proportionate to their number. This does not imply, reductio ad absurdum, that each individual is fully sovereign. Nor does it mean that 100 individuals may separate and establish their own sovereign state. Acquisition of statehood status requires that certain criteria first be fulfilled (as seen in Chapter 1). But it does mean that each individual contains within herself or himself a small portion of sovereignty. A practical reason preventing us from subdividing sovereignty into infinitesimally small segments includes the fact that it exists simultaneously at domestic and international levels. Precisely because sovereignty is a form of international legal status, it acquires meaning largely through the recognition of other members of the international community. Thus, even though technically speaking each individual is partially sovereign under a democratic conception of sovereignty, nevertheless for that individual to be fully sovereign she must be accepted as such by the international community. Also, for any sovereign entity to exercise a particular sovereign power, it must possess both the material resources to do so and be similarly accepted as having the right to do


26 See Jennings and Watts, Oppenheim’s International Law, 9th ed., p. 124.
so. In sum, the locus of sovereignty is in the people. Sovereignty is thereby divisible. But the scale of sovereignty is constrained by the need for acceptance by the international community.

C. **Scope: Examples of Non-Traditional Forms of Sovereignty**

The scope of sovereignty may be widened under a democratic view. It need not be formally associated with statehood or even with a territorial base. Moreover, if the scope of sovereignty happens to be coterminous with a particular territorial entity, it need be neither uniform nor indivisible. Let me illustrate these points with historical and present examples of entities that simply cannot be described as "sovereign states." We have already seen one example in the previous Chapter, the category of non-sovereign states. Three further categories can be classified according to their forms of sovereignty as: (1) non-state sovereigns, (2) divided sovereignties, and (3) coexisting sovereignties. As may be noticed, most of the following examples are historical, rather than current. But nearly all of them, or variations of them (with the clear exception of those with colonial or oppressive implications), could be retrieved for present use if so desired.

1. **Non-State Sovereignty**

Some would argue that the possibility of a non-state sovereign is inconceivable, or at least non-existent. The recent standardisation of statehood as the form of territorially-based international personality, as well as the tendency of most theorists to equate sovereignty with statehood, make it difficult to identify non-state forms of sovereignty today. However, some

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27 Various other categories could be employed. Perhaps the most interesting anomaly in terms of this typology is that created by the mandates and trust territories systems, in which, as held by Judge McNair in his separate opinion in the case of the International Status of South-West Africa (Advisory Opinion), 1950 I.C.J. Rep. 128, at p. 150, a territory may become simultaneously a non-state and non-sovereign entity, with sovereignty being held in abeyance. Judge McNair explains:

Upon sovereignty a very few words will suffice. The Mandates System (and the "corresponding principles" of the International Trusteeship System) is a new institution—a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other—a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it. The doctrine of sovereignty has no application to this new system.

Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State. What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it.

For an interesting extension of this line of reasoning, see Berman, "Sovereignty in Abeyance." Note, however, that I will later argue that this vision of sovereignty as existing in abeyance is incorrect. See footnote 71, below.

28 E.g., Hannum, explicitly argues that "only states can be sovereign" in Autonomy, Sovereignty and Self-Determination, at p. 15.

29 In addition, the existence of non-state sovereignty, or even the recognition of the possibility of a plurality of sovereignty existing with states, challenges current conceptions of statehood. Werther, in Self-Determination in Western Democracies, at pp. xvi-xvii and 23-26, for example, argues that such developments threaten the very underpinnings of state political legitimacy.
examples of non-state sovereign entities have been identified. Smaller than state-sized sovereign entities have been said to include, for brief periods in history, the member states of confederations, such as the German Confederation of 1815, and cantons of the Swiss Confederation. Sovereign entities larger than states may be argued to have existed in some of the earlier European empires (e.g., the Holy Roman Empire), and could re-emerge today under the auspices of advanced of European economic and political integration (through the European Union). Let us look more closely at some examples of non-state sovereignty.

a. The Holy See

The Holy See—the institutional embodiment of the Papacy or “worldwide administrative and legislative body for the Roman Catholic Church”—can be classified as sovereign. In earlier periods the Pope was considered to be the monarch of the states of Christendom, or Papal States. He was equal to all other monarchs prior to the annexation of his territory by Italy in 1870. Between 1870 and 1929 the Pope and the Holy See were protected under the Italian Law of Guarantee, but the precise status of the Holy See was the

30 The International Court of Justice, in its Advisory Opinion on Western Sahara, 1975 I.C.J. Rep. 12, at p. 63 (paras. 148-49), recognises the possibility of a non-state entity enjoying some form of sovereignty or international personality. The Court applied a passage from the advisory opinion Reparation for Injuries Suffered in the Service of the United Nations [1949 I.C.J. Rep. 174, at p. 178: “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community”], to establish the possibility of a sub-state entity (“the Mauritanian entity”), being a subject of international law. Although the Mauritanian “entity” did not satisfy the Court’s test so as to be seen to enjoy “some form of sovereignty” over the Western Sahara region, the very fact that the Court scrutinised a loose-knit nomadic society in this context reveals a willingness to consider the possibility of non-state sovereignty. Accord: Brownlie, Principles of Public International Law, 5th ed., p. 176. See further, Advisory Opinion on Western Sahara, ibid., pp. 63-4 (paras. 149-50).


32 E.g., Jennings and Watts, in Oppenheim’s International Law, 9th ed., comment at p. 20 (n. 27):

The creation of the European Communities has thus involved, at a regional level, a notable concession of sovereign powers by member states and a degree of supranationality for the Communities. The transfer of sovereign powers from the member states to the Communities and the pooling of sovereignty involved in membership of the Communities are, however, limited by the ultimate possibility of withdrawal from the Communities: so long as that possibility remains, any transfer of powers from states to the organisations is in the last analysis essentially temporary.

But see e.g., Steinberger, “Sovereignty,” p. 398 (Holy Roman Empire as not sovereign); MacCormick, “Beyond the Sovereign State” (European Community as a new, non-sovereign legal form). Confederated states or unions of confederated states, strictly speaking, would not fall under the category of supra-state sovereigns, as each member state retains its full sovereignty. E.g., Jennings and Watts, supra, comment at p. 247: “Such a union of confederated states is no more itself a state than a real union [two states sharing the same Head of State] is; it is merely an international confederation of states, a society of an international character, since the member states remain fully sovereign states and separate international persons.”


34 Jennings and Watts, Oppenheim’s International Law, 9th ed., p. 325.
subject of some controversy. 35 In 1929 this was resolved. Under the Lateran Treaty between Italy and the Holy See, the sovereignty of the Holy See was recognised (Article 2), along with the sovereignty of the Supreme Pontiff over the State of Vatican City (Article 26). 36 The "Sovereignty" of the Holy See has been expressly recognised by Italy, and a number of other states have recognised the Holy See, entered into diplomatic relations with it, and have allowed it to be a party to multilateral treaties (including the 1958 conventions dealing with the law of the sea and the four Geneva Conventions of 1949). 37 Kunz describes it as being a permanent subject of international law (with respect to all states), with the capacity to conclude agreements with states, including concordats (a special form of international legal treaty) and regular treaties, as well as having active and passive rights of legation. 38 He also highlights the way that the Holy See, although not having precisely the same status as a sovereign state, nonetheless possesses sovereignty and independence. 39

The precise status of the Holy See as a 'non-state sovereign' for our purposes is complicated by the fact that the Holy See is based in Vatican City, which some scholars consider to be a state, albeit not a sovereign one. 40 However, others deny Vatican City such status because it has "no population, apart from the resident functionaries, and its sole purpose is to support the Holy See as a religious entity." 41 In any event, if the Holy See possesses sovereign identity

37 Brownlie, Principles of Public International Law, 5th ed., p. 64; Kunz, "The Status of the Holy See in International Law," p. 310 (n. 10) [regarding the Geneva Conventions of 1949]. See generally, Kunz, ibid., and Jennings and Watts, Oppenheim's International Law, 9th ed., pp. 325-29. In ibid., at p. 328 (nn. 4-6), the authors list various treaties to which the Holy See is a party and international organisations of which it is a member.
38 Kunz, ibid., p. 310. Rights of legation are similar to rights regarding the sending and receiving of diplomats, and include immunities. Papal nuncios are considered equal to ambassadors for such purposes under international law: ibid.
39 Moreover Kunz, in ibid., at p. 310, argues that the recognition in the 20th Century of the status of the Holy See can only have been declaratory in nature:

[The] sovereignty and independence of the Holy See is not only based on Canon Law, but on general customary international law, on the practice of states. The recognition of this sovereignty by the Italian municipal Law of Guarantee of May 13, 1871, and by the international Lateran Treaty of 1929 is purely declaratory in nature. [Citations omitted.]
40 E.g., Kunz, ibid., at pp. 312-13. At the latter page Kunz identifies it as a "vassal state of the Holy See." Shaw, in International Law, 4th ed., at p. 172 argues that "[i]t would appear that by virtue of recognition and acquiescence in the context of its claims, it does exist as a state." It is unclear from the text whether Shaw means to refer to the Holy See as being a "state" or Vatican City, but it is submitted that the latter is preferable. See also, Jennings and Watts, Oppenheim's International Law, 9th ed., p. 328 [surmising about Vatican City that "it is accepted that in one form or the other there exists a state possessing the formal requirements of statehood and constituting an international person recognised as such by other states].
41 Brownlie, Principles of Public International Law, 5th ed., p. 64. Such difficulties lead Brownlie, ibid., to argue that it is not a state and in fact only has international personality with respect to those recognising it as having such (a kind of constitutive view of recognition):
distinct from Vatican City, as argued by Kunz, then it can properly be classified as a non-state sovereign regardless of the exact status of Vatican City. It also should be noted that the legal separability of Vatican City and the Holy See (i.e., the former being a state and the latter a sovereign), may reveal an example of sovereignty and statehood existing independently, even if they happen to share the same territorial base.

b. The Sovereign Order of Malta

The Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta (Sovereign Order of Malta), was established by Christian knights in Jerusalem in the 11th Century to tend the sick and wounded as well as to wage war, and continues today as a humanitarian order. It is recognised as possessing "sovereignty" under Italian law, and was recognised as possessing sovereign "rights" by a special tribunal instituted by a Pontifical Decree of December 10, 1951. In the case of Nanni v. Pace and the Sovereign Order of Malta, decided by the Italian Court of Cassation in 1935, the Order is described as follows:

[Vatican City] is widely recognized as a legal person with treaty-making capacity. Its personality seems to rest partly on its approximation to a state in function, in spite of peculiarities, including the patrimonial sovereignty of the Holy See, and partly on acquiescence and recognition by existing legal persons. More difficult to solve is the question of the personality of the Holy See as a religious organ apart from its territorial base in the Vatican City. It would seem that the personality of political and religious institutions of this type can only be relative to those states prepared to enter into relationships with such institutions on the international plane. [Citations omitted.]

Brownlie lists several eminent scholars as accepting the distinct international personality of the Holy See, including Kelsen, Oppenheim, Ehler, Kunz and Guggenheim, but notes that "[t]he problem of personality divorced from territorial base is difficult to isolate because of the interaction of the Vatican City, the Holy See, and the Roman Catholic Church." Ibid., p. 64 (n. 43).

42 Kunz, in "The Status of the Holy See in International Law," at p. 310, says that the "Holy See can also conclude normal international treaties ... on behalf of the State of the City of the Vatican, but also in its own capacity" (emphasis added). He also explains the transition from the Papal State (conquered by Italy in 1870) to Vatican City (founded in 1929), in ibid., at p. 311, by asserting the continuity of the Holy See: "Of these two persons in international law the one, the Papal State, undoubtedly came to an end, under the rules of general international law, by Italian conquest and subjugation in 1870. But the Holy See remained, as always, a subject of general international law also in the period between 1870 and 1929."

43 Jennings and Watts, in Oppenheim's International Law, 9th ed., at p. 328, note that some authors argue that the Holy See and Vatican City are in fact two international persons. In ibid., at pp. 328-9 they also highlight another aspect of the importance of the Holy See/Vatican City:

Its true significance in international law lies in the fact that international personality is here recognised to be vested in an entity pursuing objects essentially different from those inherent in national states such as those which have hitherto composed the society of states. A way is thus opened for direct representation in the sphere of international law of spiritual, economic, and other interests lying on a plane different from the interests of states. [Notes omitted.]


45 Arthur C. Breycha-Vauthier and Michael Petulicki, in "The Order of St. John in International Law: A Forerunner of the Red Cross" (1954) 48 A.J.L.L. 554-63, at pp. 560-61, discuss the papal tribunal as well as, on the latter page, reproduce the part of its judgement confirming the Order's possession of "sovereign" rights—but not "the complex of rights and privileges which are reserved to entities which are sovereign in the full sense of the word." See also Jennings and Watts, Oppenheim's International Law, 9th ed., p. 329 (n. 7) [discussing the Order and citing related case law and publications].

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With the recognition of the Church and of the Byzantine Empire, the Order established, after the conquest of territory of its own, its independence and sovereignty.... The Grand Master was recognised as Sovereign Head of Rhodes with all of the attributes of such a position, which included, for instance, among other rights, the right to create and confer titles of Knight Commanders, the right to be accompanied on ceremonial occasions by three Knights of the Order ... and finally, the right of active and passive legation together with the right of negotiating directly with other States and of making conventions and treaties.... Such attributes of sovereignty and independence have not ceased, in the case of the Order, at the present day—at least not from the formal point of view in its relations with the Italian State. Nor has its personality in international law come to an end notwithstanding the fact that as a result of the British occupation of Malta such personality cannot be identified with the possession of territory.... With regard to this second aspect of the matter it is enough to point out that the modern theory of the subjects of international law recognises a number of collective units whose composition is independent of the nationality of their constituent members and whose scope transcends by virtue of their universal character the territorial confines of any single state.46

In a subsequent case, that of the Sovereign Order of Malta v. Soc. An. Commerciale, the Italian Tribunal of Rome specified in greater detail the Order's status and described it as having "the character of a sovereign State and therefore an international legal personality."47 The Tribunal's analysis is weakened, however, by its use of the analogy of a Government-in-exile to describe the Order.48

46 Nanni and Others v. Pace and the Sovereign Order of Malta (1935) 8 I.L.R. 2 (Italian Court of Cassation), p. 5. Note however, that immediately after this passage the Italian Court of Cassation admits that "only States can contribute to the formation of international law as an objective body of rules." In a previous passage, in ibid., at p. 4, the Court describes the Sovereign Order of Jerusalem and Malta as "an international person existing apart from the national sovereignty of the [Italian] State," and later concludes this section of its judgement by again describing the Sovereign Order (at p. 6) as an "international person." See also Sovereign Order of Malta v. Soc. An. Commerciale (1954) 22 I.L.R. 1 (Italian Tribunal of Rome) [Order not entitled to sovereign immunity when engaged in acts jure gestionis (or, in an alternative reading of the case, the Order is not entitled to immunity if it "spontaneously submits itself to the jurisdiction of the Italian judge")], and Scarfo v. Sovereign Order of Malta (1957) 24 I.L.R. 1 (Italian Tribunal of Rome) [Order entitled to sovereign immunity regarding a contract of employment, an act jure imperii].


48 In ibid., at pp. 2-3, the Tribunal states:

[The Court notes that the Sovereign Military Order of Malta is a subject of international law having the characteristics of a sovereign State; to be more precise, its position is similar to that of Governments-in-exile during the Second World War: although they did not exercise actual sovereignty on their territories, which were occupied by the enemy, nevertheless they arrogated to themselves that sovereignty which they exercised through a large number of international activities—they had their own diplomatic missions, participated in international conferences and agreements, intervened on the battlefields with their own armed forces, and so on. Similarly, the Sovereign Military Order of Malta, which affirms its rights as a sovereign of Malta, has its own government, which maintains twenty-four diplomatic missions in foreign States (although not in England, which it regards as an unlawful occupier and usurper of its territory); it enacts instruments which have the force of law; it confers titles, military and chivalric honours; it has an air fleet for relief purposes, and it participates in international conferences and agreements. The Sovereign Military Order of Malta has recently affirmed its sovereignty vis-à-vis the Grand Pontiff and the Holy See, of which, however, it recognizes the High Spiritual Sovereignty. On the basis of the foregoing observations, there is no doubt as to the character of the Sovereign Military...]

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The Order of Malta’s status as a sovereign entity, or even as a state, are debated at the international level. On the one hand, the Sovereign Order of Malta has no significant territorial base, occupying two locations in Rome, as well as Fort St. Angelo in Malta. On the other hand, it does maintain extensive international relations, possesses aspects of international personality and exercises sovereign powers. The Order maintains embassies, representations or delegations in over ninety states, has possessed permanent observer status at the United Nations since 1994, and has permanent representation with a variety of regional and international governmental and non-governmental organisations. It maintains its own (neutral) foreign

Order of Malta as a sovereign entity and therefore of its right to be treated by other States as par inter pares.

49 E.g., Arthur C. Breycha-Vauthier and Michael Potulicki, “The Order of St. John in International Law: A Forerunner of the Red Cross” (1954) 48 A.J.I.L. 554-63, pp. 560-61. See also Brownlie, Principles of Public International Law, 5th ed., p. 65 (rejecting the possibility of statehood status for the Sovereign Order of Jerusalem and Malta because orders of this kind “lack the territorial and demographic characteristics of states”). It is interesting to note that in the case of Scarfo v. Sovereign Order of Malta (1957) 24 I.L.R. 1, at p. 2, the Italian Tribunal of Rome comments that “the limitations on the sovereignty of the Order of Malta which undoubtedly exist result mainly from the absence of State territory and citizens, and also from the fact that it is a religious Order recognized by the Holy See and what may be termed a ‘persona moralis in Ecclesia’ (which by reason of its military, noble and knightly origin, occupies a special position).” The tribunal immediately continues by stating that “[t]hese limitations however, are not such as to be able to negative its sovereignty.” Ibid. It concludes its judgement by recognising the Order’s sovereign immunity: ibid., p. 4.


The Order has recently returned to Malta, after signing an agreement with the Maltese Government which granted the Order the exclusive use of Fort St. Angelo for a term of 99 years. Located in the town of Birgu, the Fort belonged to the Knights from 1530 until the island was occupied by Napoleon in 1798. Today, after restoration, the Fort accommodates the Accademia Internazionale Melitense, which is engaged in historical and cultural activities.

51 The Order maintains diplomatic relations with the following countries/entities (by region): Europe—Albania, Austria, Belarus, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Holy See, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Macedonia, Malta, Moldova, Poland, Portugal, Romania, Russian Federation (representation enjoying diplomatic rank and privileges), San Marino, Slovakia, Slovenia, Spain, Yugoslavia; South America—Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Guyana, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent-Grenadines, Salvador, Suriname, Uruguay, Venezuela; Asia—Afghanistan, Armenia, Cambodia, Georgia, Kazakstan, Lebanon, Philippines, Tajikistan, Thailand; Africa—Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Central African Republic, Comores, Congo, Democratic Republic of Congo, Republic of Ivory Coast, Egypt, Eritrea, Ethiopia, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Niger, São Tomé and Príncipe, Senegal, Seychelles, Somalia, Sudan, Togo; Oceania—Micronesia. The Order is also accredited by Representations or Delegations to Belgium, France, Germany, Luxembourg, the Principality of Monaco, and Switzerland. In 1994 the Order was admitted to the United Nations as a Permanent Observer. The Order of Malta has permanent representations to the Commission of the European Union (Brussels), the Council of Europe (Strasbourg), the United Nations Education, Science and Culture Organisation (Paris), the Permanent Delegation of the UN (Vienna), the Food and Agricultural Organisation (Rome), the United Nations High Commissioner for Refugees (Geneva), the International Committee of the Red Cross (Geneva), the World Health Organisation (Geneva), the International Organisation for Migration (Geneva), the International Committee of Military Medicine and Pharmacology (Brussels), the Organisations of Central American States (Washington), and the International Institute for the Unification of Private Law (Rome). Sovereign
policy, and issues its own laws, postage stamps, passports and coinage.\textsuperscript{52} It can no longer declare war and does not collect taxes.\textsuperscript{53} But it does possess its own administration and courts.\textsuperscript{54} The Order clearly possesses some form of international personality. Two commentators have argued that its personality may be ‘particular’ rather than ‘general,’ in contrast to the Holy See (i.e., the Order only having international personality with respect to those recognising it).\textsuperscript{55} However, since the Order of Malta has such extensive international relations (including status with the UN), the better view is that it has general, or objective international personality.

c. Free Cities

Some free cities, such as the Free City of Danzig, possessed so many sovereign powers during their period of existence that it is difficult not to consider them sovereign city-states.\textsuperscript{56} The Free Territory of Trieste, contemplated by the Italian Peace Treaty at the end of WWII, would have been similar if it had come into full legal existence.\textsuperscript{57} These two examples might


\textsuperscript{55} E.g., Arthur C. Breycha-Vauthier and Michael Potulicki, in “The Order of St. John in International Law: A Forerunner of the Red Cross” (1954) 48 A.J.I.L. 554-63, at p. 556, state: “what is undeniable is the fact that the Order has still an international legal personality, independent of specific territorial sovereignty.” Throughout their article, however, the authors seem to imply that the Order more closely might be described as an international organisation (e.g., describing it as the “oldest international organisation,” at p. 563, and generally comparing it to the Red Cross). In ibid., at p. 558, they argue that “the Order is a person in particular, and not in general, [and hence] its right of legation is based on the recognition of individual receiving states.” See also, Shaw, International Law, 4th ed., p. 171.

\textsuperscript{56} E.g., Brownlie, in Principles of Public International Law, 5th ed., at p. 60, describes the Free City of Danzig under the category “political entities legally proximate to states” as follows: Political settlements both in multilateral and bilateral treaties have from time to time produced political entities, such as the former Free City of Danzig, which, possessing a certain autonomy, fixed territory and population, and some legal capacities on the international plane, are rather like states. Politically, such entities are not sovereign states in the normal sense, yet legally the distinction is not very significant. The treaty origin of the entity and the existence of some form of protection by an international organization—the League of Nations in the case of Danzig—matter little if, in the result, the entity has autonomy and a nucleus of the more significant legal capacities, for example the power to make treaties, to maintain order and exercise jurisdiction within the territory, and to have an independent nationality law. The jurisprudence of the Permanent Court recognized that Danzig had international personality, except in so far as treaty obligations crated special relations in regard to the League and to Poland. [Citations omitted.]


\textsuperscript{57} Brownlie, in ibid., at pp. 60-61, describes the territory: “The Italian Peace Treaty of 1947 provided for the creation of a Free Territory of Trieste with features broadly similar to those of the Free City of Danzig, but placed under direct control of the United Nations Security Council.” At p. 61 (in n. 19), he notes, inter alia, that “[t]he
also be called “internationalised territories,” because they were placed under the supervision of the League of Nations and United Nations Security Council, respectively.38

d. Charter Companies

Several chartered trading companies also exerted sovereign powers from the 16th to 18th Centuries, and for practical purposes acted as sovereigns in far flung regions of the world.39 These included: British trading companies such as the Muscovy Company, the Eastland Company, the Levantine Company, the (British) East India Trading Company and the Hudson’s Bay Company; Dutch companies such as the Dutch East India Trading Company and the Dutch West India Trading Company; and French companies such as the Compagnie des Indes (formed out of several companies, including the Compagnie des Indes occidentales and the Compagnie des Indes orientales).60 These chartered trading companies were given exclusive rights of trade with their respective territories, as well as full administrative authority (on behalf of the sovereign), including the ability to exert such sovereign powers as those of sending and receiving envoys, dispatching warships, men and war materials, building and maintaining fortifications, waging wars (on non-Christian peoples and other trading companies), and minting coins.61 The Hudson’s Bay Company reveals the extensive competence that these charter companies could possess:

The Charter of the Hudson’s Bay Company, dating from 1670, vested this company with a monopoly on trade with, and full legislative, administrative and juridical authority over, all inhabitants of the lands assigned to it. Its mandate comprised the right to erect fortifications, to maintain land and sea forces and to decide on matters of war and peace with all non-Christian peoples and other trading companies.

Permanent Statute of Trieste was not implemented: the administration of the territory was divided by agreement in 1954; the partition was made definitive by the Treaty of Osimo, in force 3 Apr. 1977, Rivista di d.l. 60, 674.”

38 Brownlie, ibid., p. 61. Note, however, that at p. 60 Brownlie argues against the use of the term “internationalized territories” because “the phrase covers a number of distinct entities and situations and begs the question of legal personality.”


60 Grewe, ibid., pp. 299-301. Grewe notes that other nations, including Denmark, Sweden Portugal and Prussia had their own trading companies, but argues that these companies were not as influential historically.

61 Grewe, in ibid., at p. 299, explains that “the trading companies were «chartered companies», that is to say, corporations operating on the basis of concessions and privileges granted to them by States. First, the «charter» conveyed upon them a trade monopoly in respect of the specified regions. This trade monopoly was later combined with the bestowal of sovereign rights.” Representatives of these companies came to be treated as sovereigns in places such as India:

Although most Indian princes initially adopted a reserved attitude towards the companies and made every effort to establish direct contacts with European sovereigns, over time the companies succeeded in establishing themselves as equal partners in negotiations and gaining the power to send and receive envoys and to be respected as sovereign rulers (who did not fail to display an appropriate degree of outward pomp).

Ibid., pp. 301-2. See also ibid., pp. 302-3 (describing the numerous powers of these trading companies).
princes and peoples. The King, for his part, reserved for himself »the Faith, Allegiance, and Sovereign Dominion due to us, our Heirs and Successors«.62

The precise legal status of such charter companies was subject to a heated debate in the 19th Century. As summarised by Wilhelm Grewe:

It was a matter of controversy in international legal theory during the nineteenth century whether the great trading companies were »subjects« of international law, whether they held a »sovereignty« of their own, or whether they were merely »organs« of their parent country. In general, the latter view as taken and the entire problem was considered to be a matter of domestic public law. However, the questions which were asked actually missed the issue. Although the trading companies could not be squeezed into the continental European notion of »State«, they were nevertheless a phenomenon of relevance to international law. Their very function was to prevent the transfer of the concept of »State« to the non-European world.63

Grewe argues elsewhere that the precise legal status of these companies was purposefully ambiguous, allowing them to exist in a kind of intermediate position between full state sovereignty and private ownership.64 Such ambiguity enabled the authorities of the various empires to come into contact (and conflict) in far flung areas of the world without entailing the more serious consequences that would occur at the state-to-state level.65 Thus, these companies could go to war with one another without automatically provoking a war between their respective sovereigns (although the latter in fact sometimes happened).66 The trading companies could also maintain peaceful relations between themselves during times of conflict between their home states.67 In sum, these trading companies provide examples of non-state sovereigns, or in the alternative, of non-state entities vested with significant sovereign powers.

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62 Ibid., pp. 302-3 (citations omitted).
63 Ibid., p. 302.
64 Grewe, in ibid., at p. 298, makes this argument:
The most important point relates to the specific, semi-State, semi-private intermediate position that the trading companies asserted. This position made it possible to avoid a complete transfer to the overseas colonial sphere of the European concept of State, with all of its far-reaching legal consequences and associated concepts of sovereignty, nation-State, State territory and State borders.

The intermediate position of the trading companies was the main reason that the legal ambiguity »beyond the line« was not transformed directly into a situation where the strict rules of a law of nations applied, which was in conformity with the limited geographic extension and narrow political circumstances of Europe.

Since it was not the States themselves which were confronting each other, but rather corporations, which were regarded as or at least pretended to be more or less self-reliant, a separate, flexible system of colonial law of nations developed.
65 Ibid., p. 304.
66 Ibid., p. 303.
67 Grewe, in ibid., at p. 303, discusses the example of the peaceful relations which existed between the French Compagnie des Indies and the English East India Company during the war between France and Britain. This
e. International Organisations: The League of Nations and United Nations

International organisations are not generally characterised as "sovereign." However, the specific historical examples of the League of Nations' mandate system and the United Nations trusteeship system both open up the possibility of the sovereignty of, or at least the possession of sovereign powers by, these international organisations. The mandate system was created at the end of the First World War to deal with the colonies and territories of Germany and Turkey by placing them under the administrative authority of Great Britain, France, Belgium, South Africa, New Zealand, Australia and Japan (the 'mandatory states'). Germany and Turkey were divested of all rights of ownership with respect to the territories. However not all of these rights were vested in the mandatory states. This created a situation where sovereign powers were exercised by mandatory powers, but sovereignty per se existed elsewhere.

Jennings and Watts devote a small section of their work to the question of where sovereignty might lie in respect of mandated areas. They list six possible answers regarding the locus of sovereignty (without choosing one): (1) in the mandatory, (2) in the mandatory "acting with the consent of the Council of the League," (3) in the principal allied powers, (4) in the League, (5) in the inhabitants of the mandates area, but temporarily in suspense, and (6) in abeyance. If the fourth possibility is a real one, then the League of Nations can be said to have been sovereign over the mandated territories.

relationship soured in 1745 after the British government directly, militarily intervened in the area, thereby provoking hostile reactions from the French company.

68 E.g., in Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, at p. 179, the International Court of Justice "come[s] to the conclusion that the Organization is an international person." However, in describing the UN as such, the Court made clear that this was not the same thing as saying that it is a State or that its legal rights and duties are the same as those of a State. Nor was it a "super-State." Ibid. Rather, "it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims." Ibid.

69 See, e.g., Jennings and Watts, Oppenheim's International Law, 9th ed., pp. 295-307. The former German and Turkish territories were divided into different categories based upon descending order of political development, with the most self-sufficient being placed in the 'Type A' category (e.g., Iraq, Palestine, Syria and Lebanon), the mid-level states in the 'Type B' category (e.g., British and French Cameroons, British and French Togoland, Tanganyika and Ruanda Urundi), and the most dependent in the 'Type C' category (e.g., South West Africa, Samoa, Nauru and the various Pacific Islands). Ibid., p. 296 (n. 5). The 'Type A' mandates enjoyed their own "limited treaty-making capacity": ibid., p. 297.

70 Ibid., pp. 296-7. Jennings and Watts note that this possibility arises from the International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128. The same authors, in ibid., at p. 297, point out that the International Court of Justice "held that the conferment of the mandate over that territory upon South Africa did not involve any cession or transfer of territory to the Union of South Africa" (citing p. 132 of the above opinion, as well as noting the clear rejection of the notion of annexation in the later Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 16 [hereafter Namibia Opinion], at pp. 28, 30, 43). For an excellent, brief discussion of the various South West Africa cases, see ibid., pp. 300-307.

71 Jennings and Watts, ibid., pp. 296-7 (n. 6). Only possibilities 3 and 4 would seem to be tenable. The first possibility may be discounted because the International Court of Justice in International Status of South-West Africa, ibid., at p. 132, concluded that the creation of the new international institution of the Mandate over the territory of South West Africa "did not involve any cession of territory or transfer of sovereignty to the Union of South Africa." Judge Dillard, in the later Namibia Opinion, ibid., at p. 163 (Sep. Op.), comments that the
The United Nations may be seen to have been vested with similar sovereign capacity, at least at the formal legal level (if not in actual practice), with respect to South West Africa (Namibia), after the termination of the South African mandate over that territory. It also acted in the same capacity with respect to the mandates that were placed under trusteeship arrangements and for other trust territories. Jennings and Watts explain this situation as follows:

"exercise of the power [of the General Assembly to terminate the South African Mandate over Namibia] involved no invasion of national sovereignty since it was focussed on a territory and a régime with an international status." But see the Dissenting Opinion of Judge Skubiszewski in the Case Concerning East Timor (Portugal v. Australia), 1995 I.C.J. Rep. 90, at pp. 269-71 [arguing that Portugal as the administering Power of the Territory of East Timor possessed sovereignty over it]. The second possibility also may be dismissed because the consent of the League Council was not necessary for the continuation of South Africa's mandate responsibilities after the demise of the League, nor for the mandaté's eventual termination by the United Nations General Assembly (confirmed by the International Court of Justice), nor for the subsequent placement of direct responsibility over the territory in the hands of the United Nations. See generally, International Status of South-West Africa, ibid.; Namibia Opinion, ibid. Possibilities 5 and 6 are illogical because it is difficult to see how sovereignty could lie in "suspense" or "in abeyance" for a populated territorial entity possessing international status. Support for this international status of the Mandates is found in the International Status of South-West Africa opinion, ibid., at p. 132 ("The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations, including the Union of South Africa"). Ironically, Judge McNair, whose Separate Opinion gave rise to the possibility of sovereignty being held in abeyance (see the passage quoted in footnote 27, above), himself describes a form of "international status" as having been created by the Mandate: ibid., pp. 153-58. The term "abeyance" is defined in the Oxford English Dictionary Online as having the following meanings: "1. Law. Expectation or contemplation of law; the position of waiting for or being without a claimant or owner. 2. A state of suspension, temporary non-existence or inactivity; dormant or latent condition liable to be at any time revived." Vice President Ammoun, in the Namibia Opinion, ibid., p. 68 (Sep. Op.), also denies the possibility of sovereignty being suspended or held in abeyance when he describes the Namibian people as having retained their sovereignty even during the periods that they were subject to German colonial rule and the South African Mandate:

Namibia, even at the periods when it had been reduced to the status of a German colony or was subject to the South African Mandate, possessed a legal personality which was denied to it only by the law now obsolete. It was considered by the Powers of the day as a merely geographical concept taking its name from its location in the South-West of the African Continent. It nevertheless constituted a subject of law that was distinct from the German State, possessing national sovereignty but lacking the exercise thereof. The institution of the Mandate, a fortiori, did not connote the annexation of the country which was subject to it, as the Court has made clear by its reference to its earlier Advisory Opinion of 18 July 1950. Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate. It had simply, for a time, been rendered inarticulate and deprived of freedom of expression.

This idea of inherent, if inarticulate, sovereignty gives rise to a seventh, preferable possibility. This is that sovereignty under the mandates system remained vested in the inhabitants of the mandates (the source), but that their sovereign powers were exercised on their behalf by the mandatory ( locus 1, in a trust-like relationship), with the League of Nations (or subsequent body) acting as the ultimate supervisory power ( locus 2). Sovereignty under this view remains with the people, even if their ability to exercise of sovereign powers is temporarily restricted.

72 Jennings and Watts, Oppenheim's International Law, 9th ed., at p. 297 (n. 6), cite the following authorities to support this proposition: "(see H Lauterpacht, Analogies, § 86, while admitting that the exercise of sovereignty rests with the mandatory); see Attorney General v Goralshchyi, mentioned in AJ, 20 (1926), p 771 (AD, 3 (1925-26), No 33); Redslab, Théorie de la Société des Nations (1927), pp 196, 197; Corbett, BY (1924), p 134; Bentwich, The Mandates System (1930), p. 19; Seelle, i, pp 170, 171."

73 From October 1966 until March 1990 the United Nations possessed sovereignty at law over South West Africa/Namibia, if the termination of the South African mandate by the General Assembly was capable of producing such an effect. However from 1946 to 1990, as a factual matter, South Africa controlled the territory. South Africa refused to yield control even though the General Assembly terminated its mandate, and the General Assembly, Security Council, and the International Court of Justice all denounced the illegality of South Africa's continuing presence in Namibia. See generally, Jennings and Watts, ibid., pp. 300-307, and the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 16.
In considering the question of sovereignty over trust territories, sovereignty (or what may be described as residuary sovereignty) must be distinguished from its exercise. The latter is clearly vested with the trustee states subject to supervision by and accountability to the United Nations. Thus, as the trustee states wield full power of jurisdiction as well as of protection, internal and external, over the inhabitants of the trust territories, the governments of these territories are entitled to exact allegiance from the inhabitants although these do not possess the nationality of the trustee states. For it is fundamental that trust territories do not form part of the territory of the states entrusted with their administration. For this reason the trustee state cannot cede or otherwise alter the status of trust territories except with the approval of the United Nations in which the residuary sovereignty must be considered to be vested.\(^74\)

In sum, sovereignty, or at least residuary sovereignty, over the trusteeship territories was held by the United Nations.

Further examples of sovereign powers vesting in the United Nations may be found in the recent arrangements in which the UN has accepted the responsibility of administering a territory during a period of transition. Examples that come to mind include the United Nations’ transitional authorities in Cambodia (UNTAC),\(^75\) East Timor (UNTAET),\(^76\) and

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\(^74\) Jennings and Watts, *ibid.*, p. 316 (emphasis added, citations omitted—except for those appended to the final sentence, which referred to the cases of *Arandanas v. Hogan* (1957) 24 I.L.R. 57 ["a trust territory is primarily under the sovereignty and jurisdiction of the United Nations"], and *Porter v. United States* (1974) 61 I.L.R. 102 [in which the "view as preferred that sovereignty resided in the people of the territory and was held in trust for them by the administering authority"]).

\(^75\) Technically, the Supreme National Council of Cambodia (SNC), possessed sovereignty over Cambodia during the period of control of the United Nations Transitional Authority in Cambodia (UNTAC). However, given that the SNC was itself made up of four warring factions, as well as that the UN had been delegated “all powers necessary” (see the summary by the United Nations Department of Public Information, below), it might be possible to say that UNTAC itself exercised Cambodia’s sovereignty. UNTAC was established following the Agreements on the Comprehensive Political Settlement of the Cambodia Conflict (Paris, 23 Oct. 1991), which authorised an “Advance Mission,” followed by UNTAC itself. The first Security Council Resolution on the Situation in Cambodia that ‘establishes’ UNTAC is S.C. Res. 745 (28 Feb. 1992), as available at http://www.un.org/documents/scres/1992/scres92.htm (accessed 7 July 2001). In paragraph 2 of this resolution the Security Council “Decides that the United Nations Transitional Authority in Cambodia shall be established under its authority in accordance with the above-mentioned report [of the Secretary-General on Cambodia of 19 and 26 February 1992] for a period not to exceed eighteen months.” The actual mandate of the Transitional Authority appears to have been specified in the Agreements made in Paris in 1991 (above). In any event, it was supplemented by later Security Council resolutions in light of the increasing complications faced by UNTAC. The United Nations Department of Public Information, in “Completed Peacekeeping Operations,” in the section entitled “Cambodia—UNTAC,” as available at http://www.un.org/Depts/dpko/dpko/co_mission/untac.htm (accessed 7 July 2001), summarises about UNTAC that it was

Established to ensure the implementation of the Agreements on the Comprehensive Political Settlement of the Cambodia Conflict, signed in Paris on 23 October 1991. Under the Agreement, the Supreme National Council of Cambodia (SNC) was “the unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined”. SNC, which was made up of the four Cambodian factions, delegated to the United Nations “all powers necessary” to ensure the implementation of the Agreements. The mandate given to UNTAC included aspects relating to human rights, the organization and conduct of free and fair general elections, military arrangements, civil administration, the maintenance of law and order, the repatriation and resettlement of the Cambodian refugees and displaced persons and the rehabilitation of essential Cambodian infrastructure during the transitional period. Upon becoming operational on 15 March 1992, UNTAC absorbed UNAMIC, which had been established immediately after the signing of the Agreements in
Kosovo (UNMIK). In each of these latter situations, sovereignty may be said to have remained with the people themselves, but sovereign powers clearly were being exercised in the interim by the UN authorities.

October 1991. UNMIK's mandate ended in September 1993 with the promulgation of the Constitution for the Kingdom of Cambodia and the formation of the new Government.

For an 'on-the-ground' overview of the scope of activities of UNMIK prior to the election see John Sanderson, "Peacekeeping and Peacemaking: A Critical Retrospective" (1995) 20 Melbourne Univ. L. Rev. 35-54.

The United Nations Transitional Administration in East Timor (UNTAET), was authorised under the Security Council Resolution on the Situation in East Timor, S.C. Res. 1272 (25 Oct. 1999), as available at [http://www.un.org/Docs/scres/1999/99scl244.htm](http://www.un.org/Docs/scres/1999/99scl244.htm). The Security Council, acting under Chapter VII of the Charter of the United Nations (1945), in paragraph 1 of this resolution created "a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice." Paragraph 2 specified that the "mandate of UNTAET shall consist of the following elements: (a) To provide security and maintain law and order throughout the territory of East Timor; (b) To establish an effective administration; (c) To assist in the development of civil and social services; (d) To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance; (e) To support capacity-building for self-government; [and] (f) To assist in the establishment of conditions for sustainable development."

The United Nations Interim Administration Mission in Kosovo (UNMIK), was authorised under the Security Council Resolution on the Situation Relating to Kosovo, S.C. Res. 1244 (10 June 1999), as available at [http://www.un.org/Docs/scres/1999/99se1244.htm](http://www.un.org/Docs/scres/1999/99se1244.htm). The Security Council, acting under Chapter VII of the Charter of the United Nations, in paragraph 5 of this resolution "Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal Republic of Yugoslavia to such presences." The functions of the international security presence are described in paragraph 9 as including: "(a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2; (b) Demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups as required in paragraph 15 below; (c) Establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered; (d) Ensuring public safety and order until the international civil presence can take responsibility for this task; (e) Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task; (f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence; (g) Conducting border monitoring duties as required; (h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations." The functions of the international civil presence are described in paragraph 11 as including: "(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648); (b) Performing basic civilian administrative functions where and as long as required; (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities; (e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648); (f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement; (g) Supporting the reconstruction of key infrastructure and other economic reconstruction; (h) Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid; (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo, (j) Protecting and promoting human rights; (k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo." See also the "Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999)," S/1999/672 (12 June 1999), as available at [http://www.un.org/Docs/sc/reports/1999/s1999672.htm](http://www.un.org/Docs/sc/reports/1999/s1999672.htm), and the follow up "Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo," S/1999/779 (12 July 1999), as available at [http://www.un.org/Docs/sc/reports/1999/s1999779.htm](http://www.un.org/Docs/sc/reports/1999/s1999779.htm). As part of its administrative authority, UNMIK has even promulgated a "Constitutional Framework For Provisional Self-Government," UNMIK/REG/2001/9 (15 May 2001), as available at [http://www.un.org/peace/kosovo/pages/regulations/constitframe.htm](http://www.un.org/peace/kosovo/pages/regulations/constitframe.htm). For other regulations see the UNMIK web page entitled "UNMIK Regulations," as available at
2. **Divided Sovereignty**

Sovereignty need not be seen as uniform and indivisible. Historical and present examples reveal that sovereignty may be *divided* between two or more entities. In contrast, other examples, such as those explored in the following section, show that it can be *shared* as a whole, or in other words, jointly possessed. One, complex form of divided sovereignty was discussed earlier, in Chapter 7, namely, that existing in federal arrangements. To this form may be added five more examples of the divisibility of territorial sovereignty, as illustrated by Jennings and Watts, who dedicate an entire section to this topic in the most recent edition of Oppenheim’s *International Law*.

Firstly, these authors allude to situations in which “two or more states exercise sovereignty conjointly over territory” (*condominia*). I will examine this form in detail below, as it may more appropriately fall under the topic of ‘shared’ or ‘coexisting sovereignty.’ Secondly, they describe situations in which territorial entities are administered by one foreign power with the consent of the original, sovereign owner. Thirdly, some international leases or pledges of territory by one sovereign to another may divide sovereignty, if sovereign title legally remains with the original state. Fourthly, grants of the use, occupation and control of territory in perpetuity will divide sovereignty if the grantor retains “in law the property in the territory, even whilst only the grantee exercised

http://www.un.org/peace/kosovo/pages/regulations/regs.html. All of the above web sites were accessed on 7 July 2001.


The distinction between divided and coexisting sovereignty may be difficult to maintain, as seen in the example of federal states, where both the units and federal authority are sovereign. However, I make such a distinction on the basis that in situations of *divided* sovereignty powers are allocated in a zero sum manner, with areas of power being given to one sovereign or the other. In situations of *coexisting* sovereignty, on the other hand, no formal division of powers exists. In the latter case the two or more sovereigns must make *ad hoc* arrangements regarding such matters.

80 Jennings and Watts, *Oppenheim’s International Law*, 9th ed., pp. 567-68. In *ibid.*, at p. 567, the authors provide examples including those of the then Turkish island of Cyprus being placed under British administration from 1878-1914, and Bosnia and Herzegovina being placed under the administration of Austria-Hungary from 1878-1908.

81 Jennings and Watts, in *ibid.*, at pp. 568-69, provide the following examples:

Perhaps the best-known historical examples were the ‘Chinese’ leases. In 1898 China leased the district of Kiaochow to Germany, Wei-Hai-Wei and the land opposite the island of Hong Kong to Great Britain, Kuang-chou Wan to France, and Port Arthur to Russia. In Article 4 of the Peace Treaty of 1947 Finland granted to Soviet Russia on the basis of a 50 years’ lease at an annual rent of five million Finnish marks the use and administration of territory and waters for the establishment of a Soviet naval base in the area of Porkkala-Udd.

The authors note that the lease over Wei-Hai-Wei was rescinded and the territory restored to China in 1930, and the Porkkala base was restored to Finland in 1955: *ibid.*, p. 569. Hong Kong was returned to China on July 1, 1997. See, e.g., Michael Laris, “In Beijing, Organized Jubilation, Private Pride: Hong Kong Handover Celebrated Grandly in Tiananmen Square, Quietly at Home,” *The Washington Post* (July 1, 1997), p. A14. Other forms of international lease, which merely involve leases of land without transferring the exercise of sovereignty, do not divide sovereignty: Jennings and Watts, *ibid.*, pp. 570-71.
sovereignty there." These latter three examples all reveal a split between the exercise of sovereign powers and the legal ownership of the sovereign territory. A fifth example, which we have seen already, is the situation of the divided sovereignty of the federal state. Jennings and Watts explain that because “a federal state is itself a state side-by-side with its single member-states, it is apparent that the different territories of the single member-states are at the same time collectively the territory of the federal state, since sovereignty is divided between a federal state and its member-states.” Their sixth illustration of divided sovereignty is provided by the relation of mandated and trusteeship territories to the mandatory and trustee state, respectively, since the latter states exercise sovereignty over territory not their own. In sum, as argued by Brownlie in the context of condominium, “sovereignty is divisible both as a matter of principle and as a matter of experience.”

3. Coexisting Sovereignties

Shared or coexisting forms of sovereignty may be found where two or more sovereigns jointly own a single territorial area over which there is no pre-determined division of powers.

a. Condominia

The first example of such coexisting sovereignty is the international legal condominium. A condominium is defined by Brownlie as a “joint exercise of state power within a particular territory by means of an autonomous local administration.”


84 Ibid., p. 571 (citations omitted).

85 ibid., pp. 571-2.

86 Brownlie, Principles of Public International Law, 5th ed., p. 114 (also providing the example of the joint sovereignty of Great Britain and Egypt over the Sudan between 1898 and 1956).

87 Mauritania suggested to the Court in the Advisory Opinion on Western Sahara, 1975 I.C.J. Rep. 12, at p. 60 (para. 138), that its predecessor, the “Mauritanian entity” which existed at the period of Spanish colonisation of the Western Sahara, possessed a form of co-sovereignty:

If it is thought necessary to have recourse to verbal classifications, Mauritania suggests that the concepts of “nation” and of “people” would be the most appropriate to explain the position of the Shinguitti people at the time of colonization; they would most nearly describe an entity which despite its political diversity bore the characteristics of an independent nation, a people formed of tribes, confederations and emirates jointly exercising co-sovereignty over the Shinguitti country.

The Court did not embrace this suggestion. On the contrary, it held that “the proposition ... that the Bilad Shinguitti should be considered as having been a Mauritanian “entity” enjoying some form of sovereignty in Western Sahara is not one that can be sustained”: ibid., p. 63 (para. 149).

88 Brownlie, Principles of Public International Law, 5th ed., p. 61 (citations omitted). Brownlie, in ibid., at p. 175, also identifies a kind of joint sovereignty as existing over shared resources, such as “an oilfield underlying parts of two or more states” (citing, inter alia, the Agreement relating to the Exploitation of Single Geological
in the condominium is divided between the two or more sovereigns, and does not vest with the local administration.99 One example of a condominium, provided by Shaw, is that of the New Hebrides (prior to their independence in 1980, as Vanuatu). These South Pacific islands were subject to joint French and English sovereignty, with authority over British and French nationals being exercised by their respective British and French resident commissioners (responsible to their respective High Commissioners), as well as by a condominium government.90 Other historical examples of condominium provided by Jennings and Watts include Schleswig-Holstein and Lauenburg (1864-66, under Austria and Prussia), the Sudan (1898-1955, under Great Britain and Egypt), and the Islands of Canton and Endenbury (after 1939, under the “joint control” of Great Britain and the United States).91 The same authors note that often condominiums were established “as a provisional measure for territories whose disposal was to be decided later on.”92 This happened to the territories previously held by the Central Powers at the end of the First World War, which were ceded to, and placed under the joint sovereignty of, the Allied and Associated Powers by the Peace Treaties of 1919 until their final disposition.93 Another, more recent example is that of the Kuwait-Saudi Arabia Neutral Zone established by the Uqair Convention of 2 December 1922, which provided “equal rights” for the two parties over roughly 2000 square miles of common border territory. Even though by
agreement this Neutral Zone was partitioned into two sections in 1965, one being annexed to each state, these annexations remain "qualified by the preservation of rights [of both states] over the whole and by the joint exercise of sovereignty over the whole."\(^94\)

A current example of a maritime \textit{condominium}, in which sovereignty is jointly shared by three states, is that recognised in the \textit{Case Concerning the Land, Island and Maritime Frontier Dispute} between El Salvador and Honduras (with Nicaragua intervening).\(^95\) In this case El Salvador and the Honduras asked a Chamber of the International Court of Justice to delimit land boundary lines in certain zones not covered by their \textit{General Treaty of Peace} of October 30, 1980, as well as "to determine the legal situation of the islands and maritime spaces."\(^96\) The maritime spaces in question included the Gulf of Fonseca, which is a bay bordered by El Salvador, Honduras and Nicaragua. In addressing the latter question, as a preliminary matter the Court decided that its role with respect to the Gulf must be limited to determining the "legal situation" of the maritime spaces, without actually \textit{delimiting} them. This preliminary decision had important implications, because \textit{condominium} regimes cannot be delimited, at least in the manner suggested by Honduras.\(^97\) In assessing the legal situation of the Gulf of Fonseca the Court noted that the three states, and commentators generally, agreed that the area is a historic bay, enclosing historic waters, and as such falls within a unique régime.\(^98\) The Gulf had been under the continuous and peaceful sovereignty of the Spanish Crown from its discovery in 1522 until the three states concerned gained their independence (in 1821). From 1821 until 1839 it also remained under the control of a single entity, the Federal Republic of Central America, of which the two parties and intervener had been member States.\(^99\) Taking into account such factors, the Chamber of the International Court of Justice substantially agreed with the findings of an earlier authority brought to their attention (a 1917 Central American Court of Justice case between El Salvador and Nicaragua on a similar topic), and held that the historic waters of the

\(^{93}\) \textit{Ibid.}, p. 567 (citing Art. 99 of the \textit{Treaty of Versailles} for Memel, and Arts. 53 and 74 of the \textit{Treaty of Trianon} for Fiume).

\(^{94}\) \textit{Ibid.}, p. 567 (citations omitted).

\(^{95}\) \textit{Land, Island and Maritime Frontier Dispute} (El Salvador/Honduras: Nicaragua intervening), 1992 I.C.J. Rep. 351. The finding of the existence of a maritime \textit{condominium} was not unique to this judgement, as the Court notes, in \textit{ibid.}, at p. 600 (para. 401): "An instance of a condominium of the waters of a bay is the Baie du Figuier at the Atlantic boundary between France and Spain: by a 'Declaration' of 1879, the bay was said, for purposes of jurisdiction to be in three parts, 'la troisième formant des eaux communes'.''

\(^{96}\) \textit{Ibid.}, p. 357 (para. 3) [Art. 2(2) of the "Special Agreement" between the parties].

\(^{97}\) \textit{Ibid.}, pp. 582-5 (pars. 372-88) [role of determining the legal situation, not including delimitation]. See also \textit{ibid.}, pp. 602-3 (pars. 406-8) [Court's examination of Honduras' argument that the Gulf is subject to a "community of interests" régime, not a \textit{condominium} one, and as such must be delimited].

\(^{98}\) \textit{Ibid.}, pp. 588-9 (para. 384).

Gulf were subject to a "'co-ownership' ('condominio') of the three coastal States."100 This aspect of the decision was not greeted with enthusiasm by either Honduras or Nicaragua, the former of which argued, for example, that such regimes could only be established by express agreement, or at minimum, as a result of trilateral local custom. But the Chamber rejected this argument, favouring the findings of the Central American Court of Justice:

It is true that condominium as a term of art in international law usually indicates just such a structured system for the joint exercise of sovereign governmental powers over a territory; a situation that might more aptly be called co-imperium. But this [form of condominium by express agreement] was not what the Central American Court of Justice had in mind. By a condominium they clearly meant to indicate the existence of a joint sovereignty arising as a juridical consequence of the succession of 1821. A State succession is one of the ways in which territorial sovereignty passes from one State to another; and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States.101

In other words, the specific historical status of the Gulf as an undivided maritime unit (for nearly three centuries) remained intact and had been transferred to the three states of El Salvador, Honduras and Nicaragua upon their independence. However, the Court was quick to note that such a condominium or 'co-ownership' status need not be an automatic consequence of state succession. Rather, the bay's undivided status had been established historically, was reaffirmed by the lack of any subsequent demarcation or partition between the three states, and was supported by the "continued and peaceful use of the waters by all the riparian States after independence."102 The condominium status of the Gulf was the "logical outcome of the principle of uti possidetis juris itself."103 Of equal interest to the finding of the existence of a condominium

100 Ibid., p. 597 (para. 398). The Central American Court of Justice held that the Gulf was "an historic bay possessed of the characteristics of a closed sea" (i.e., not part of the high seas): ibid., p. 591 (para. 390). The Central American Court divided the waters of the Gulf of Fonseca into two categories: (1) a 3-mile littoral maritime belt (1 marine league) extending along the coast of each state (over which each state had exclusive jurisdiction), beyond which, and filling up the remainder of the bay, lay (2) "territorial waters" (in today's terminology, "internal waters" or "waters claimed à titre de souverain"): ibid., pp. 592-3 (paras. 392-3). The International Court of Justice agreed that all of the waters in the historic bay (including the 3-mile belt), are subject to existing rights of innocent passage. Ibid., p. 616 (para. 432(1) of the dispositif). Note that the judgement of the Central American Court of Justice was not a "binding precedent" for the present case, which involved a new party and a new tribunal, and hence was considered to be a subsidiary means for the determination of rules of law for the Chamber of the International Court of Justice: ibid., p. 601 (para. 400). However the Chamber's opinion "parallels" that of the Central American Court, as seen, inter alia, in ibid., at p. 601 (para. 404):

The opinion of the Chamber on the particular régime of the historic waters of the Gulf parallels the opinion expressed in the 1917 Judgement of the Central American Court of Justice. The Chamber finds that the Gulf waters, other than the 3-mile maritime belts, are historic waters and subject to joint sovereignty of the three coastal States.

101 Ibid., pp. 597-8 (para. 399).

102 Ibid., p. 599 (para. 401).

103 Ibid., p. 602 (para. 405). Both states agreed to the application of uti possidetis as the primary principle for determination of land frontiers in the case. However the Court pointed out that uncertainties arise in the
is the International Court of Justice’s decision regarding its scope. The *condominium* régime was recognised as existing not only inside the bay area, but also as extending *outward* from the Gulf of Fonseca. The Court held that the closing line of the bay was a baseline from which could extend three further, jointly sovereign areas, namely, a territorial sea, an exclusive economic zone and a continental shelf. In sum, the judgement in the *Case Concerning the Land, Island and Maritime Frontier Dispute* recognises an extensive régime of joint sovereignty over most of the bay and its external areas including a territorial sea, exclusive economic zone and continental shelf, applicable to El Salvador, Nicaragua and Honduras. This régime could exist indefinitely, or be replaced by an agreed delimitation by the three states concerned. The future

application of *uti possidetis* when pre-existing boundaries are themselves uncertain: *ibid.*, p. 386 (paras. 40-41). Jennings and Watts, in Oppenheim’s *International Law*, 9th ed., at p. 669, describe the meaning of the doctrine of *uti possidetis juris* as follows:

This doctrine in effect conflates boundary and territorial questions by assuming as a governing principle that boundaries must be as they were in law at the declaration of independence; viz 1810 for former Spanish colonies in South America and 1822 for those in Central America. It is a necessary part of this doctrine that there could have been no *terra nullius* in those parts at those times. [Citations omitted.]

The principle is a general one, applicable outside of the South and Central American context, as noted by the International Court of Justice in the *Frontier Dispute* (Burkina Faso/Republic of Mali), 1986 I.C.J. Rep. 554, at p. 565 (para. 20):

In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.


105 *Ibid.* The relevant passage is found at pp. 608-9 (para. 420):

There can be no question that this [modern] law applying to the seas and seabed and subsoil off a coast, applies now to the area off the Gulf of Fonseca; and that, as always, the entitlement to these rights depends upon and reflects the territorial position of the coast to which the rights are appurtenant. The coast of a bay is for this purpose the closing line of the bay, for the waters inside are claimed in sovereignty. Since the legal situation on the landward side of the closing line is one of joint sovereignty, it follows that all three of the joint sovereigns must have entitlement outside the closing line to territorial sea, continental shelf and exclusive economic zone. This must be so, both in respect of the continental shelf rights belonging *ipso jure* to the three coastal States, and in respect of an exclusive economic zone which requires proclamation. Whether this situation should remain in being, or be replaced by a division and delimitation into three separate zones is, as inside the Gulf also, a matter for the three States to decide. Any such delimitation of maritime areas will fall to be effected by agreement on the basis of international law.

106 Notice that because Nicaragua was not a party in the case that, technically speaking, the Court’s judgement is *not* binding upon it. The Court states, in *ibid.*, at p. 610 (para. 424): “The Chamber therefore concludes that in the circumstances of the present case, this Judgement is not *res judicata* for Nicaragua.” The effect of such a pronouncement may be limited, however, because Nicaragua is bound by the nearly identical pronouncement (regarding the waters inside of the bay) of the 1917 Central American Court of Justice judgement between itself and El Salvador. Also, the present case provides a clear indication for Nicaragua of the International Court’s understanding of the legal status of the area.

107 El Salvador’s argument favouring the *condominium* régime was premised in part on the fact that the Court’s recognition of such a régime would provide “an essential prerequisite to the process of delimitation which
effects of the Court’s judgement are uncertain. On the one hand, the Court’s recognition of a condominium régime under modern international law may be seen as exceptional. The decision may be limited to the specific historical circumstances of the case and the Court’s lack of jurisdiction to delimit the maritime areas. Commentators also could suggest that the Court may have been influenced by an understanding that their decision would either resolve the conflict, or prod the concerned states into effecting their own, mutually agreed delimitation. On the other hand, this case is important because it clearly recognises the possibility of joint sovereignty as more than a historical matter. The set of realistic legal options for resolving territorial and boundary disputes has been expanded. The option of joint sovereignty, through condominium, remains available in the 21st Century.

b. Continuing Indigenous Sovereignty Within Sovereign States

The final, and perhaps most challenging, possibility for coexisting sovereignty is that of the existence of multiple sovereignties within a single, modern, liberal democratic state. This possibility is raised by the current claims of some indigenous peoples to continuing sovereignty under both national and international law. I have explored these claims and their fascinating theoretical consequences in greater detail elsewhere. For present purposes, let us identify the three central premises of the argument. The first is that indigenous sovereignty, in the international legal sense of the term, existed at the time of European contact. There is increasing scholarship supporting this premise, and even some case law.

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109 Guntram Werther, for example, in Self-Determination in Western Democracies, at pp. 8-9, strongly supports the existence of aboriginal sovereignty at that time:

[When European states colonized North America, they recognized the sovereign nature of the societies they encountered. Spanish and British cases form the major theoretical and legal foundation for the recognition of aboriginal rights in property, land, personal liberty, and national self-determination. The seminal writing in this area is Francisca de Victoria’s De Indes et de Ivre Belli Relectiones. De Indes establishes a theoretical relationship that is recognizable not only in European and international law between states and aboriginal nations but also by the Catholic Church through its influence on Bull Sublimus Deus (1537). Sublimus Deus said that ‘Indians and other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property ... should the contrary happen, it shall be null and of no effect.’ This Papal Bull then had the effect of law and, when considered along with the writings of Victoris, Gentili, Grotius, Pufendorf, Vattel, Wolff, Locke, and others, generates an impregnable defense against the notion that aboriginal nations had no international standing as sovereigns in the European mind at contact and for a long time thereafter. [Citations omitted.]

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Chief Justice John Marshall of the United States Supreme Court, for example, identified the sovereign status of indigenous nations in a famous trilogy of cases—*Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*—even though he eventually concluded that such sovereignty subsequently had been diminished to the status of mere "domestic dependent nations." Additionally, the international legal capacity of tribal societies to engage in treaty-making in the mid-19th Century has been confirmed by Brownlie with respect to the Maori peoples (of New Zealand).

The second premise is that this indigenous sovereignty, or significant aspects of it, was not extinguished by the subsequent actions of the indigenous people themselves, the settling and colonising Europeans, or the governments of the new states that arose in traditional indigenous lands. This premise is much more difficult to establish because it requires both an analysis of the international laws applying at the time of conquest or settlement as well as an examination of the effects of the subsequent colonial and national legal systems. However, an alternative foundation for this premise may be the theoretical dissonance that existed in international law at the time of first contact between Europeans and indigenous peoples, a dissonance which has continued up to the present. It may be argued that for a period there existed two contradictory 'streams' of international legal doctrine describing the status of these peoples and the relevant legal standards to be applied to them.

One stream accepted the fundamental human (moral) equality of indigenous peoples, and

Note, however, that Robert A. Williams, Jr., in *American Indian in Western Legal Thought*, at pp. 74-108, views these Papal bulls in a different light, seeing them as instruments of the Church used to legitimate colonisation and conquest (if the "Indians of the Americas [refused] to hear the truth of the Christian religion").


Brownlie, in *Treaties and Indigenous Peoples*, at pp. 8-9, discusses the way Great Britain entered into the Treaty of Waitangi with the chiefs of New Zealand on the understanding that it was an international legal act:

In the first half of the nineteenth century it was entirely normal for European States, and others, to make treaties with tribal societies. Treaties were made with individual Somali and West African chiefs. In the Pacific region Great Britain made treaties with the King of Hawaii, otherwise known as the Sandwich Islands (1843, 1846, 1851). If there was anything exceptional about the Treaty of Waitangi it was the fact that there was no king or single paramount chief but an acephalous confederation of chiefs and sub-tribes. As a result the formal mechanics of treaty-making were cumbersome.

There can be no doubt, however, that the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make an agreement which was valid on the international plane. Moreover, there is evidence that, in the decade prior to the conclusion of the Treaty, the British Government conducted itself on the basis that relations with the Maori tribes were governed by the rules of international law. Moreover, the fact that subsequent developments in international law doctrine denied treaty-making capacity to what were described as 'Native Chiefs and Peoples' is irrelevant. Facts have to be appreciated according to the principles of international law prevailing at the material time. [Citations omitted.]
yielded the conclusion that indigenous ‘nations’ were nations in the international legal sense of the term. They thus possessed international personality in the same manner as European states (sovereignty). The opposing stream literally de-humanised indigenous peoples. It denied any relevance for their social and legal systems, and treated their land, and their persons, as un-owned property (res nullius) that could be acquired by Europeans at will. Although the latter stream came to dominate international legal discourse, the former lingers up to the present and can be traced in the troubled legal relations between indigenous persons and their surrounding settler communities, European empires, and subsequent nation states.\textsuperscript{114}

The third and final premise is that this indigenous sovereignty, or aspects of it, has either survived until the present, or is being ‘recreated’ today. As argued later, the role played by indigenous peoples at national and international levels is unique. Despite the continuing and significant disabilities and challenges faced by these people, the international and national roles that they play are statistically disproportionate to their numbers, size, economic and political strength.\textsuperscript{115} Indigenous peoples and indigenous issues have taken on an increased prominence at the international level, as seen in such things as their involvement in various international organisations and structures, and the increasing recognition of the international legal status of the treaties, agreements and other constructive arrangements between states and indigenous populations.\textsuperscript{116} Additionally, non-state sovereign status is being articulated with increasingly frequency in the context of current aboriginal self-determination claims under international and national law.\textsuperscript{117}

D. Attributes

Because the source, locus and scope of sovereignty under a democratic conception have been so radically expanded, with permissible forms of sovereign entities having become so varied, the possibility of creating a list of sovereignty’s potential attributes has become even more elusive. The various sovereign attributes and powers described in Chapter 6 must all remain available, since sovereign statehood is itself an acceptable expression of sovereignty under the democratic conception. But precisely what sovereign powers an entity possesses will be subject to a variety of factors. Just as very small states may have some difficulty in asserting and exerting certain forms of sovereign power, for example, so too will the more limited and

\textsuperscript{113} These arguments are explored in Berry, “Legal Anomalies, Indigenous Peoples and the New World.”

\textsuperscript{114} See generally, \textit{ibid}.

\textsuperscript{115} See generally, Werther, \textit{Self-Determination in Western Democracies}.

\textsuperscript{116} See, e.g., Martinez, “Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations.”
partial forms of sovereignty described above. To the extent that the Holy See and Sovereign Order of Malta, for example, do not possess substantial (if any) territory, those entities and entities like them will have great difficulty exercising sovereign powers related to territorial possession. In this way, the precise attributes possessed by each democratic sovereign will be more functionally oriented (and constrained).

III. SYNTHESIS: TOWARDS A DEMOCRATIC CONCEPTION OF SOVEREIGNTY

Let us attempt to synthesise the above comments about democracy and sovereignty so as to set out the basic parameters of the democratic sovereign.

A. THE DEMOCRATIC SOVEREIGN

If we were to try to encapsulate the nature of such an entity, the three most basic variables appear to be those regarding the natures of (1) the participants, (2) the decision-making processes, and (3) the unit itself. Issues related to the participants particularly highlight the democratic nature of the sovereign. To constitute an identifiable unit, the sovereign must be bounded, either territorially or in some other manner. Those falling within the boundary who are subject to democratic decisions constitute the democratically sovereign people. Because the unit is democratic, questions regarding the makeup of this ‘people’ must be resolved in a non-discriminatory manner, one that respects the fundamental principle of equality. Further, nearly all of the people must be able to participate in democratic decision-making processes (i.e., the demos can only exclude children, transients and persons proved to be mentally defective). The participants also take on a prominent role in the sovereignty of the democratic sovereign, being both its source and locus. The source of sovereignty (in terms of validity) is the people. Sovereignty, in fact, is explicable in terms of being an expression of the idea of individual self-governance on a large scale. It is derived from the moral autonomy of the individual, since individuals are equal, with interests which require equal preference, which each individual is best qualified to make decisions regarding. The locus of sovereignty also is in the people (or more accurately, in the demos), since by means of their democratic decision-making and the continuous checks that are placed upon the actions of officials (who are merely their agents), they are able to hold and exercise sovereign powers.

117 For examples of sovereignty claims advanced in aboriginal legal and political theory see, e.g., Macklem, "Distributing Sovereignty," Werther, Self-Determination in Western Democracies.

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The acceptable decision-making processes, or mechanisms for implementing democracy in the democratic sovereign, can include most of the large variety of forms in which democracy is practised today. But in order for the democratically sovereign unit to best respect the ideals of democracy, preference should be given to participatory forms of democracy whenever possible. At times these latter forms may need to be combined with representative forms of democracy in order to meet such challenges as those posed by geographically large or highly populated sovereign units. A variety of possibilities arise with respect to implementing democratic processes. Some of these could apply to the democratic sovereign and others could be used more broadly to increase democracy in the international community. Because of the interdependent nature of international and national relations, promotion of all such democratic possibilities may help support and bolster democratic sovereignty generally. Suggestions for implementing and enhancing democracy include the use of mini-populii, the democratic decentralisation of the state into small face-to-face decision-making groups, and the improvement of regional and global mechanisms for increased democratic participation and accountability. The latter might involve such things as creating new regional parliaments, holding transnational referenda, making militaries democratically accountable, and democratically reorienting the UN (by dramatically changing the natures of the General Assembly and Security Council).

The nature of a democratically sovereign unit could vary considerably. It could exist in numerous forms, with the exception of that of a “world government,” since the latter is not compatible with the ‘sovereign’ aspects of democratic sovereignty. Democratically sovereign units could broadly fall into two general categories, depending upon whether they are territorially based. The first category is that of non-territorial democratic sovereignty. Such a category can exist because democratic theory does not limit the polis to territorially-based entities. In fact it not only embraces the possibility of non-territorial, transboundary forms of decision-making; it may encourage them. This is because transboundary democracy may be necessary in some cases in order to enable individuals to participate in all of the decisions that affect them. Sovereignty theory also admits the possibility of non-territorial forms, or at least forms in which territory is of little significance, as seen in the examples of the Holy See and the Sovereign Order of Malta. Interestingly, these two entities reveal that a democratic sovereign need not exist solely to satisfy general political purposes.

But the second general category of democratic sovereigns, that involving territory, will remain the larger one. Democratic sovereignty would most likely be exercised from a territorial base because many, if not most, sovereign powers are related to control over territory or territorially-based resources. In fact, the form of sovereignty chosen by a democratic sovereign may be determined largely by the particular attributes of sovereignty.
that it wishes to possess. That being said, a wide variety of territorially-based forms of sovereignty remain available. As seen in existent sovereign states, territorial size may vary from less than 1,000 square kilometres (19 independent states falling under this category were listed in Chapter 1), to nearly 10,000,000 square kilometres.  

Further, a wide variety of forms of sovereignty may be exerted over territory. This is because sovereignty is not only divisible, but also may be shared by two or more entities. Some of the diverse forms of sovereignty include: territorially minute sovereigns (city states), ‘corporate’ sovereigns (chartered trading companies), temporary or trustee sovereigns (international organisations), delegated sovereignties (in which territory is administered by, or leased to, another with the original sovereign’s consent), divided sovereigns (federal states), joint sovereigns (condominia), and coexisting sovereigns (continuing sovereignty of aboriginal peoples). These diverse forms of sovereignty may themselves support democracy by allowing more functional forms of decision-making and by bringing issues closer to the people concerned with them. By devolving sovereign powers to different levels they may also support, or enhance, sovereignty.

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118 Canada, for example, has a combined land and (internal) water territorial area of 9,976,140 sq. km (land: 9,220,970 sq. km, water: 755,170 sq. km). Other large countries, for example Brazil, China, Russia and the United States, have the following total territorial areas: Brazil, 8,511,965 sq. km (land: 8,456,510 sq. km, water: 55,455 sq. km—figure includes Arquipelago de Fernando de Noronha, Atol das Rocas, Ilha da Trindade, Ilhas Martin Vaz, and Penedos de Sao Pedro e Sao Paulo), China, 9,556,960 sq. km (land: 9,326,410 sq. km, water: 270,550 sq. km—figures exclude areas of Hong Kong, Macau and Taiwan), Russia, 17,075,200 sq. km (land: 16,955,800 sq. km, water: 79,400 sq. km), and the United States, 9,629,091 sq. km (land: 9,158,960 sq. km, water: 470,131 sq. km—figure includes only the 50 states and District of Columbia). All figures are from the Central Intelligence Agency, World Factbook 2000.

119 As summarised by Hans Michelmann, in his “Conclusion” to Federalism and International Relations: The Role of Subnational Units, ed. H.J. Michelmann and P. Soldatos, 299-315 (Oxford: Clarendon Press, 1990), at pp. 312-13, sub-sovereign interaction may be functionally more practicable as well as allow decision-making process to take place at more localised levels:

[The state-centred view of international relations, in which actions and interactions in the international system emanate from and are directed towards nation-state actors almost exclusively, is a gross distortion of reality, in particular as it concerns the international relations of federal states. Earl Fry, Panayotis Soldatos, and especially John Kineard argue that multi-actor, multifaceted international relations in which liberal democratic federal states are engaged are essential for the functioning of what are highly pluralistic polities, whose relations with actors outside national borders could not possibly be channelled exclusively through institutions dominated and controlled by national elites. An attempt by federal authorities thus to monopolize interactions with foreign entities would lead to bottle-necks in communications, inflexibility in reactions to commercial and other opportunities abroad in an era of instant communications, and ill-informed responses to international stimuli when the domestic expertise resides, as it not infrequently does, in public bureaucracies outside the national capital. Furthermore, component-unit international action can lead to increased citizen awareness of and even participation in international affairs because of the greater proximity to citizens of their political and policy-making institutions as compared to those of national governments. [Citations omitted.]

120 E.g., Hannum, in Autonomy, Sovereignty, and Self-Determination at pp. 463-4, argues that the devolution of sovereignty to local levels may actually strengthen it:

Less clear is the rationale for equating territorial integrity with a unitary or centralized form of government. It is certainly possible that a government’s emphasis on territorial integrity is merely a smokescreen to cover up its unwillingness to share political power; the specter of secession and geographic disintegration is a much more powerful symbol around which to organize support than the
Finally, a democratic conception of sovereignty has certain evaluative implications. It may be used to assess the quality, or even existence, of sovereignty. However, I have argued that such evaluative functions should be tempered by our awareness of the underdetermined nature of democracy. Until exact criteria for democracy can be specified, we must remain cautious about basing drastic decisions—such as whether to deny an entity’s sovereignty—on the basis of democratic deficiencies. In other words, we should err on the side of over-inclusion so as better to allow the kind of cross-pollinization that can occur with a wide variety of types of polity, types that may generate important new ideas and improvements for democracy and democratic sovereignty.

B. **SOME DIFFERENCES AND FURTHER IMPLICATIONS**

In concluding this Chapter, let me quickly highlight three important differences between the democratic conception of sovereignty and the contractarian and absolutist models and discuss one further implication of the democratic model. Firstly, by so firmly tying authority and sovereignty to the people themselves on the basis of their moral autonomy, rather than linking it to power or might, democratic sovereignty is incompatible with notions of ultimate or absolute power. It therefore explicitly rejects absolutist conceptions of sovereignty. Secondly, since the source and locus of sovereignty rest in the people themselves, and can never be transferred to the organs or officials of government, a democratic conception of sovereignty is not compatible with the pseudo-contractual model employed by contractarian theory. It is thus freed from the constraints inherent in such a model. In addition, since sovereignty does not vest with the government or its organs, authorities become more easily changeable, limitable and removable. Thirdly, unlike both of the previous models, under the democratic model because the source and locus of sovereignty lie in the people, not in some government structure, sovereignty cannot be held “in abeyance.”

Since sovereignty stems

“threat” of administrative decentralization, local control over police, or even the regional devolution of power. However, it cannot seriously be doubted that federal or consociational states, or those in which substantial powers have been devolved to local governments, are any less sovereign or stable than unitary states; in fact, the reverse may be true.

121 Berman, in “Sovereignty in Abeyance,” presents the fullest discussion of this option, relying upon the opinion of Judge McNair in the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 16. Berman, in *ibid.*, at pp. 77-8, argues that sovereignty can be held in a state of suspension during periods of crisis. Subsequently, he argues, sovereignty can be revived and reinstated with international legal doctrines such as self-determination. Berman’s model must be rejected, however, under a democratic view of sovereignty because even if the government representing a people may not be ascertainable in times of crisis, nevertheless the source and locus of sovereignty remain with the people themselves. Such sovereignty may be momentarily frustrated or ineffective, but it has not disappeared. For a more perceptive view of sovereignty (as existing, but temporarily “inarticulate”), see the statement by Vice President Ammoun in the same case at p. 68 (reproduced in footnote 71, above). Note, however, that Judge Ammoun, in *ibid.*, at p. 69, makes the Rousseau-like mistake of equating sovereignty with the unity of the people as a whole, therefore arguing that it is indivisible;
from and exists in the people, it can never be lost or destroyed without all of the people being annihilated.

A final, more general implication of democratic sovereignty is that it helps to enable a humanistic understanding of the nature of authority, a central facet of sovereignty. By returning sovereignty to the people and actively linking decision-making to democratic processes, the democratic model allows individuals to be a part of their authority structures. All exercises of authority become the result of democratic decisions and remain subject to subsequent democratic checks and corrections. Authority structures themselves may be both democratically created and democratically dissolved. As a result, a democratic conception of sovereignty provides strong justifications for, and legitimisation of, authority. This is vital because authority is predicated upon the existence of power, obedience to that power, and legitimacy. Without the latter component of legitimacy, authority is unlikely to be accepted or to survive for any length of time. For this reason, the importance of the ability of democracy to create and maintain legitimate authority must not be underestimated. In fact, it has been suggested that the root of the modern malaise is the disconnection of authority and legitimacy: it has become possible to see, and even accept, forms of illegitimate authority. A democratic conception of sovereignty allows us to re-establish the important link between authority and legitimacy by revealing our ever-present role in creating and maintaining authority, as well as our ability to democratically check and modify that authority.

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[I]t must surely be agreed that sovereignty is indivisible, as is liberty, and that all that is conceivable is a distinction between the possession of sovereignty and its exercise. Stoyanovsky [...] took a more accurate view when he upheld the notion of virtual sovereignty residing in a people deprived of its exercise by domination or tutelage. Those were also the views of Paul Pic. [Citations omitted.]

Judge Ammoun takes this position in order to defeat the possibility of sovereignty being vested in South Africa as the mandatory power. Such a possibility may also be avoided if it is argued that sovereignty remains vested in the inhabitants of the mandates, but that their sovereign powers are exercised on their behalf by the mandatory (in a trust-like relationship), with the League of Nations (or a subsequent body) acting as the ultimate supervisory power.


123 This division is based upon Max Weber’s typology. Weber requires two components for an exercise of authority: the external fact of the order being obeyed, and an internal acceptance (i.e., that the command is accepted as a ‘valid’ norm). The second component thus imports the requirement for legitimacy. See, e.g., Kronman, Max Weber, pp. 39-40.

124 Sennett, in Authority, at pp. 26 ff., argues that this crisis of legitimacy has arisen in various political and legal spheres of human activity, and that our increasing acceptance of illegitimate authority undermines authority generally.

125 See generally, ibid. (the importance of reconnecting legitimacy and authority as well as suggestions as to ways in which this may be achieved). Interestingly, Sennett envisages democracy as playing a crucial role. It disrupts authority (a necessary occurrence), and thereby enables new participation in the authority structures of our world: “[m]odern anarchism ought to be conceived as purposive disorder introduced into the house of power; this is the hard, uncomfortable, often bitter work of democracy.” Ibid., p. 190.
This brings us to the end of the first part of the present work. Let us now examine the implications of a democratic conception of sovereignty for several areas of international law, looking closely at developments that may either assist, or frustrate, this conception.
PART TWO: PARALLELS OR ALTERNATIVES TO THE DEMOCRATIC CONCEPTION OF SOVEREIGNTY
INTRODUCTION

Having fleshed out the potential of a democratic conception of sovereignty in the previous Chapters, let us turn to examine some of the current developments in international law that could encourage its further establishment. The present Chapter, and the two that follow, assess the democratic potentials of the right to self-determination, the new developments in the law regarding recognition of states, and the right to democratic governance, respectively. Other developments could be examined in detail, including such things as the increases in the variety, scope and effectiveness of human rights and human rights monitoring and enforcement mechanisms, the development of elaborate and sophisticated international election-monitoring mechanisms and procedures, the increased role of civil society, and the advent of new jurisprudential conceptions of the state (including revitalised versions of the Rechtsstaat). Each of these latter developments could help to increase democracy at the international level. The focus of the current work is limited to developments related to self-determination, state recognition and the right to democratic governance because these three areas may yield the greatest potential for developing broad international respect for democracy, per se. Even such developments, however, may bring with them their own particular limitations and difficulties. As a result, the concluding Chapter suggests that a democratic conception of sovereignty offers

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4 E.g., O’Hagan, in End of Law?, sets out an idealised form of the right-state or Rechtsstaat which ties democracy to the notion of the rule-of-law state at the jurisprudential level. In ibid., at p. 131, he defines this idealised state: “Stated dogmatically, the Rechtsstaat can be defined as a society ruled by procedural justice and guaranteeing the universal and equal distribution of basic constitutional rights to all citizens.” See also, ibid., pp. 132-33 (further defining procedural justice).
the most significant possibilities. It allows us to instil democratic values into the very foundation of international law and international relations.
CHAPTER 9: SELF-DETERMINATION

In current international legal scholarship the right of self-determination occupies a kind of uneasy half-way position between human rights and state rights, between law and politics. Concerning itself with the right of ‘peoples freely to determine their political, economic, social and cultural destinies,’ it seems to apply to groups rather than individuals or states. In such a manner, even though the right of self-determination is formulated under international law, in some ways it also challenges the authority of that legal system. By arbitrating between a traditional international legal non-subject (the people), and a traditional subject (the state), it allows the normative authority of the former to challenge formal legal authority of the latter. As a result the right of self-determination does not easily fit into the normal operation of international law, always having the potential both to fundamentally change that legal system and to challenge state sovereignty.

Perhaps for such reasons, the right of self-determination has been greatly restricted in recent times. It is now mainly characterised as a kind of remedial right, one only allowing the most dramatically disenfranchised or persecuted groups a chance to participate in state policies and other matters that concern them. Moreover, it is a “right” only in the most limited sense of the term, as there is no international mechanism for its enforcement and a number of doctrines...

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5 The self-determining unit is called a “peoples” in international legal scholarship. This involves a rather awkward use of a plural noun where the singular (people), would be more appropriate. However, because the term “peoples” is a legal term of art I will use it frequently throughout this Chapter. For substantive definitions of what constitutes a peoples see below, p. 368 ff.

6 Berman, in “Sovereignty in Abeyance,” at p. 56, characterises self-determination as a flexible domain between law and non-law, one that allows parties a space to negotiate outwith the normal restrictions of international law:

Self-determination appears, at first, to be a contemporary example of ideas that challenge legal thought by posing the problems of law’s relationship to sources of normative authority lying beyond the normal rules of a functioning legal system. Such challenges may confront positive law with its presumed source in natural law or may urge legal discourse to look to the realms of morality or politics when fundamental issues arise.... It is my thesis, however, that, in its contemporary form, the discourse of self-determination provides a novel framework in which these quandaries may be discussed and a useful perspective on these impasses. In self-determination, legal discourse has developed a doctrine with an extraordinary status: a legal doctrine which, within certain exceptional situations or domains, discusses the limitations of the conceptual basis of law and outlines the conditions for the temporary suspension of the ordinary legal framework. [Emphasis added.]

7 Jennings and Watts, in Oppenheim’s International Law, 9th ed., at p. 715, state:

It is clear that the injection of a legal principle of self-determination into the law about acquisition and loss of territorial sovereignty is both important and innovative. State and territory are, in the traditional law, complementary terms. Normally only a state can possess a territory, yet that possession of a territory is the essence of the definition of a state. The infusion of the concept of the rights of a ‘people’ into this legal scheme is therefore a change which is more fundamental than at first appears. [Citations omitted].
check and restrict its application. In fact self-determination has become exceptional in nature.\(^8\)

For such reasons, even though the right of self-determination has, and likely always will have, significant potential (as it contains within it a profound and revolutionary vision of human autonomy, choice and authority), this Chapter argues that at present its utility for implementing democracy at the international level must remain limited. This may change, as the meaning and content of the right of self-determination constantly changes and evolves, and some international legal authorities have consistently argued for stronger and more vibrant conceptions of the right.\(^9\)

But for the purposes of the present Chapter, let us focus upon the development of the right, its present status, and its future prospects. For the foreseeable future, it will be argued, the development of the right is more likely to focus upon the ‘internal’ aspects of self-determination. Such an ‘internal’ approach is limited and regressive when compared to the more revolutionary forms of self-determination advocated and achieved during the decolonisation period. But it may nonetheless be useful for promoting increased democracy at the international level.

**I. DEVELOPMENT OF THE RIGHT**

Self-determination as an international legal right has a short, but active, history. Let us first briefly describe its underpinnings, before moving on to examine some of the more important United Nations documents that helped to flesh out the right, as well as the related customary international law and case law developments.\(^{10}\)

\(^8\) E.g., Berman, in “Sovereignty in Abeyance,” at p. 58, emphasises the ‘exceptional’ nature of self-determination, placing it firmly outside the normal parameters of international law:

Issues of self-determination arise in unusual temporal or spatial gaps in the legal system. These gaps arise when, as a result of a set of circumstances — be they political, historical, ideological — sovereignty has been called into question and, with it, the functioning of normal law. The “exceptional” quality of self-determination signifies that the ensuing confrontation between normative bases of law constitutes a limited suspension of the usual legal norms. The situation is ultimately directed back towards the quotidian complementarity of law and sovereignty. In discussions of self-determination, consequently, arguments that privilege either legal or sovereign authority are constantly met by those that privilege the other.

\(^9\) This Chapter relies in part upon an earlier work in which I argued for a much stronger conception of the right of self-determination: David S. Berry, *Aboriginal Self-Determination Under International Law: Reconciling Distinct Historical Rights With Existing International Law Models*, LLM Thesis, Faculty of Law, Queen’s University (Kingston, Ont.: Queen’s University, 1993). The striking contrast between my views in the present Chapter and those in the former work is a result of their different purposes—this Chapter explains the current status of the law of self-determination (*lex lata*), whereas the previous work suggested both what the right should be and is becoming (*lege ferenda*).

A. UNDERPINNINGS

Self-determination has been described as the right of peoples “freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.”¹¹ The right is argued to have a variety of philosophical underpinnings, from Greek classical philosophy to Rousseau.¹² The most important theoretical link for present purposes is that between self-determination and democracy, a connection which has been apparent since the 19th Century ‘national’ claims to the right.¹³ Self-determination may be connected to democracy because it shares the same vision of the moral autonomy of the individual and the consequent right of that individual (acting within a group) to govern herself or himself. A right of self-determination therefore involves an application of the idea that a government or state must derive its legitimacy from the will or consent of its people.¹⁴ Because it embodies this idea, self-determination could be used to implement democracy at national and international levels. However, because it stops short of advocating a particular form


The right is a statement of the third formulation of Kant’s categorical imperative. Moral autonomy is the right of an individual to be subservient to no one, to be subject to the moral law as it derives from reason and not from the fiat of any individual or authority. Autonomy in this sense is equivalent to self-determination because one is morally free.

¹³ Farley, in Plebiscites and Sovereignty, at p. 4, argues that democracy and national self-determination advanced together during this era:

In this triumphal progress national self-determination and democracy went hand in hand. Self-determination might indeed be regarded as implicit in the idea of democracy; for if every man’s right is recognised to be consulted about the affairs of the political unit to which he belongs, he may be assumed to have an equal right to be consulted about the form and extent of the unit.


At its core, self-determination involves the right of people to control their own destiny, free from alien rule. The fundamental notion—that government should be based on the will of the people—is closely tied to the principle of democracy. Indeed, the theories of self-determination and democracy developed together and, combined with the principle of nationality, constituted the philosophical basis for the American and French revolutions.

¹⁴ This idea was dramatically expressed by US President Woodrow Wilson, a strong proponent of self-determination [54 Cong. Rec. 1741, 1742 (22 January 1917)], as follows:

No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were property.
of self-government, self-determination need not (and historically has not) result in democracy. In this way the practical application of the right may be limited. Claims to self-determination may amount to no more than raw and dramatic cries for liberation from tyranny. They need not offer, or even contemplate, any real and effective mechanisms for the promotion of moral autonomy.

**B. HISTORICAL DEVELOPMENT**

1. Treaties, Declarations and Resolutions

The international legal right of self-determination has been argued to stem from the minority rights provisions of the Peace of Westphalia treaties (1648), as well as a number of other treaties and documents. But it first appears in its modern guise in the *Charter of the* 

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15 The principle of self-determination has at times been perverted to serve ulterior ends. Examples include, notoriously, Adolf Hitler’s appeal to the principle (on Sept. 26, 1938), on behalf of the 3,500,000 Germans in Czechoslovakia: Daniel Patrick Moynihan, *Pandemonium: Ethnicity in International Politics* (Oxford: Oxford University Press, 1993), p. 80. In *ibid.*, at p. 114, the same author also describes its strategic use by the Bolsheviks in Russia as a mechanism to destabilise governments and thereby promote Communism:

> Whereas for Wilson self-determination had an absolute character and was the ethical justification for the dismemberment of the polyglot German, Hapsburg and Ottoman Empires, for the Bolsheviks it was essentially a utilitarian device of only transitory and relative moral relevance, designed to bring about the decomposition of all multinational states and colonial empires, including the Russian, insofar as dissolutions promoted the advance of the Communist Revolution. [Citations omitted.]

Hannum, in *Autonomy, Sovereignty, and Self-Determination*, at p. 32, notes that Lenin and Stalin “were strong proponents of the principle of national self-determination, but only insofar as its exercise would promote the interests of the class struggle...”

16 The right has been traced back to a variety of sources including: the two treaties establishing the Peace of Westphalia [the Treaty of Peace Between France and the Empire (Münster, October 24, 1648), and the Treaty of Peace Between Sweden and the Empire (Osnabrück, October 24, 1648)], the Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles) (1919), U.S. President Woodrow Wilson’s Fourteen Points (1918), and the Atlantic Charter (Aug. 14, 1941). See, e.g., Hannum, *ibid.*, pp. 50 [Peace of Westphalia], and 27-32 [Treaty of Versailles and Fourteen Points], Nafziger, “Self-Determination and Humanitarian Intervention,” p. 12 [Atlantic Charter]. Luing, in “The Norm of Self-Determination,” argues that the Atlantic Charter is the first modern expression of the right. However the latter document’s understanding of the concept is quite limited since it is primarily concerned with a few of its political aspects (i.e., the people being able to choose their “form of government,” and “self-government”), rather than its full range of economic, social and cultural implications. The actual phrase “based upon respect for the principle of equal rights and self-determination of peoples” did not appear in the Atlantic Charter or the later Dumbarton Oaks Proposals. It was only added at the San Francisco Conference which produced the UN Charter: Cristescu, *Right to Self-Determination*, pp. 2-3 and 17-18. It should be noted that minority rights frameworks and self-determination were conceptually distinguished at earlier periods. They were not necessarily seen as compatible, but often as alternatives. Speaking of the League of Nations preference for minority rights structures, for example, Buchheit in *Secession*, at p. 70, states:

The League obviously hoped that this process [of ensuring respect for minority groups through League minority treaties] would suppress in the future those special conditions which give rise to minority grievances and can arguably legitimate a claim to self-determination. Once this decision was made, of course, the League had to reject self-determination and particularly secessionist self-determination as a further remedy for minority groups. In a conscious methodological choice, the League preferred to employ the external pressure of international commitments and world opinion as an inducement for States to moderate their minority policies rather than rely on whatever internal pressure would result from an international endorsement of self-help measures on the part of such minorities where a State’s policies were manifestly immoderate.
United Nations (1945). Article 1(2) of the Charter describes one of the “Purposes of the United Nations” as being “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” Article 55 of the Charter also uses the phrase “self-determination,” and its meaning is fleshed out by Articles 73 and 76, which describe the responsibilities of Member States regarding Non-Self-Governing Territories and the International Trusteeship System, respectively. 17

The other alternative to minority rights accepted by the League was that of entrusted dependent peoples to Mandatory States. In many ways this was the opposite of self-determination, as may be seen in the phrasing of Art. 22(1)-(2) of the Covenant of the League of Nations (1919):

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

17 Arts. 55, 73 and 76 of the Charter of the United Nations (1945), state:

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: […]

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; […]

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: […]

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement....
Further support for self-determination came with Article 21(3) of the Universal Declaration of Human Rights (1948), which although not specifically referring to the right reiterates one of its basic premises, namely, that "the will of the people shall be the basis of the authority of governments." Various subsequent United Nations resolutions and declarations, although not binding per se, helped to further substantiate and flesh out the meaning of the right. The 1952 General Assembly Resolution regarding the "Right of Peoples and Nations to Self-Determination," for example, bolstered arguments in favour of self-determination's status as a right in addition to being a principle. The right was included in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the related 1961 Resolution on the Situation With Regard to Implementation of Declaration on Granting of Independence to Colonial Countries and Peoples. The 1960 Declaration "[s]olemnly proclaims the necessity of

18 This Universal Declaration provision has been argued to represent an elaboration of Article 55 of the UN Charter, and even to support the existence of a right to "popular sovereignty" under customary international law. See, e.g., Nafziger, "Self-Determination and Humanitarian Intervention," pp. 13-14 [elaboration of Art. 55 of the Charter], Chen, "Self-Determination and World Public Order," pp. 1290-91 [customary international law of popular sovereignty]. The Declaration is also notable because it stretches human rights law, usually associated with individuals, to cover groups. E.g., Nafziger, ibid., pp. 13-14 [illustrating this point by, inter alia, referring to the unique language in Article 21(3) which uses the phrase "the will of the people" instead of the standard terminology such as "everyone" or "no one" as used in most of the other articles]. Note, however, that Cristescu, in Right of Self-Determination, at p. 38, points out that the reference to "self-government" in this article is a less onerous requirement for administering authorities than self-determination, per se (i.e., self-government being merely one component of self-determination).

19 See, e.g., Higgins, Problems and Process, pp. 24-38 (pointing out that General Assembly resolutions are not directly binding, and contrasting them to treaties). Nonetheless, the General Assembly can engage in "law-declaring" activities, and organs of the United Nations can interpret provisions of the Charter applicable to their functions and even related treaties (which interpretations may solidify into custom over time): ibid., p. 25. Further, even United Nations resolutions that are unambiguously 'declaratory' (i.e., concerned with general international law), can represent the 'first step' in the process of customary law creation, sometimes themselves providing "evidence of developing trends of customary law," or providing opinio juris about existing trends: ibid., pp. 27 and 37 (referring to the Nicaragua case as "a clear illustration of the Court using Assembly resolutions as opinio juris, without going further"). In Higgin's assessment, in ibid., at p. 37, such resolutions still can "undoubtedly play a significant role in creating norms." See also, Cassese, Self-Determination, ch. 4.

20 Note, however, that some argue that self-determination's status as a right was not resolved at the time this resolution was passed, during the Seventh Session of the General Assembly. Subsequent, extensive debates were held during the Ninth, Tenth, Twelfth and Thirteenth Sessions, for example, regarding whether self-determination had acquired the status of being a right or remained a principle. See, e.g., Buchheit, Secession, pp. 80-84 (discussing the general themes of these debates). See also the discussion of the two International Covenants in footnote 23, below. Cristescu, in Right to Self-Determination, at pp. 22-3, comes to the conclusion that self-determination is simultaneously a right and a principle: "self-determination, having been classified as a right by the Charter, is a legal concept which finds expression both as a principle of international law and as a subjective right.

21 The Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), includes the following statements:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence. [...]
bringing to a speedy and unconditional end colonialism in all its forms and manifestations” (emphasis added).22

A few years later the two International Covenants both lent strong support to the right of self-determination.23 The discussions in the General Assembly leading up to the adoption of

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

Cassese, in Self-Determination, at p. 70, argues that this 1960 Declaration and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations were especially important because they forced states to “express their views and take a stand on self-determination.” For a more comprehensive treatment of the series of resolutions aimed at implementing the original Declaration see, e.g., Cristescu, ibid., pp. 9-10. For more on the general decolonisation process see, e.g., United Nations Department of Public Information, The United Nations and Decolonization, Highlights of United Nations Action in Support of Independence for Colonial Countries and Peoples (New York: United Nations, 1980).

22 This phrasing, when combined with the general tenor of the document, has led some later writers to argue that the Declaration actually created an expanded definition of colonialism, one broad enough to include behaviour taking place within the boundaries of independent states (and thereby susceptible to challenge by the right of self-determination). E.g., Johnston, “Quest of the Six Nations Confederacy,” p. 25. Others, however, disagree and see this document as allowing self-determination only within traditional colonial contexts. E.g., Buchheit, in Secession, at p. 87, comments: “It seems inescapable that the use of the phrase ‘self-determination’ in the [1960] declaration means ‘colonial self-determination.’” Sections 6 and 7 of the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) indirectly support Buchheit’s assessment:

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

23 Both the International Covenant on Economic, Social, and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966) share the following identical Art. 1:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

See also the commentary on this article by the Committee on Civil and Political Rights, “General Comment 12: The right to self-determination of peoples (Article 1),” 21st Sess. (13/04/84), as available at http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+12.En?OpenDocument (accessed 5 August 2001). Cristescu, in Right to Self-Determination, at pp. 8-9, argues that these two Covenants secured self-determination’s status as a right under international law. Hannum, in Autonomy, Sovereignty, and Self-Determination, at p. 45, similarly concludes:

[It] would seem difficult to question its status as a ‘right’ in international law. While General Assembly Resolutions do not themselves make law, the unanimous adoption of Resolutions 1514, 2625, and numerous others reiterating the ‘right’ to self-determination is significant, as is the fact that more than half of the world’s states have formally accepted the right of self-determination through their adherence to one or both of the Covenants.
these Covenants identified the right as the “corner-stone of the whole edifice of human rights,” making it so essential to the Covenants themselves that they would be “devoid of all meaning if [they] did not include the right of self-determination.”\(^{24}\) Clear connections also were made regarding self-determination’s role in helping to ensure world peace.\(^{25}\) Later authors argue that the combined effect of these two International Covenants and the subsequent Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations (1970), provided self-determination with the additional status of being a norm, or even a peremptory norm of international law (\textit{jus cogens}).\(^{26}\)

\(^{24}\) Cristescu, \textit{Right to Self-Determination}, pp. 4-5. Cristescu, in \textit{ibid.}, at p. 5, argues that this connection between self-determination and human rights also was made explicit in an earlier General Assembly Resolution, entitled “Inclusion in the International Covenant or Covenants on Human Rights an Article Relating to the Rights of Peoples to Self-Determination” (1952). But cf., Buchheit, \textit{Secession}, pp. 80-84 [discussing the general themes of the debates leading up to the two Covenants and reaching the conclusion that Art. 1 was not meant to not support a secessionary form of the right], Cassese, \textit{Self-Determination}, pp. 47-65 [discussing the Covenants in detail but arguing that their first articles are more closely linked to internal forms of the right].

\(^{25}\) Cristescu, in \textit{ibid.}, at p. 7 (para. 41), when discussing the above 1952 Resolution and the debates leading up to the Covenants, summarises:

It was observed that people throughout the world look on freedom and self-determination not only as conducive to human dignity and the assertion of human personality, but also as elements of peace and conditions necessary for effective progress and international co-operation. Indeed, the wider the extent of self-determination, the broader the basis for peace in the world, since freedom is as indivisible as peace. Relations between dominant and subject peoples should be replaced by relations between free peoples on a footing of equality and trust. In that way, co-operation and peace could take the place of antagonism and war.

For further proponents of self-determination as a mechanism towards world peace see, e.g., Stavenhagen, “Self-Determination: Right or Demon?”, pp. 10-11, Laing, “The Norm of Self-Determination,” p. 239.

\(^{26}\) The relevant section of the 1970 Declaration, entitled “The Principle of Equal Rights and Self-Determination of Peoples,” reads:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and
(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and
Other significant documents that refer to the right of self-determination include the constitutions of the former Union of Soviet Socialist Republics (1917), France (1958), the Central African Republic (1962), and the Congo (1963).²⁷ The African regional organisation, the Organization of African Unity (now African Union), mentions the right of self-determination and similar principles in some of its treaties and human rights instruments.²⁸ In
another hemisphere, the right of self-determination was incorporated into the *Pacific Charter* (1954). In the Americas, the Organization of American States, as seen in Art. 23 of the *American Convention on Human Rights* (1969), has tended to emphasize a particular political aspect of the right of self-determination, namely, democratic rights, rather than the broader right in its entirety. However the phrase “self-determination” is found in the Preamble to the *Additional Protocol to the American Convention* (1988). The Conference on Security and Cooperation in Europe codified and elaborated the meaning of the right of self-determination for the countries of Europe and North America in the Helsinki Final Act of 1975. The Final Act’s description of the right is unique in that it posits it as being a

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- RECALLING the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation;
- CONSIDERING that since its inception, the Organization of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our continent and has provided a unique framework for our collective action in Africa and in our relations with the rest of the world.


30 Art. 23(1) of the *American Convention on Human Rights* (1969), sets out the “right to participate in government”:

1. Every citizen shall enjoy the following rights and opportunities:
   - (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
   - (b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
   - (c) to have access, under general conditions of equality, to the public service of his country.

31 The Preamble to the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (1988), otherwise known as the ‘Protocol of San Salvador,’ states:

> Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources....

32 Principle VIII of the Conference on Security and Cooperation in Europe (CSCE): Final Act (1975), provides:

**VIII. Equal Rights and Self-Determination of Peoples**

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status,
continuous one: "all people always" are entitled to use it. The Helsinki Conference was followed by other notable CSCE/OSCE meetings, which produced the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), and the Charter of Paris for a New Europe (1990). The former enunciates various democratic principles and the latter reaffirms the Helsinki Final Act and makes specific reference to the right of self-determination.\(^{33}\)

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without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.

The CSCE is now the Organization for Security and Co-operation in Europe (OSCE). Note that several other Principles in the Helsinki Final Act might conflict with some applications of the right to self-determination—i.e., the principles entitled "I. Sovereign Equality. Respect For the Rights Inherent in Sovereignty," "II. Inviolability of Frontiers," "IV. Territorial Integrity of States," and "VI. Non-Intervention in Internal Affairs." But no hierarchy is created for the Principles in the Helsinki Final Act, as expressly stated at the end of its Section (A): "[a]ll the principles set forth above are of primary significance and, accordingly, they will be equally and unreservedly applied, each of them being interpreted taking into account the others." The Helsinki Final Act was signed by thirty-five states, including the United States, the USSR and Canada. Interestingly, because of the membership and scope of the Final Act, it would not appear to have been meant to be restricted solely to cases of decolonisation. See, e.g., Saladin, "Self-Determination, Minority Rights, and Constitutional Accommodation," pp. 186-7.

\(^{33}\) The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), contains a variety of provisions encouraging democracy, democratic reforms, and concrete rights associated with democratic systems. One of the most interesting provisions from this perspective is para. 6, which states:

The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes. They recognize their responsibility to defend and protect, in accordance with their laws, their international human rights obligations and their international commitments, the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order of that of another participating State.

See also paras. 30-39 (national minorities), and 40-40.7 (prohibiting discrimination against minorities). Note, however, that para. 37 asserts the supremacy of territorial integrity over minority rights. The OSCE’s Charter of Paris for a New Europe (1990) reaffirmed the Helsinki Final Act and its principle regarding self-determination in the section entitled "Friendly Relations Among Participating States" as follows:

To uphold and promote democracy, peace and unity in Europe, we solemnly pledge our full commitment to the Ten Principles of the Helsinki Final Act. We affirm the continuing validity of the Ten Principles and our determination to put them into practice. All the Principles apply equally and unreservedly, each of them being interpreted taking into account the others. They form the basis for our relations. [...]\(^{33}\)

Our relations will rest on our common adherence to democratic values and to human rights and fundamental freedoms. We are convinced that in order to strengthen peace and security among our States, the advancement of democracy, and respect for and effective exercise of human rights, are indispensable. We reaffirm the equal rights of peoples and their Right to Self-Determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

Note that in the "Guidelines For The Future" section (under the title "Human Dimension"), the Charter of Paris indicates that minorities are expected to solve all of their conflicts within the state system: "We declare that questions relating to national minorities can only be satisfactorily resolved in a democratic political framework."
2. **International Decisions**

   *The Åland Islands Question*

   Juridical consideration of the principle of self-determination first occurred in the context of the dispute between Finland and Sweden over the Åland Islands after the end of the First World War. The islands were of strategic importance to the Baltic region because of their military, naval and shipping potential, and were of especial interest to Sweden and Finland, the two neighbouring states. Historically the islands had been conquered and occupied several times by Sweden and Russia, with possession alternating between the two states. For some time prior to the dispute being heard by the League of Nations, the Åland Islands were part of the Grand Duchy of Finland, which itself was part of the Russian Empire. After civil war broke out in Russia in 1917, the Ålanders expressed their wish to be incorporated into Sweden. However during the same period Finland declared her independence from Russia (December 4, 1917), and was recognised as such by both Russia (December 31, 1917) and Sweden (January 4, 1918). The Swedish King, upon hearing of the Åland Islands referendum results on January 16, 1918, expressed the hope Finland's independence would solve the dispute. Instead, Finland

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For a general analysis of the Helsinki Final Act and some of the later CSCE/OSCE developments see, e.g., Cassese, *Self-Determination*, pp. 277-96.


35 The Åland Islands are an archipelago made up of some 6,554 islands and islets located in the Baltic sea, only 100 of which are inhabited, with an area of roughly 550 square miles: Padelford and Andersson, *ibid.*, at p. 465 [the statistics regarding the number of inhabited islands are from 1938]. The main Åland island, Fasta Åland, lies roughly 30 miles from Sweden and 45 miles from Finland. *ibid.*

36 *Ibid.*, p. 466. For example, Sweden possessed the islands in 1362, 1721, 1743, 1808, whereas Russia possessed them in 1714, 1742, and from 1809-1920.


38 Their representatives adopted a unanimous resolution to this effect on August 20, 1917, communicated to Sweden their second vote on November 27, 1917, and held a referendum on December 31, 1917. The latter resulted in an overwhelming vote in favour of union with Sweden. *Ibid.*, p. 469.


40 Padelford and Andersson, *ibid.*
asserted full sovereignty over them. The situation became further complicated when several of the powers of the region claimed sovereignty over, or occupied, the Åland Islands.

The question of ownership of the islands was complicated, but the clearly Swedish social, cultural and linguistic identity of the population was not. Because of this identity, Swedish public opinion strongly favoured the request of the Ålanders, and there was even "talk of settling the question by force" on the Swedish side. The Islanders themselves sent a petition to the Peace Conference in Paris in 1919 "asking for a plebiscite, and at the same time stated their historic, economic, and racial ties with Sweden." After tensions escalated between Finland and Sweden, the British government, acting under Art. 11 of the Covenant of the League of Nations, decided to submit the matter to the Council of the League. In the Council hearings of July 9-12, 1920, the Swedes argued that the inhabitants of the Åland Islands had a right to self-determination, and consequently that their views must be ascertained by means of a plebiscite. The Finns, on the other hand, argued that the League had no competence to look into the question, deeming it to be entirely an internal matter. Because of this 'jurisdictional' challenge, the Council appointed a special Committee of Jurists to consider whether the question was one solely within the jurisdiction of Finland, and

41 Walters, A History of the League of Nations, pp. 103-4. Note, however, that Finland's independence was not complete at this time as she and Russia were still nominally at war.

42 Padelford and Andersson, in "The Aaland Islands Question," at p. 471, summarise the complicated status of the islands during this period:

The situation respecting the islands in the last of 1918, then, was as follows: Russia had not formally relinquished all right and title to the islands; Finland claimed to have sovereignty over the islands; Sweden claimed no title for herself, but favored an international settlement of the question, which might result in conveyance of a title or mandate to Sweden; Germany had occupied the islands and concluded treaties with Finland, Russia and Sweden, all of which provided for the demilitarization of the islands but none of which indicated the locus of sovereignty.

43 Walters, in A History of the League of Nations, at p. 104 comments that the inhabitants of the islands were "Swedish in speech, blood and affections."

44 Ibid.

45 Padelford and Andersson, "The Aaland Islands Question," p. 472 (citations omitted). The Supreme Council decided not to concern itself with the matter and the question was left for the League to resolve.

46 Ibid., p. 473. Walters, in A History of the League of Nations, at p. 791, notes with some irony that the Åland Islands dispute, "the first serious political question laid before the Council," was also "the last such question discussed at Geneva before the outbreak of the Second World War." The dispute went to the League Council, rather than to the Permanent Court of International Justice, for the simple reason that it arose before the latter had come into existence.

47 Walters, ibid., p. 104. See also the Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question (Larmoude, Struycken, Huber), L.N.O.J. Sp. Supp. No. 3 (Oct. 1920) [hereafter referred to as the Report of the Committee of Jurists], pp. 3-5. Art. 15(8) of the Covenant of the League of Nations (1919) prohibited the League Council from scrutinising disputes which fell within a Member State's domestic jurisdiction: "8. If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall make no recommendation as to its settlement."
whether continuing obligations existed with respect to the demilitarisation of the islands.\footnote{48} The Committee reported to the Council that the Åland Islands question did not solely fall under Finnish domestic jurisdiction.\footnote{49} Thereby satisfied with its own competence to deal with the matter, the Council sent a neutral Commission of Rapporteurs to engage in further investigations. The Rapporteurs submitted their report to the League Council in April 1921, concluding that even though it was clear that the Ålanders wished to join Sweden, that nonetheless Finland had sovereignty over the islands and this must be the decisive factor.\footnote{50} Sovereignty over the Åland Islands remained with Finland, subject to certain minority rights protections and the requirement that the non-military status of the islands be preserved (by means of a new convention); self-determination was inapplicable.\footnote{51} Neither state was particularly happy with this solution, and Sweden only accepted it under strong protest.\footnote{52}

\footnote{48} The two questions asked of the Committee were:

(1) Does the Swedish case, as presented by the Council, of the question of the Aaland Islands, arise out of a matter which by International Law is solely within the jurisdiction of Finland, within the meaning of paragraph 8 of Article XV of the Covenant? and (2) What is the present state of the international obligations regarding the demilitarization of the Aaland Islands.


\footnote{49} Verzijl, in International Law in Historical Perspective, Vol. 1, at p. 329, argues that this finding of the Committee was based “chiefly on the ground that the dispute did not relate to an already established political situation, but rather to a factual situation occurring in a period of political transformation, during which the character of a definitively constituted State could not yet be attributed to Finland.” Walters, on the other hand, in A History of the League of Nations, at p. 104, regarded the decision as being based more on the fact that the dispute concerned Swedish and Russian interests as well as the 1856 Convention on the Demilitarization of the Åland Islands. The first article of this latter treaty, concluded between Great Britain, France and Russia reads (in the French original):

\textit{Article 1er.}

\textit{Sa Majesté l’Empereur de toutes les Russies, pour répondre au désir qui lui a été exprimé par Leurs Majestés la Reine dy Royaume Uni de la Grande Bretagne et d’Irlande et l’Empereur des Français, déclare que les îles d’Aland ne seront pas fortifiées, et qu’il n’y sera maintenu ni créé aucun établissement militaire ou naval.”}

\footnote{50} Walters, \textit{ibid.}, p. 104. See generally, Report Presented to the Council of the League by the Commission of Rapporteurs (Beyens, Calonder, Elkus), L.N. Council Doc. B 7.21/68/106 [VII] (16 April 1921) [hereafter referred to as the Report of the Commission of Rapporteurs]. Interestingly, as commented upon by John Spencer Bassett, in The League of Nations: A Chapter in World Politics (New York: Longmans, Green and Co., 1928), at pp. 62-5, there is an important point of disagreement between the Committee and Commission: the former considered the question of the Åland Islands as not being solely within the jurisdiction of Finland, and yet the latter held that they were under Finnish sovereignty. This is fascinating because if they were entirely governed by Finnish sovereignty, then neither the League nor the Commission should have been able to deal with the matter (which the Rapporteurs advised the Council to continue to do). Perhaps a distinction could be made between the international nature of the dispute (involving questions of emerging sovereignty, treaty interpretation, self-determination and the relations of states), on the one hand, and the ‘domestic’ nature of Finnish title, on the other. Verzijl, however, in \textit{ibid.}, Vol. 1, at pp. 331-2, is deeply critical of the reports of the Committee and Commission, as well as the involvement of the League Council in the affair. In his opinion Finland had sovereignty over the islands before the referral of the matter to the League and thus the ‘dispute’ fell entirely within Finland’s domestic jurisdiction.

\footnote{51} Walters, in \textit{ibid.}, at pp. 104-5, explains the primary concern underlying the Rapporteurs’ decision: “A minority had the right to fair and just treatment within the State: but it could not be permitted to separate itself from the country of which it was a part, and incorporate itself within some other State, simply because it desired to do so. Such a doctrine would lead to international anarchy.” The operative paragraphs of the “Decision of the Council of the League of Nations on the Åland Islands,” as set out in the Minutes of the Fourteenth Meeting of the
Importantly, as evidenced by the formal protest of Swedish Prime Minister Branting and in the reports of both the Committee of Jurists and the Commission of Rapporteurs, there was a consensus that self-determination was not a rule of positive international law at the time.53 The Council of June 24, 1921, L.N.O.J. 694-700 (Sept. 1921), at p. 697 [as reproduced in Åland Culture Foundation, InternATIONella avtal och dokument rörande Åland/International Treaties and Documents Concerning Åland Islands, 1856-1992 (Mariehamn, Finland: 1993), as available at http://www.kultur.aland.fi/kulturstiftelsen/traktater/eng, fr, ram right-enfr.htm (accessed 6 August 2001)], state:

1. The sovereignty of the Aaland Islands is recognised to belong to Finland;

2. Nevertheless, the interests of the world, the future of cordial relations between Finland and Sweden, the prosperity and happiness of the Islands themselves cannot be ensured unless (a) certain further guarantees are given for the protection of the Islanders; and unless (b) arrangements are concluded for the non-fortification and neutralisation of the Archipelago.

3. The new guarantees to be inserted in the autonomy law should specially aim at the preservation of the Swedish language in the schools, at the maintenance of the landed property in the hands of the Islanders, at the restriction, within reasonable limits, of the exercise of the franchise by new comers, and at ensuring the appointment of a Governor who will possess the confidence of the population.

4. The Council has requested that the guarantees will be more likely to achieve their purpose, if they are discussed and agreed to by the Representatives of Finland with those of Sweden, if necessary with the assistance of the Council of the League of Nations, and, in accordance with the Council’s desire, the two parties have decided to seek out an agreement. Should their efforts fail, the Council would itself fix the guarantees which, in its opinion, should be inserted, by means of an amendment, in the autonomy law of May, 7th, 1920. In any case, the Council of the League of Nations will see to the enforcement of these guarantees.

5. An international agreement in respect of the non-fortification and the neutralisation of the Archipelago should guarantee to the Swedish people and to all the countries concerned, that the Aaland Islands will never become a source of danger from the military point of view. With this object, the convention of 1856 should be replaced by a broader agreement, placed under the guarantee of all the Powers concerned, including Sweden. The Council is of the opinion that this agreement should conform, in its main lines, with the Swedish draft Convention for the neutralisation of the Islands. The Council instructs the Secretary-General to ask the governments concerned to appoint duly accredited representatives to discuss and conclude the proposed Treaty.

The new Convention on the Non-Fortification and Neutralization of the Åland Islands was concluded in 1921 between a number of states, including Germany, Denmark, Estonia, Finland, France, Great Britain, Italy, Latvia, Poland and Sweden.

52 In the “Decision of the Council of the League of Nations on the Åland Islands,” ibid., Swedish Prime Minister Hjalmar Branting greeted the Council’s decision with a formal protest, stating, inter alia:

It is with a feeling of profound disappointment that the Swedish nation will learn of the Resolution of the Council of the League of Nations. […] The Swedish Government had hoped that an institution, which was established to assist in the realisation of right in international relationships, would have favoured a solution of the Aaland question in conformity with the principle of self-determination, which, although not recognised as a part of international law, has received so wide an application in the formation of the New Europe. It had hoped that the Aalanders would not be refused the rights, which have been recognised in respect of their Slesvig brothers, who belong, as do the Aalanders, to the Scandinavian race. It had hoped that, in the very special case under consideration, in which right appears so evident, and in which the wishes of the population have been expressed with such unusual unanimity, the League of Nations would have filled, at least on this occasion the rôle of the champion and defender of right, and thus, by its first decision, would have proclaimed the dawn of a new international order.

53 The Committee, in its Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question (Larnaude, Struycken, Huber), L.N.O.J. Sp. Supp. No. 3 (Oct. 1920), at p. 5, concludes that self-determination is subservient to sovereignty under normal conditions:

Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the
comments of the Commission of Rapporteurs about the principle of self-determination are especially illuminating:

This principle is not, properly speaking a rule of international law and the League of Nations has not entered it in its Covenant. This is also the opinion of the International Commission of Jurists... It is a principle of justice and liberty, expressed by a vague and general formula which has given rise to most varied interpretations and differences of opinion... To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity... The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.54

The breadth of this denial of the principle of self-determination is striking. The Åland Islands case therefore would not seem to auger well for the right of self-determination.55

Later commentators, however, have either limited the two opinions to the specific facts of the case, or exploited a few of the implicit exceptions in the above statement by the Rapporteurs. At a factual level, the Åland Islands question arose in a unique and difficult situation. If Finland had not been in such peculiar circumstances at the time the dispute arose (emerging from its own independence struggle), for example, it is doubtful whether the principle of self-determination even would have been invoked.56 Also, once these circumstances had been resolved by the Commission of Rapporteurs (who, disagreeing with the Committee of Jurists, held that there could be no serious doubt about Finnish sovereignty over the territory), the
covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations....

Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.


55 See generally, Cassese, Self-Determination, pp. 19-33 [exploring the status of the principle from Wilson to the end of the League, considering it at the latter point to be a "political principle, nothing more"].

56 According to Cassese, in ibid., at p. 29, "the principle of self-determination of peoples was called into play not because the population of the Islands had a right that superseded State interests, but because Finland was purportedly still in flux."
principle seemed less relevant.57 Furthermore, in applying the principle, the Committee and Commission both understood that the Ålanders were themselves a small minority of a larger minority group (representing only six percent of the total Swedish population in Finland).58 As a result, a holding in favour of the Ålanders might have negatively affected the larger Swedish population on the mainland. Finally, there was little evidence of persecution of the Ålanders by Finland; the latter in fact readily agreed to guarantee Åland rights and customs.59

With regard to the possible exceptions implicit in the Åland Islands statements, Crawford argues that the Rapporteurs left open the possibility of the principle of self-determination applying to situations in which “territories are so badly misgoverned that they are in effect alienated from the metropolitan State,” or in other words, applying to situations involving carence de souveraineté.60 Also, the reports and subsequent League actions not only acknowledge links between self-determination and protection of minorities, they seem to support the possibility of secession by minorities when “the State at issue manifestly abuse[s] its authority to the detriment of the minority.”61 At a more abstract level, the treatment of the Åland Islands question by the League of Nations has been argued to have altered understandings of the scope of international law. Simply by applying international law to examine the question—rather than accepting Finland’s prima facie jurisdiction over such matters—Berman argues that these reports reveal a vision of self-determination as providing an “alternative” form of international law, one that allows jurists to look into the legal and factual factors surrounding the birth of states.62 To sum up, the treatment of the Åland Islands question by the League of

57 See the discussion in footnote 50, above, about the disagreement between the Committee and Commission regarding Finland’s sovereignty over the area. Padelford and Andersson, in “The Åland Islands Question,” at p. 475, suggest that the Commission was heavily influenced by the fact that the Åland Islands had been attached to Finland since 1809.

58 E.g., George F. Kohn, The Organization and the Work of the League of Nations (Philadelphia: American Academy of Political and Social Sciences, 1924), pp. 12-13 [producing the 6% figure and commenting that the Ålanders “could, therefore, not be considered as expressing the wish of the total minority”].

59 Ibid., p. 13. Note, however, that during the struggles for control over the region from 1918 to 1920, and again near the beginning of the Second World War, the Ålanders were at times victimised by Russian and Finnish troops. See generally, Padelford and Andersson, “The Åaland Islands Question.”

60 Crawford, Creation of States, pp. 86-7.

61 Cassese, Self-Determination, pp. 30-31.

62 Berman, in “Sovereignty in Abeyance,” at pp. 72-6, discusses the Åland Islands situation in some detail and argues that the Committee of Jurists revealed a whole new, alternative form of international law, one that could look into areas not previously permissible. At p. 75, for example, he quotes the comment of the Finnish Minister Enckell who “declared that the Jurists’ conclusions could not be justified [unless a new international law is to be called into existence] by the decision.” On the same page Berman goes on to argue that the latter was the actual result when the Commission took jurisdiction:

Thus, rather than merely deciding a jurisdictional question, the Åaland Islands opinion recounts the birth of an alternative international law, an international law that is, in turn, competent to discuss the birth of states. With the rupture of the complementarity of law and fact, the foundations of international law become a matter for discussion. Law may now inquire into the processes by which groups come to
Nations reveals an awareness of the new political ideal or idea of self-determination, even if the League was unable (or unwilling), to implement it fully in practice.  

b. Namibia Opinion


The principle of self-determination was relevant to Namibia/South West Africa because South Africa refused to convert its Mandate into a Trusteeship Territory after the League of Nations was replaced by the United Nations. South Africa argued that it was not required to do so (correctly, according to the 1950 International Status of South-West Africa Advisory Opinion), and sought to incorporate Namibia into its own territory (illegally, according to both the 1950 and 1971 opinions). Difficulties arose regarding the status of Namibia in such circumstances. South Africa itself admitted that the Mandate had survived the termination of the League of Nations. But what obligations such a continuing Mandate might impose upon the mandatory power, and who should enforce those obligations, were both subjects of heated debate before the Court. In ascertaining whether the central meaning of the Mandate (its “sacred trust”), had survived the demise of the League, the Court stated:

To the question whether the continuance of a mandate was inseparably linked with the existence of the League, the answer must be that an institution established for the fulfilment of a sacred trust cannot be presumed to lapse before the achievement of its purpose. The responsibilities of both mandatory and supervisor resulting from the mandates institution were

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assert their collective will, by which they begin to acquire the indicia of international ‘determination,’ by which they obtain 'access' to the international stage.

63 See, e.g., Cassese, Self-Determination, pp. 1-4 and ch. 2.


65 In the Namibia Opinion, at p. 41 (para. 78), the Court summarises: “In the light of the foregoing review, there can be no doubt that, as consistently recognized by this Court, the Mandate survived the demise of the League, and that South Africa admitted as much for a number of years.” See also, ibid., p. 39 (para. 74) [South Africa’s admission].
complementary, and the disappearance of one or the other could not affect the survival of the institution. [...] In the particular case, specific provisions were made and decisions taken for the transfer of function from the organization which was to be wound up to that which came into being.66

In addition, the Court held that the supervisory functions of the United Nations could be properly substituted for those of the League of Nations.67 In the 1950 Advisory Opinion on the International Status of South-West Africa the General Assembly had been deemed the appropriate replacement supervisory body.68 As a result, South Africa was to continue its mandatory role under the supervision of the General Assembly.

However, South Africa continued to assert its intention to annex Namibia, in spite of clear statements from the International Court of Justice about the illegality of this course of action. After a series of “fruitless negotiations ... over a period of thirteen years, from 1946 to 1959” between the United Nations and South Africa regarding Namibia, the General Assembly adopted a resolution terminating the South African Mandate over the territory.69 The Mandate was terminated because South Africa’s claims to title over the territory of Namibia “lead by South Africa’s own admission to a situation which vitiates the object and purpose of the Mandate.”70 Because the General Assembly had no enforcement powers, however, it asked the Security Council to look into the matter. The Security Council adopted a resolution which, inter alia, made the continued presence of South Africa in Namibia illegal and called upon states to act accordingly.71 The International Court of Justice subsequently was asked to provide an advisory

66 Ibid., pp. 32-3 (para. 55).

67 E.g., ibid., p. 33 (para. 57): “It would have been contrary to the overriding purpose of the mandates system to assume that difficulties in the way of the replacement of one régime by another designed to improve international supervision should have been permitted to bring about, on the dissolution of the League, a complete disappearance of international supervision.” See also, ibid., pp. 33-35 (paras. 58-67).


69 See the Namibia Opinion, ibid., pp. 44-5 (paras. 85-6) [referring, inter alia, to General Assembly Resolution 2145 (XXI)]. Interestingly, as pointed out by Higgins, in Problems and Process, at pp. 24-5, the General Assembly resolution, although not binding per se, had some legal effect:

The Court [in the Namibia Opinion] was faced with both General Assembly and Security Council resolutions that purported to terminate South Africa’s mandate over South-West Africa. It found the Security Council resolution binding, even though it could not be clearly identified as a traditional ‘Chapter 7’ resolution; and it found that the General Assembly resolutions, while manifestly not binding, were not without legal effect, given the existence of a right to terminate and the Assembly’s constitutional role in monitoring the mandate. As the Court pertinently put it: “It would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.” [Citation omitted.]

70 Namibia Opinion, ibid., p. 43 (para. 83).

opinion regarding these events, specifically to answer the following question: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"  

In answering this question, the Court significantly developed the law regarding self-determination in two ways. Firstly, it reinterpreted the meaning of the League of Nations' mandates system and its central purpose, or "sacred trust." Secondly, at least in the Separate Opinion of Vice President Ammoun, the case extended the idea of self-determination beyond the context of the League and (possibly) beyond the United Nations and its trusteeship system. Regarding the League's mandates system, the Court was required to re-examine this regime because South Africa asserted that 'C' Mandates (such as the Namibian one), were by their very nature "not far removed from annexation." In making such an argument, South Africa purported to be entitled to annex Namibia. The Court rejected the argument for a variety of reasons. It was contrary to the provisions of the Covenant of the League of Nations (1919), the South West Africa Mandate, and two principles of "paramount importance" to the mandates system. These two principles were identified in the 1950 International Status of South-West Africa Advisory Opinion as being "the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization.'" In the Namibia Opinion the Court affirmed the continued validity of these principles, but noted that subsequent developments related to non-self-governing territories had altered their meaning and purpose. The mandates system had largely been superseded and many of the trusteeship

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72 Namibia Opinion, ibid., p. 17 (para. 1), and p. 27 (para. 42). Note that the Court explicitly disavows any powers of judicial review or appeal of the decisions taken by the United Nations General Assembly and Security Council, including the above two resolutions: ibid., p. 45 (para. 89). It does, however, examine the meaning of these resolutions in order to determine their consequences: ibid., pp. 45-54 (paras. 90-116). The General Assembly exercised the right to terminate the mandate relationship in the "case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship": ibid., p. 47 (para. 95). The League Council possessed such a power to revoke the mandate (pp. 48-9, para. 100), and the General Assembly also possesses such a power (pp. 49-50, paras. 102-3). However, because the General Assembly lacked the necessary powers to ensure the withdrawal of South Africa from Namibia, it drew the matter to the attention of the Security Council: ibid., p. 51 (para. 106). The resulting Security Council resolution 276 (1970), was binding in accordance with Art. 25 of the UN Charter: ibid., p. 53 (para. 115).

73 Ibid., p. 28 (para. 45) [South African argument]. See generally, ibid., pp. 28-31.

74 Ibid., p. 28 (para. 45) [citing: I.C.J. Reports 1950, p. 131].

75 The Court, in the Namibia Opinion, ibid., at p. 31 (para. 52), highlights the following post-League developments: [T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to "all territories whose peoples have not yet attained a full measure of self-government" (Art. 73). Thus it clearly embraced territories under a colonial régime. Obviously the sacred trust continued to apply to League of Nations mandated territories on which an international status had been conferred earlier. A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which "have not yet attained independence". Nor is it possible to leave out of account the
territories had become independent. Self-determination had played a significant role and, in combination with the other developments, had helped to modify the nature of the League’s mandatory regime, including the meaning of its “sacred trust.” The Court expresses this development as follows:

53. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court it bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—“the strenuous conditions of the modern world” and “the well-being and development” of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings related, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.

This statement is fascinating because, despite its cautious wording, its effect is to dramatically re-interpret the mandatory system of the League. According to the Court, not only is the possibility of annexation denied to mandatory powers (refuting the South African argument), but even the continuance of the Mandate itself is to be frowned upon. In this sense, the purpose of the mandate system became its own termination: self-determination, including “independence,” became the ultimate objective of the sacred trust. This is a fascinating reinterpretation of the League system, which otherwise was paternalistic and colonial in nature.

Regarding the Namibia Opinion’s extension of the principle or right of self-determination to a wider range of situations, although the majority opinion speaks of self-determination mainly in the context of League Mandates, the Separate Opinion of Vice-President Ammoun connects the right of self-determination to the broader historical “fight of peoples for freedom and independence.” Judge Ammoun therefore views self-determination

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political history of mandated territories in general. All of those which did not acquire independence, excluding Namibia, were placed under trusteeship. Today, only two out of fifteen, excluding Namibia, remain under United Nations tutelage. This is but a manifestation of the general development which has led to the birth of so many new States.

76 Ibid., p. 31 (para. 53) [emphasis added].

77 See, e.g., Covenant of the League of Nations (1919), Art. 22(1)-(2) [reproduced in footnote 16, above].

as an international legal right of universal applicability, one embodied in the *Charter of the United Nations* and extending beyond the League’s mandates regime.  

Despite such bold statements by the Court, however, it must be noted that the situation in Namibia subsequent to the advisory opinion did not change. South Africa continued to occupy and administer Namibia in the face of the clear determinations by the General Assembly, the Security Council, and the International Court of Justice that its continued presence was illegal, and that it was obligated to withdraw its administration from the territory and to put an end to its occupation of it.  

A large number of United Nations resolutions to a similar effect followed, but Namibia was unable to practically realise its goal of self-determination until March 1990, when it gained its independence.  

In sum, the *Namibia Opinion* further developed the law of self-determination but, partly because it was a non-binding advisory opinion, proved unable to help with the actual implementation of the right.  

### c. Western Sahara Opinion

The *Western Sahara* Advisory Opinion, decided in 1975, further fleshed out the international law regarding self-determination by applying it to a trusteeship territory inhabited by partly nomadic peoples. Questions regarding the status of the Western Sahara arose following a 1958 communication by Spain to the Secretary-General of the United Nations that Spain possessed no non-self-governing territories. This was hotly contested by Morocco, as the

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79 In discussing the customary legal status of the right, Judge Ammoun, in *ibid.*, at pp. 74-5 [Sep. Op.], refers to a variety of historical treaties and General Assembly resolutions, and argues about the “general practice” regarding self-determination that it has, in the case of the right of peoples to self-determination, become so widespread as to be not merely “general” but universal, since it has been enshrined in the Charter of the United Nations (Art. 1, para. 2, and Art. 55) and confirmed by the texts that have just been mentioned: pacts, declarations and resolutions, which, taken as a whole, epitomize the unanimity of States in favour of the imperative right of peoples to self-determination. There is not one State, it should be emphasized, which has not, at least once, appended its signature to one or another of these texts, or which has not supported it by its vote. The confirmedrightness of this practice is moreover evinced by the great number of States—no less than 55—which, since the consecration by the Charter of the right of self-determination, have benefited from it, after having ensured, by the struggles and the winnings of their peoples, its definitive embodiment in both the theory and the practice of the new law. [Citing, *inter alia*, the Atlantic Charter, the *UN Charter*, the *Pact of Bogotá*, the *OAS Charter*, and General Assembly resolutions 1514 (XV), 2625 (XXV), and 2627 (XXV).]

80 *ibid.*, p. 56 (para. 133(1)). The Court also held that UN Members could not recognise either the illegal South African presence or the validity of its acts, and that non-UN Members should give assistance to the UN in this regard: *ibid.* (para. 133(2)-(3)). South Africa’s system of apartheid was also considered a “flagrant violation of the purposes and principles of the Charter: *ibid.*, p. 57 (para. 131).


latter claimed that some of the Saharan territory then under Spanish control was its own national territory. In 1961 Spain agreed to transmit information to the General Assembly on its Western Saharan territory, but Morocco objected to these communications with the “strongest reservations.” Morocco and Spain continued to contest who should control the territory from 1966 to 1974, although Morocco came to formally accept the applicability of self-determination to the question. Mauritania added its voice to the discussions after becoming a Member of the United Nations in 1960, claiming that portions of the Western Sahara fell within its own territory (although also formally accepting the applicability of the principle of self-determination to the question). The matter was referred to the International Court of Justice in 1974 by means of General Assembly Resolution 3292 (XXIX). Spain challenged the ability of the Court to scrutinise the question under its advisory jurisdiction by alleging, inter alia, that the question touched upon a dispute between itself and Morocco and thus would require its consent. The Court rejected this challenge and identified the carefully circumscribed focus of the opinion, which was not regarding the “legal status of the territory today, but … the rights of Morocco over it at the time of colonization.” The settlement of the latter issue therefore would “not affect the rights of Spain today as the administering Power, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonization process in the territory.” Spain also challenged the necessity of the Advisory Opinion because in its view the principle of self-determination should be applied to the territory in accordance with General Assembly Resolution 1514 (XV), entailing decolonisation by means of a referendum conducted by the administering power under United Nations auspices. Both Morocco and Mauritania, however, argued that other aspects of Resolutions 1514 (XV) and 2625 (XXV) were applicable.

83 Ibid., p. 25 (para. 34). The 10 November 1958 communication of Spain to the Secretary-General stated: “Spain possesses no non-self-governing territories, since the territories subject to its sovereignty in Africa are, in accordance with the legislation now in force, considered to be and classified as provinces of Spain.” Ibid.

84 Ibid., p. 25 (para. 35).
85 Ibid., p. 26 (para. 36).
86 Ibid., p. 26 (para. 37).
87 The General Assembly resolution is reproduced in ibid., at p. 13 (para. 1). The two questions referred to the Court, also reproduced in ibid., were:
I. Was the Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?
If the answer to the first question is in the negative,
II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?
88 Ibid., p. 27 (para. 42).
89 Ibid.
90 Ibid., p. 29 (para. 48).
namely, those affirming national unity and territorial integrity. The Western Sahara opinion was required because of this divergence of views. In order for the General Assembly to properly apply the principle of self-determination it needed to ascertain the status of the Western Sahara prior to Spanish colonisation. Only by knowing whether Morocco or Mauritania had exerted sovereignty over the area could the General Assembly adjudge the relevance of arguments about national unity and territorial integrity.

The Court first decided to examine the “applicable principles of decolonization,” including the law regarding self-determination of peoples. It summarised the relevant provisions of the Charter of the United Nations and various General Assembly resolutions, as well as reproduced relevant passages from the Namibia Opinion of 1971, particularly highlighting the need for a “free and genuine expression of the will of the peoples concerned” for any exercise of the right of self-determination. The Court emphasised that although the exercise of the right of self-determination could include the possibilities of “free association” or “integration with an independent State,” that nevertheless both possibilities require a free and voluntary choice on the part of the peoples concerned. In considering the legal status of the Western Sahara from the period beginning in 1884, the Court concluded firstly, that it had not been terra nullius, and secondly, that although some legal ties had existed between the peoples of the Western Sahara and Morocco and the Mauritanian entity, that nevertheless these ties were not sovereign ones. At the time of colonisation there were legal ties of allegiance between the Sultan of Morocco and some of the Western Saharan tribes, and “rights, including some rights related to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara.” These legal ties were insufficient, however, to affect the right of self-determination of the peoples of Western Sahara.

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91 Ibid., pp. 29-30 (paras. 49-50).
92 See the two questions asked of the Court, reproduced in footnote 87, above, and the comments of the Court in ibid., at pp. 36-7 (paras. 72-73).
93 Ibid., pp. 30-31 (paras. 52-3).
94 Ibid., pp. 31-3 (paras. 54-9) [the quoted passage being found in para. 55]. The Court also examines the particular resolutions and developments regarding the Western Sahara in ibid., at p. 34-7 (paras. 60-73).
95 Ibid., pp. 32-33 (paras. 57-8) [referring to General Assembly resolutions 1514 (XV), 1541 (XV) and 2625 (XXV)]. The potential counter-examples of cases in which “the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory” were also distinguished by the Court. Ibid., p. 33 (para. 59).
96 Ibid., pp. 40 (para. 82) [territory not terra nullius], and 68 (para. 162) [legal ties but no sovereignty].
97 Ibid., p. 68 (para. 162). On the Moroccan claim see ibid., pp. 43 (para. 92) [the Court noting that there was a “paucity of evidence of actual display of authority unambiguously relating to Western Sahara” by Morocco] and 43-57 (paras. 94-130) [detailed analysis of Moroccan claim]. On the Mauritanian claim see, ibid., pp. 57-65 (paras. 130-52) [detailed analysis of the Mauritanian claim]. The Court dismissed arguments about the international legal existence of a “Mauritanian entity” at the time (including Mauritania’s arguments for co-sovereignty: ibid., p. 67, para. 158), but explains the nature of the legal ties between this Mauritanian entity and the peoples of the Western Sahara, in ibid., at pp. 64-5 (para. 152):
Two aspects of the *Western Sahara* opinion are important for the development of the law of self-determination. Firstly, it helped ‘codify’ and further elaborate the meaning of the right, both by referring to numerous treaties and General Assembly resolutions and by repeatedly emphasising that self-determination requires the free and genuine expression of the will of the peoples.\(^99\) Secondly, it affirms the applicability of the right to a population not organised in a traditional, state-like manner, namely, to nomadic, indigenous peoples.\(^100\)

Accordingly, although the Bilad Shinguitti has not been shown to have existed as a legal entity, the nomadic peoples of the Shinguitti country should, in the view of the Court, be considered as having in the relevant period possessed rights, including some rights relating to the lands through which they migrated. These rights, the Court concludes, constituted legal ties between the territory of Western Sahara and the “Mauritanian entity”, this expression being taken to denote the various tribes living in the territories of the Bilad Shinguitti which are now comprised within the Islamic Republic of Mauritania. They were ties that knew no frontier between the territories and were vital to the very maintenance of life in the region.

\(^99\) The Court concludes, in *ibid.*, at p. 68 (para. 162), that it “has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory” [cross reference omitted]. See also, Crawford, *Creation of States*, pp. 377-80.

\(^99\) Judge Dillard expresses this point dramatically, in *ibid.*, at p. 122 (Sep. Op.):

It seemed hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people.

See also the Declaration of Judge Nagendra Singh, in *Western Sahara*, *ibid.*, pp. 80-81 [strongly emphasising that the “consultation of the people of the territory awaiting decolonization is an inescapable imperative” and that “ascertaining the freely expressed will of the people [is] the very sine qua non of all decolonization”].

\(^100\) The Court, in *Western Sahara*, *ibid.*, at pp. 41-2 (paras. 87-8), describes the character of the Western Saharan peoples:

At the time of its colonization by Spain [post 1884], the area of this desert with which the Court is concerned was being exploited, because of its low and spasmodic rainfall, almost exclusively by nomads, pasturing their animals or growing crops as and where conditions were favourable. It may be said that the territory, at the time of its colonization, had a sparse population that, for the most part, consisted of nomadic tribes the members of which traversed the desert on more or less regular routes dictated by the seasons and the wells or water-holes available to them. In general, the Court was informed, the right of pasture was enjoyed in common by these tribes; some areas suitable for cultivation, on the other hand, were subject to a greater degree to separate rights. Perennial water-holes were in principle considered the property of the tribe which put them into commission, though their use also was open to all, subject to certain customs as to priorities and the amount of water taken. Similarly, many tribes were said to have their recognized burial grounds, which constituted a rallying point for themselves and for allied tribes. Another feature of life in the region, according to the information before the Court, was that inter-tribal conflict was not infrequent.

88. These various points of attraction of a tribe to particular localities were reflected in its nomadic routes. But what is important for present purposes is the fact that the sparsity of the resources and the spasmodic character of the rainfall compelled all those nomadic tribes to traverse very wide areas of the desert. In consequence, the nomadic routes of none of them were confined to Western Sahara; some passed also through areas of southern Morocco, or of present-day Mauritania or Algeria, and some even through further countries. All the tribes were of the Islamic faith and the whole territory lay within the Dar al-Islam. In general, authority in the tribe was vested in a sheikh, subject to the assent of the “Juma’a”, that is, of an assembly of its leading members, and the tribe had its own customary law applicable in conjunction with the Koranic law. Not infrequently one tribe had ties with another, either of dependence or allegiance, which were essentially tribal rather than territorial, ties of allegiance or vassalage.

But see also the Declaration of Judge Gros, in *ibid.*, at p. 76 (para. 11), who critically comments: “The description given in the Opinion of the Saharan desert and of nomadic life in 1884 is an idyllic vision of what was a harsh
Thus, as articulated in this case, the right to self-determination can reach out to a-traditional groupings and offer them the possibility to become an international person, an independent state.

The Western Sahara opinion, however, like the previous Namibia Opinion, fell short when it came to the practical application of the right of self-determination, in large part because of the territorial ambitions of Morocco and Mauritania. Both of these states subsequently annexed parts of the Western Saharan territory and justified their actions through mock referenda. Following the annexations a resistance movement known as the Frente POLISARIO became a serious force in the Sahara, causing the Mauritanians to abandon their claims in 1979, and continuing to challenge the Moroccans with armed resistance. In September 1992 a United Nations peacekeeping force (MINURSO) was deployed in the area to lay the ground for a referendum, originally scheduled for January 1992. This United Nations supervised referendum still has not been held, and the situation remains bleak despite new UN proposals and a Framework Agreement.


103 The situation has become increasingly bleak over the last ten years, with Morocco and the Frente POLISARIO intermittently engaging in armed conflict and remaining unlikely to reach agreement. As indicated in the “Report of the Secretary-General on the Situation Concerning Western Sahara,” S/2001/613 (20 June 2001), ibid., at p. 4 (para. 21-23), the most intransigent issues remain those related to identifying those eligible to participate in the referendum. The two sides have not even been able to agree upon the rough number of voters who may be eligible. Frente POLISARIO, for example, has argued that only the 74,000 persons counted in a 1974 Spanish census should take part in the referendum, but Morocco has argued that additional Saharan persons that were not in the territory at the time of the census (especially those in Morocco), must be included: ibid. (para. 23). The voter identification process has stopped and started several times over the years. It halted in 1995 as a result of conflicts, but substantive talks were held between the warring parties in 1997 under UN auspices, and the identification processes resumed for a short period before collapsing again: ibid., pp. 4-5. The identification process was finally completed at the end of 1999, but with 131,038 appeals pending: ibid., p. 5 (para. 28). In the conclusions of his report the Secretary-General is sceptical of whether future progress can be made on the referendum in the near future. After summarising the substantial efforts of the UN over the last ten years he states, in ibid., at p. 8 (para. 45): “During that period, the timetable for the implementation of the plan has been revised several times, with the
A interesting thing to note about the Western Sahara opinion and its aftermath is that one of the same features of the case that makes it progressive for self-determination—namely, its recognition that the right of self-determination may be possessed by nomadic peoples—arguably caused many of the subsequent, practical problems in implementing the right. In other words, it would seem that the further the right is stretched to cover a-typical, non-state entities, the greater the likelihood of difficulties arising when such entities are forced to fit into the dominant modality of self-determination, namely, independent statehood.

d. East Timor Case

The most recent case before the International Court of Justice to raise the right of self-determination is the 1995 Case Concerning East Timor. Unlike the previous two opinions, this was a contentious case arising between two states, Portugal and Australia, and thus had the potential to produce the first directly binding decision of the Court in the area. Such hopes were quashed, however, when the Court refused jurisdiction over the matter.

The Case Concerning East Timor concerned the territory of the same name, presently located in Indonesia, but from the 16th Century a Portuguese colony and after 1974 a Portuguese non-self-governing territory under Chapter XI of the UN Charter. In 1975 after internal disturbances Portuguese forces deserted East Timor and Indonesian forces occupied

referendum date moving further into the future each time, so that it is in serious doubt that it will ever be within reach." This is because difficulties with the referendum and a substantial number of other issues remain to be resolved: ibid., p. 9 (para. 48). Also, a pattern seems to be emerging whereby neither party comes to the table with any solutions or proposals, and when the UN suggests options, each side ‘waters them down’ after local consultations so as to completely support its own agenda (turning everything into a zero-sum game): ibid., p. 8 (para. 47). The current UN proposals involve a new Framework Agreement for consideration of the opposing sides, and the Security Council has extended the MINURSO mandate until November 2001. See ibid., Annex 1 (pp. 11-12) [reproducing the Framework Agreement]. See also, the Security Council resolution on the Situation Concerning Western Sahara, S.C. Res. 1359 (29 June 2001), as available at http://www.un.org/Docs/scres/2001/res1359e.pdf (accessed 9 August 2001) [extending the MINURSO mandate until November 30, 2001]. For additional information about the UN’s involvement in the Western Sahara process see also the earlier report of the Secretary-General: United Nations, “Report of the Secretary-General on the Situation Concerning Western Sahara,” S/2001/398 (24 April 2001), as available at http://www.un.org/Docs/sc/reports/2001/398e.pdf (accessed 9 August 2001).

104 See, e.g., the “Report of the Secretary-General on the Situation Concerning Western Sahara,” S/2001/613 (20 June 2001), ibid., which states at p. 4 (paras. 21-22):

The establishment of the electorate body for the referendum in Western Sahara has been, and remains to date, the most contentious issue and one of the main reasons for the successive deadlocks in the work of MINURSO.

22. The difficulties in determining who among the Saharans is eligible to take part in the referendum were due, in particular, to the characteristics of the Saharan population, notably its nomadic tradition and the tribal structure of the society. [Emphasis added.]

105 In this way the passage from Judge Dillard’s Separate Opinion that is quoted in footnote 99, above, takes on an ironic second meaning: the nature of the people has determined the destiny of the territory.

the territory. In 1976 Indonesia enacted a law incorporating the East Timor Territory as part of its national territory.\textsuperscript{106} Both the Indonesian occupation and annexation of East Timor were contested by Portugal and subject to condemnation by the international community through a series of United Nations Security Council and General Assembly resolutions (issued from 1975-1976 for the former and from 1975-1982 for the latter).\textsuperscript{109} These called upon Indonesia to withdraw her forces and to allow the people of East Timor to exercise freely their right to self-determination and independence.\textsuperscript{110} From 1982 the General Assembly maintained the question of East Timor on its agenda, but consistently postponed its consideration.\textsuperscript{111}

Australia recognised Indonesia’s \textit{de facto} incorporation of East Timor in 1978, and began negotiating with Indonesia to delimit the continental shelf between Australia and East Timor in the same year.\textsuperscript{112} Delimitation negotiations were unsuccessful and so the two states reached a provisional arrangement, embodied in a 1989 treaty, allowing joint exploration and exploitation of the continental shelf (including the Timor Gap). The Australian laws implementing this treaty came into force in 1991.\textsuperscript{113} Shortly thereafter Portugal brought the matter before the International Court of Justice, alleging that Australia had acted unlawfully by entering into the treaty, had infringed the rights of the people of East Timor (including their right to self-determination), and had infringed its rights as the administering Power.\textsuperscript{114} Australia challenged the Court’s jurisdiction to hear the case on a variety of grounds.\textsuperscript{115} The Court agreed with one of Australia’s objections: that in order to decide the case the Court would have to adjudicate on the lawfulness of the conduct of Indonesia, a state not party to

\begin{footnotesize}
\begin{enumerate}
\item[107] \textit{East Timor}, pp. 95-6 (paras. 11-12). Note that Portugal was reluctant to place East Timor under the non-self-governing régime and required significant prompting by both the United Nations General Assembly and Security Council from 1961-1973 for it to do so: \textit{ibid.}, p. 114 (para. 10, Sep. Op. Judge Oda).
\item[108] \textit{Ibid.}, p. 96 (para. 13).
\item[109] \textit{Ibid.}, pp. 96-7 (paras. 14-15).
\item[110] See, e.g., Security Council resolutions 384 (1975) and 389 (1976), and General Assembly resolutions 3485 (XXX) of 12 December 1975, 31/53 of 1 December 1976 and 32/34 of 28 November 1977 (portions of all of which are reproduced \textit{ibid.}).
\item[111] \textit{Ibid.}, p. 97 (para. 16). At \textit{ibid.}, the Court also mentions that up to the time of the judgement East Timor continued to be included on the list of non-self-governing territories (as per Chapter XI of the \textit{UN Charter}), and the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples remained seized of the matter.
\item[112] \textit{Ibid.}, pp. 97-8 (para. 17).
\item[113] \textit{Ibid.}, p. 98 (para. 18).
\item[114] Portugal’s arguments, as set out in \textit{ibid.}, at p. 98 (para. 19), were that Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal legislative measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources, infringed the rights of Portugal as the administering Power, and contravened Security Council resolutions 384 and 389.
\item[115] See, e.g., the Court’s summary in \textit{ibid.}, at p. 99 (para. 20).
\end{enumerate}
\end{footnotesize}
the proceedings.\textsuperscript{116} In the eyes of the Court, such a decision “would run directly counter to the ‘well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent’ (Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954, p. 32).”\textsuperscript{117} As a result the Court was unable to take jurisdiction.

Despite the unhelpful termination of the case, some of the passages of the judgement develop one aspect of the law of self-determination. The Court recognised that the right of self-determination has an \textit{erga omnes} character, in other words, that it is opposable to every member of the international community:

In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an \textit{erga omnes} character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see \textit{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971}, pp. 31-32, paras. 52-53; \textit{Western Sahara, Advisory Opinion, I.C.J. Reports 1975}, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law.\textsuperscript{118}

Unfortunately, the Court does not elaborate on the meaning or implication of the right’s \textit{erga omnes} character.\textsuperscript{119} The implications of such a right are addressed, however, in the dissenting opinion of Judge Weeramantry. Weeramantry points out that such a right in reality must embrace “a series of separate rights \textit{erga singulum}.”\textsuperscript{120} As such “[w]ith the violation by any State of the obligation so lying upon it, the rights enjoyed \textit{erga omnes} become opposable \textit{erga singulum} to the State so acting.” This point is important because, as noted by Weeramantry himself, if a right \textit{erga omnes} could not be considered as having \textit{bilateral} implications (in addition to multilateral, or universal ones), then no case involving such a right could ever come before the Court—since every state’s ‘multilateral’ \textit{erga omnes} obligation would be in question, even if it were not present before the Court or even subject to its jurisdiction.\textsuperscript{121}

\textsuperscript{116} \textit{Ibid.}, pp. 102 (para. 28), 104 (para. 33), 105 (para. 35) and p. 106 (para. 38).
\textsuperscript{117} \textit{Ibid.}, p. 105 (para. 34). Note that Judge Oda, in his Separate Opinion, \textit{ibid.}, at p. 118 (paras. 19 and 20), refused jurisdiction on the basis that the dispute could only be raised by Portugal on the basis of its being the “coastal State lying opposite Australia,” and thereby entitled to exercise rights over the continental shelf. In Judge Oda’s opinion Portugal did not possess such a status and thus did not have standing.
\textsuperscript{118} \textit{Ibid.}, p. 102 (para. 29).
\textsuperscript{119} The Court’s non-elaboration of the meaning of such a right may be explained by the fact that it would not have changed its inability to assume jurisdiction over the case: “the Court cannot act, even if the right in question is a right \textit{erga omnes}.” \textit{Ibid.}
\textsuperscript{120} \textit{Ibid.}, p. 172 (Diss. Op. Judge Weeramantry). See also \textit{ibid.}, pp. 213-16.
Because Judge Weeramantry views the right of self-determination as having this *erga omnes* and *erga singulum* character, and because he views the 1989 Treaty as having a direct impact upon the people of East Timor, he concludes that the Australian actions may have infringed their right to self-determination:

In the result, I would reaffirm the importance of the right of the people of East Timor to self-determination and to permanent sovereignty over natural resources, and would stress that, in regard to rights so important to contemporary international law, the duty of respect for them extends beyond mere recognition, to a duty to abstain from any State action which is incompatible with those rights or which would impair or nullify them. By this standard, Australia's action in entering into the Timor Gap Treaty may well be incompatible with the rights of the people of East Timor.\(^{122}\)

Of course Judge Weeramantry's opinion is a dissenting one, and the majority judgement accepts a more limited view of self-determination (or at least of its own competence to adjudicate this right). But the *Case Concerning East Timor* as a whole may help to further solidify and consolidate the law regarding self-determination.\(^{123}\)

The subsequent developments in East Timor, although horrific for a brief period, may generate more optimism than those in the Western Sahara. After a bloody conflict following the August 1999 referendum in East Timor—in which the Timorese decided to become independent rather than remain within Indonesia under a new autonomy arrangement—the UN Security Council mobilised a multinational force (INTERFET) to help restore peace and security, and eventually took over the administration of the territory under the United Nations Transitional Administration in East Timor (UNTAET).\(^{124}\) UNTAET itself established an East


\(^{123}\) Note, however, that several of the judgements are deeply dissatisfied with the majority opinion's treatment of the right. The entire Separate Opinion of Judge Vereshchetin, for example, is dedicated to making the point that none of the parties to the case, no UN organ, or even the Court itself, adequately examined the "views of the people of East Timor, on whose behalf the Application has been filed": *ibid.*, p. 138. This lack of interest in the views of the self-determining peoples presents a striking contrast to the views expressed by the Court in its earlier Western Sahara opinion. Judge Skubiszewski's Dissenting Opinion, in the *Case Concerning East Timor, ibid.*, at p. 275 (para. 162), also criticises the role of the Court:

The Court administers justice within the bounds of the law. In the present case, on the one hand, we have insistence on national interests—legitimate, it is true—and on Realpolitik: we have been told that recognition of conquest was unavoidable. On the other hand we have the defence of the principle of self-determination, the principle of the prohibition of military force, the protection of the human rights of the East Timorese people. And last but not least, the defence of the United Nations procedures for solving problems left over by West European, in this case Portuguese, colonization. We may safely say that in this case no Portuguese national self-interest is present. Portugal does not want to be the sovereign of East Timor and to get from it various benefits, maritime ones for example. Its stand is a negation of selfishness. Portugal has espoused a good cause. This should have been recognized by the Court within the bounds of judicial propriety. How could this cause be dismissed on the basis of debatable jurisdictional arguments?

\(^{124}\) In June 1998 Indonesia proposed the option of limited autonomy for East Timor within Indonesia, and after several agreements between Indonesia and Portugal in May 1999, the Secretary-General of the United
Timor Transitional Administration (ETTA) to help run the territory in conjunction with a National Council and Cabinet until the elections could be held for an independent government for East Timor.\textsuperscript{125} Elections were held as planned on August 30, 2001, and a second Transitional Government of East Timor was formed, headed by an all-Timorese Council of Ministers.\textsuperscript{126} Although it is too soon to tell, and despite some bleak beginnings, the situation appears to be hopeful for East Timor.\textsuperscript{127}

Nations was entrusted "organizing and conducting a 'popular consultation' in order to ascertain whether the East Timorese people accepted or rejected a special autonomy for East Timor within the unitary Republic of Indonesia": United Nations, “East Timor-UNTAET: Background,” as available at http://www.un.org/peace/etimor/UntaetB.htm (accessed 10 August 2001). To carry out the referendum the Security Council established the United Nations Mission in East Timor (UNAMET), by means of resolution 1246: Situation in Timor, S.C. Res. 1246 (11 June 1999), as available at http://www.un.org/Docs/scres/1999/99sc1246.htm (accessed 10 August 2001). In East Timor on the 30th of August 1999, "some 98 per cent of registered voters went to the polls deciding by a margin of 94,388 (21.5 per cent) to 344,580 (78.5 per cent) to reject the proposed autonomy and begin a process of transition towards independence": United Nations, “East Timor-UNTAET: Background,” ibid. The events following their vote in favour of independence were brutal for the people of East Timor, as "pro-integration militias, at times with the support of elements of the Indonesian security forces, launched a campaign of violence, looting and arson throughout the entire territory." ibid. Indonesia did little to stop the violence until 12 September 1999, when it agreed to accept international assistance, thereby allowing the UN Security Council to create and mobilise a multinational force (INTERFET) in East Timor to restore peace and security. The Security Council, acting under Chapter VII of the UN Charter, established INTERFET in its resolution on the Situation in East Timor, S.C. Res. 1264 (15 September 1999), as available at http://www.un.org/Docs/scres/1999/99sc1264.htm (accessed 10 August 2001). Ironically (given Australia’s position as the respondent state in the Case Concerning East Timor), the INTERFET force was placed under a unified command structure headed by Australia: United Nations, “East Timor-UNTAET: Background,” ibid. After the withdrawal of Indonesian forces in East Timor, and following an agreement between Indonesia and Portugal on 28 September 1999, authority over East Timor was transferred to the United Nations: ibid. Shortly thereafter, the UN replaced UNAMET with a United Nations Transitional Administration in East Timor (UNTAET). The latter was an integrated, multidimensional peacekeeping operation fully responsible for the administration of East Timor during its transition to independence. UNTAET was established by the Security Council (again acting under Chapter VII), in its resolution on the Situation in East Timor, S.C. Res. 1272 (25 October 1999), as available at http://www.un.org/Docs/scres/1999/99sc1272.htm (accessed 10 August 2001).


\textsuperscript{127} See the Conclusions to the Secretary-General’s report, ibid., at pp. 11-12 (paras. 62-4). Even the 1989 Treaty that was subject to dispute in the East Timor case is being replaced by a Timor Sea Arrangement, which will provide “East Timor with 90 per cent of the oil and gas production in the area covered under the 1989 Australia-Indonesia Timor Gap Treaty.” ibid., p. 3 (para. 12). This division of profits contrasts dramatically with the terms of the earlier Treaty, under which “revenues were split equally between the two countries.” ibid. Note, however, that ongoing difficulties are likely to continue in the areas of reconciliation and justice (including
e. Effect of Case Law

Cumulatively, these cases reveal a fascinating development of legal doctrine, but one that has had a limited impact upon the events taking place on the ground. Of the four territories in question, the Åland Islands remain part of Finland, the peoples of the Western Sahara have yet to hold a referendum, and the peoples of East Timor have only begun the journey towards self-governance. It is also notable that the peoples of the Western Sahara, East Timor and Namibia were required to engage in rebel politics and armed resistance in order to assert the right to self-determination. Namibia’s recent successful acquisition of independent statehood status followed a long military campaign by the South-West Africa People’s Organisation (SWAPO), and significant pressure from the international community upon South Africa. Nevertheless, one must not be too critical of the International Court of Justice, at least as regards its handling of the cases it was actually given. Both the Namibia and Western Sahara opinions were advisory ones, meaning that they were not directly binding upon the states which were frustrating the exercise of the relevant peoples’ rights to self-determine. The East Timor case also never reached the merits stage, at which the applicability of the right of self-determination could have been properly analysed. But these cases do show us why it is doubtful that the right of self-determination can be suitably protected through judicial proceedings. Also, only in the dispute regarding the Åland Islands were the people in question actually involved in the hearings in any substantial manner. In the Case Concerning East Timor Judge Vereshchetin dedicates his entire Separate Opinion to reminding us of the importance of consulting the views of the people on behalf of whom the case is being brought. The obvious difficulty posed for judicial enforcement of the right is that only states may be parties to a contentious proceeding before the International Court of Justice.128

For such reasons the more important role of these cases has been to develop and consolidate the international legal rules regarding the right of self-determination, thereby allowing states and international organisations to modify their behaviour accordingly. In this way, the case-law development of the right of self-determination shows a progression from the understanding of the right as a principle or political ideal, to a legally binding right (which could be used to obtain independent statehood, by a wide category of peoples), to a right opposable to any state (a right erga omnes).

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128 Statute of the International Court of Justice (1945), Art. 34(1).
II. **THE CURRENT STATUS OF THE RIGHT OF SELF-DETERMINATION**

Let us look at what the right of self-determination might mean in practice, examining its possible modalities for application as well as some of its weaknesses.

**A. AVAILABLE MODALITIES OF SELF-DETERMINATION**

The right of self-determination may be implemented in a variety of ways. Most authors divide applications of the right into two broad categories, namely, internal and external forms of self-determination. The former refers to the ability of a people to determine their social, cultural, economic and political destiny within an existing state or structure (a domestic application), whereas the latter refers to their ability to do so outside of their present territorial context (an international application). One author summarises these two categories as follows:

*External self-determination has to do with the determination of the national self, and confers a right to independence to a people. Internal self-determination, on the other hand, relates to the governmental, economic, and social order within national boundaries; it confers a right to individuals and groups to participate in the creation and re-creation of internal social order.*

The driving force behind the internal category of self-determination is expressed in Article 21(3) of the *Universal Declaration of Human Rights*, which provides that “the will of the people shall be the basis of the authority of government.”

Self-determination also includes the right of the people to determine their economic development. Economic self-determination rose to prominence as a result of the claims of Group of 77 states—the founders of the New International Economic Order (NIEO). The meaning of this form of self-determination is expressed clearly in Articles 1(2) of both of the *International Covenants*, which provide:

\[
(2) \text{All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.}\]

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131 See generally, Cass, “Re-Thinking Self-Determination.”

Economic self-determination was originally advocated in connection with the expropriation of the assets and property of multi-national resource companies by developing states. But the frequency of this kind of radical, nationalisation-oriented self-determination has decreased as developing states have become more deeply enmeshed in the global economy. An interesting recent trend in relation to economic self-determination has been the recognition by many countries of a need to strengthen indigenous participation and control in resource development and environmental matters.

Further accepted modes of self-determination (both internal and external), are set out in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations. This Declaration recognises four possibilities for exercise of the right of self-determination, namely, through:

(1) the establishment of a sovereign independent State,
(2) the free association with an independent State,
(3) the integration with an independent State, or
(4) the emergence into any other political status freely determined by a people.

The first three of these modes would fall under the above ‘external’ category of self-determination, since they involve relations with states at the international level. The fourth could be used to establish either an external or internal form of self-determination. Other frameworks for modalities of self-determination exist, but since the four options set out in the

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133 This was supported by the such documents as the General Assembly’s Declaration on the Establishment of a New International Economic Order (1974) (see especially paragraph (e)), and the Charter of Economic Rights and Duties of States (1974), both of which encouraged Lesser Developed Countries to argue for the ability to engage in nationalisation, or expropriation, with very little (if any) compensation.


136 Kirgis, in "Degrees of Self-Determination in the United Nations Era," at p. 307, creates a list of modes of self-determination (which he calls "faces" of self-determination), including eight possibilities for exercise of the right: (1) the right to be free from colonial domination; (2) the right to remain dependent (if it represents the will of the people); (3) the right to dissolve a state, at least if done peacefully, and to form new states on the territory of the former one; (4) the disputed right to secede, as in the case of Bangladesh and Eritrea; (5) the "right of divided states to reunite, as in Germany"; (6) the "right of limited autonomy, short of secession" as in "autonomous areas within confederations"; (7) the rights of minority groups within larger political entities; and (8) the "internal self-determination freedom to choose one's own form of government, or even more sharply, the right to a democratic form of government, as in Haiti."
1970 Declaration are the most commonly accepted ones, let us look briefly and critically at them.\textsuperscript{137}

1. Establishment of a Sovereign Independent State

Independent statehood has been the primary result of successful historical examples of self-determination. The vast majority of non-self-governing territories terminated their colonial status by achieving independence, leading to the situation where “[i]n United Nations practice, independence has been treated as the primary, as it were ‘normal,’ outcome for a territorial community seeking self-government through self-determination.”\textsuperscript{138} A present difficulty with this form of self-determination, however, is that there are few if any colonised territories (in the traditional sense of the phrase) remaining. The demise of the mandates and trusteeship systems and the emancipation of nearly all non-self-governing territories mean that if the option of ‘establishing a sovereign independent state’ were to be exercised today, it almost invariably would require an act of secession. This is where the anti-colonial context of the development of the right, which made it so powerful and compelling from the 1950s to 1970s, may now impose limitations on its exercise. Most independent states today would strongly resist an attempt by a group within their borders to secede, and under international law such states are allowed to suppress a secession attempt by using military and other resources. Let us glance briefly at the law regarding secession.

\textsuperscript{137} In an earlier work, I proposed an alternative set of modalities stretching along a kind of ‘sliding scale’ which would move from local, limited forms of self-determination to international, comprehensive forms: Berry, Aboriginal Self-Determination Under International Law. The six modalities suggested represented some of the innumerable potential alternatives for the application of the right (limited only by the imaginations of the self-determining groups and the entities surrounding them). Each of the modalities for self-determination could either represent a complete exercise of the right of self-determination by a people, or merely represent one part of an overall self-determining strategy (e.g., with several modes being sought simultaneously). Self-determination was suggested as including the options of:

(1) Control over specific institutions or programs (i.e., including economic, cultural and social ones);
(2) Municipal or provincial levels of self-government;
(3) Federal levels of self-government within an existing state;
(4) Integration with another state or territory at an international level;
(5) Secession from a current state and acquisition (with recognition), of sovereign statehood on an international level; and
(6) Free association with other states or entities on an international level.

[“Free association” is used here in its literal sense, to mean any form of association freely chosen.] See also, Frederic L. Kirgis, Jr., who in his “Remarks” (1992) 86 Proc. Am. Soc. Int’l L. 369, at p. 370, uses the notion of a “sliding-scale” in the same context: “Assuming that the groups or peoples can be defined, some would say that self-determination runs along a sliding scale that could range from a right to a meaningful say in how one’s own government is run, to a form of autonomy within a federal state or confederation—as apparently will be the case with Russia—and only at the very end of the scale, to actual secession without any ties to the former state.” See also, Cassese, Self-Determination, pp. 147-58 [discussing other modes of implementing the right, including support of liberation movements and use of countermeasures].

\textsuperscript{138} Crawford, “Islands as Sovereign Nations,” p. 281.
Secession and Self-Determination

Secession is not a right under international law, nor is there a legal prohibition against it. Because secession involves the actions of sub-state entities, which are unlikely to possess international personality, international law does not tend to concern itself with such questions. The predominant view is that secession lies outside of the ambit of international law, being a political rather than legal concept. The option of secession may be necessary in some contexts, even for peoples within modern liberal democratic states. However it has such grave

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139 In the words of Hurst Hannum, in Documents on Autonomy and Minority Rights, at p. xiv: "[t]here is no right to secession under contemporary international law, nor does international law prohibit forcible division of an existing state so long as it does not result from unlawful outside intervention." The Supreme Court of Canada, in Re Reference by the Governor in Council Concerning Certain Questions Related to the Secession of Quebec from Canada (1998) 161 D.L.R. (4th) 385 (S.C.C.), at p. 434 (para. 112), held that "international law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below." See also footnote 199 ff., below.

140 Stavenhagen, in "Self-Determination: Right or Demon," at pp. 5-6, comments:

The problem of identifying self-determination exclusively with secession, as I see it, is not only its limited scope but also that it is essentially a state-centred rather than a people-centred approach. There is a contradiction here, because we see self-determination as a right of peoples, but secession as a process relating to states. Clearly, we have here two categories: 'Separation' and 'secession', as well as related concepts such as 'autonomy' and 'sovereignty' relate to the political organization of states. Self-determination, on the other hand, involves the needs, aspirations, values and goals of the social and cultural communities we refer to as 'peoples'. How to relate these two levels of analysis meaningfully is, I think, one of the un-met challenges of the times.

141 Hurst Hannum, in "Contemporary Developments in the International Protection of the Rights of Minorities" (1991) Notre Dame L. Rev. 1431, at p. 1457 seems to advocate this 'political' view:

'It is time for international lawyers to bite the bullet and say that the era of self-determination, insofar as it implies that independence is at stake, is over. It may still happen. Quebec in Canada may decide to separate, or someone may win a war somewhere and decide to separate. Otherwise what self-determination means is, perhaps, empowerment; is, perhaps, effective participation; is, perhaps, political power. The only way we are going to put that message across is to state up front that self-determination will stop short of secession for independence. Secession is inherently political and has never been the legal norm.

The same author, in his speech entitled "Development and Current Content of Self-determination: The Rights of 'Peoples'" (address to the Martin Ennals Memorial Symposium on Self-Determination, in Saskatoon, Saskatchewan, on 4 March 1993), nonetheless comments that it is ironic that in self-determination claims the only thing that the 'self' can determine unilaterally is independence (i.e. secession). Although Hannum does not think that secession is currently recognised in international law as a natural result of self-determination (i.e., it is not positively advocated by international legal bodies), he nevertheless argues that the law as currently formulated does not oppose the existence of such a right. Such complexities lead Hannum to advocate instead the adoption of a framework promoting "autonomy," rather than one of "self-determination" or "secession." See pp. 1442-43 of his "Contemporary Developments," above, as well as more generally, his work Autonomy, Sovereignty, and Self-Determination. Buchheit, in his analysis of the international legal literature in Secession, at pp. 131-7, divides attitudes into three camps: (1) those who deny that there is a right to secede connected to self-determination, (2) those who abstain from expressing an opinion in the area, and (3) those who feel that secession may be legitimately used in conjunction with self-determination. The most interesting position is the middle one—for which Buchheit notes that international law neither regulates secession attempts nor the responses of the parent state (such as crushing the movement): ibid., p. 132.

142 As noted in Morton H. Halperin, David J. Scheffer and Patricia L. Small, Self-Determination in the New World Order (Washington, D.C: Carnegie Endowment for International Peace, 1992), at p. 8: "There may be ... situations in which the desire for independence is so strong and so widely held that granting democratic rights will
drawbacks that it tends to be advocated only in the most difficult and intransigent situations. Secessionist struggles have the potential to produce savage conflicts and horrific bloodshed if the secessionary movement is opposed by the dominant state government (which the latter is entitled to do under international law).143 Also, secessionist conflicts tend to produce ambivalent results. After a successful separation the new state or territory itself may be subjected to further secessionary demands from within its own population.144 Finally, secession movements may be created and manipulated by ambitious leaders, and may not be linked to any heartfelt popular demand.145

Several examples of secession exist in state practice, some involving relatively peaceful territorial separations, but most requiring bloody and lengthy military conflicts. 146 Of the latter,


143 This bloodshed may be a natural result of the way secession theory is framed in current international law. Frankel, for example, in “International Law of Secession,” at p. 538, sets out a three point argument to show why the law in the area will pre-dispose secession-seeking groups to use violence: (1) secessionist groups must control territory to gain independence; (2) states must also control territory, and they do so with force (which is legal and effective — legal, “at least until the secessionists gain recognition”, and more effective because of their larger population and resources); (3) therefore secessionists must also use force. Corollary reasons for secessionist uses of force include the recognition, international support, and potential international intervention that all may result from the high exposure that forceful conflicts attract: *ibid.*, p. 539. Frankel summarises, *ibid.*:

Thus, the structure of the international system essentially forces secessionist disputes into an escalating cycle of violence. Military success is not just the only path to independence but it may also be the only way for a parent state to maintain its territorial integrity. These incentives toward violence are directly contrary to the principles contained in the U.N. Charter and to the entire foundation of a modern organized system of international law. [Citations omitted.]

144 E.g., Alfredsson, in “Different Forms, If Any, of the Right to Self-Determination,” states at p. 2:

This reluctance of states [to support self-determination] is not only for reasons of self-interest. The redrawing of boundaries and the break-up of states tend to be violent and cause extensive human suffering. It should also be remembered that, while the creation of new states may solve one issue, it leads most of the time to new group problems.... In dealing with ethnic conflicts, the UN Secretary-General has pointed out, in his report on *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping*, that there would be no limit to fragmentation if every group claimed statehood and that peace, security and economic well-being for all would become more difficult to achieve.

See also, Buchheit, *Secession*, pp. 13-14 [discussing the concerns of the international community with the results of secession, including such matters as the creation of dependent, non-state entities, which would provide unfavourable precedents for all states].

145 E.g., Hannum, *Documents on Autonomy and Minority Rights*, at p. 189, argues about the 1993 Czechoslovakian split that “polls also suggested that there was much less support in Slovakia for outright secession than was claimed by nationalist political leaders, and there was a good possibility that separation would not have been approved if the matter had been put to popular referendum.”

146 Buchheit, for example, in *Secession*, at pp. 98-99, lists the following cases as examples of "peaceful secession": (1) the union of Norway and Sweden (Act of Union of August 6, 1815), amicably dissolved in 1905; (2) the secession by the government of Senegal from the Mali Federation in 1960; (3) the secession by the State of Singapore from the Malaysian Federation in August 1965. A secession that was not entirely passive was that of Syria from the United Arab Republic in November 1961, which was first opposed with armed force: *ibid.*, p. 99. Kirgis, in "Degrees of Self-Determination in the United Nations Era," at p. 306, argues that, in contrast to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations allows a right of secession:
few have been successful. Buchheit, for example, analyses several of the most famous secessionary attempts in recent history—including the struggles of the Katangans (the Congo), the Kurds (Iraq), the Biafrans (Nigeria), the Somalis (over territory in Kenya and Ethiopia), the Nagas (India), and the people of Bangladesh (formerly East Pakistan). But he is only able to provide the latter as an example of successful secession.\(^{147}\) In Buchheit’s analysis, the main factors leading to success in Bangladesh were the military support of the Indian government and the way in which the exceptionally brutal force used by the West Pakistan troops on the secessionists mobilised world opinion in their favour.\(^{148}\) As can be imagined, the latter factor should not generate much enthusiasm for practical implementation of secession. For such reasons Buchheit concludes that the doctrine of self-determination has been “of negligible value in contributing to the international community’s collective response to these secessionist attempts,” and that the world community has preferred internal arrangements instead of secession.\(^{149}\) Buchheit uses the data gleaned from his analysis of historical secession attempts to suggest a set of “standards of legitimacy” for evaluating secessionist claims.\(^{150}\) Others have proposed similar frameworks for secession, and there has been a general increase in the number of scholars arguing in favour of the permissibility of secession.\(^{151}\)

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147 Buchheit, ibid., ch. 3 and p. 198 ff. (Bangladesh). Jennings and Watts, in Oppenheim’s International Law, 9th ed., at p. 717 (n. 4), list the following cases of revolt leading to secession: Netherlands from Spain in 1579; Belgium from the Netherlands in 1830; the USA from Great Britain in 1776; Brazil from Portugal in 1822; the former Spanish South American states from Spain in 1810; Greece from Turkey in 1830; Cuba from Spain in 1898; and Panama from Colombia in 1903.

148 Buchheit, ibid., p. 198 ff.

149 Ibid., pp. 214-15.

150 Buchheit, in ibid., at p. 215, argues that although self-determination was not overly helpful in the cases he examines, that the doctrine nonetheless provides us with “basic data” about what may be relevant in evaluating such claims, which data can be applied to establish ‘standards of legitimacy’ with which to evaluate secession claims. These standards could be used to discourage illegitimate secessionist movements (in favour of use of alternative mechanisms such as minority rights or regional autonomy arrangements), as well as to prevent parent states from committing themselves to bloody civil wars that the international community will not accept or help resolve: ibid., p. 219. Buchheit posits three requirements for a secessionary right of self-determination: (1) that the claimant must establish that it is a ‘self’ (a peoples), and that it can exist independently or will become viable by attaching itself to another state, (2) that the claimant demonstrate to the world community that acquiescence in its secession would result “in a greater degree of world harmony” (or less disruption), and (3) that the interests of the state, secessionist entity, and world community be balanced. Ibid., p. 228, and ch. 4 generally. This approach uses a kind of utilitarian analysis—i.e., with “the institution of the existing State ... respected, unless to do so would contribute to more international disharmony than would result from legitimating the separation of a component group.” The basic goal underlying Buchheit’s model is to promote the “general ‘amount’ of world harmony” most effectively: ibid., p. 227. See also, ibid., pp. 232-45.

151 E.g., Frankel, in “International Law of Secession,” at pp. 540-61, suggests a model of “peaceful negotiation and settlement,” which would entail: (1) active international involvement to help create settlement
Nevertheless the events following the dissolution of Yugoslavia (examined in Chapter 10, below), further reveal the reluctance of the international community to support secessionary movements. No doubt largely because any precedents for secession could be applied to many states across the globe, the association of self-determination with secession has been viewed as problematic. It makes the right of self-determination too revolutionary in nature. For these reasons I would suggest that the modality of self-determination of (both meditative and diplomatic, which are currently within the scope of United Nations powers against potential threats to international peace and security); (2) creation of new Commission (or Subcommission) at the UN to deal with this area (with investigative power); (3) creation and application of “consensual legitimate standards of general applicability” (the key being “consensual formation” of these standards by political and apolitical bodies of the UN); (4) which standards could be scrutinised by the Commission in given cases, where it could make reports for the public and UN recommending such things as: further negotiations, mediation, plebiscites, peacekeeping forces, and economic sanctions (the latter, for example, if the UN made a resolution that the secessionist entity had a right to independence and the parent state ignored the resolution). Frankel, in *ibid.*, at pp. 549-56, also offers the following “suggested standards” for the new Commission to apply to secession cases: (a) traditional criteria of statehood (definable territory, population, and a government capable of asserting effective control); (b) the desire of the population (e.g., a plebiscite freely demonstrating a desire to secede); (c) commitment to human rights and democratic principles; (d) “political autonomy and unjust incorporation” (e.g., a history of being a politically separate entity or a territorial government); (e) discrimination and oppression by the parent state; and (f) “feasibility of independence” (including such political geographic and demographic factors as: [i] the desire of the international community not to have micro-states, [ii] the idea that large, wealthy and powerful territories will be more successful in the international community, and [iii] the appreciation that stronger territories are also more likely to engage in civil wars if their desires are not listened to). The conservative nature of Frankel’s model is brought out by the author’s own statement, in *ibid.*, at pp. 563-4 (n. 125), that “ideally, the system would only bring about secession where there was a good chance that it would have occurred anyway.” For other examples of writers who see secession as permissible after certain conditions have been met see, e.g., Chen, “Self-Determination and World Public Order,” pp. 1292-93; Laing, “Norm of Self-Determination,” pp. 307-8.

Various authors have commented upon this revolutionary potential for self-determination, citing its possible “chain reaction” effect—with groups within groups wanting to self-determine, *ad infinitum*. See, e.g., Nafziger, “Self-Determination and Humanitarian Intervention,” pp. 20 and 34, and Addis, “Individualism, Communitarianism, and the Rights of Ethnic Minorities,” pp. 1230-31. On March 4, 1861, United States President Abraham Lincoln stated about the claims by the Southern states of the Union to secede: If a minority in such case will secede rather than acquiesce [to the desires of the majority], they make a precedent which in turn will divide and ruin them; for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority. For instance, why may not any portion of a new confederacy a year or two hence arbitrarily secede again, precisely as portions of the present Union now claim to secede from it? All who cherish disunion sentiments are now being educated to the exact temper of doing this. […]

Plainly, the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

As quoted in: Swan, *Minority Self-Determination*, pp. 34-35 (citations omitted). Buchheit, in *Secession*, at p. 109, suggests about this early U.S. experience that “[i]n one sense, the practice of the United States has reflected what may well be an *a priori* political truth: that no country, however well intentioned, can recognize an unlimited right to self-determination and expect to survive as a unified nation.” Others, however, have questioned the validity of assumptions about stability in situations in which groups within nations are not able to self-determine, and hint that state concerns are more likely the result of fears of international scrutiny of their treatment of their own nationals. E.g., Johnston, “Quest of the Six Nations Confederacy,” pp. 27-29 and 31. Robert W. McGee goes even further, positing that fragmentation of states (and some of the resulting anarchy), may be a good thing if it produces greater democracy: McGee, “A Third Liberal Theory of Secession,” pp. 53-4. Cf. Carty, *Decay of International Law?*, p. 113 [considering international law as being itself in an anarchical state of nature and hoping that we will move towards the “goal of ‘mature’ anarchy in international relations”]. Self-determination claims by indigenous peoples within the territories of Western liberal democratic states are of particular concern, because even though most such
‘establishing a sovereign independent state’ has become less valuable today, at least as a practical matter.

2. Free Association With an Independent State

The second option, ‘free association,’ can include a wide variety of arrangements in which a “territory retain[s] internal self-government with responsibilities for international relations and defence assumed by another country.”153 This mode of self-determination remains available, but has not been chosen by many territories, which have tended to prefer either independent or dependent status. The three states freely associated with the United States are Palau, the Marshall Islands and the Federated States of Micronesia.154

3. Integration With an Independent State

The third modality of self-determination, integration, was raised by the 1960 General Assembly Resolution 1541, and then specifically attached to a right of self-determination in the 1970 Declaration on Friendly Relations.155 There is no specific priority of options in these documents, but the former seems to prefer independent statehood over integration.156 Historic examples of voluntary integration with an independent state, usually following cession, include those of the Duchy of Courland (into Russia in 1795), the Free Town of Mulhouse (into France in 1798), the Congo Free State (into Belgium in 1908), and the Empire of Korea (into Japan in

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153 Crawford, “Islands as Sovereign Nations,” p. 282. At the same page he notes: “Like the earlier protectorates, associated statehood can vary from something close to full independence to a situation of very substantial dependence (e.g., Puerto Rico, the first of these arrangements in the post-war period)” [citations omitted].

154 All three groups of Pacific islands were under US administration as part of the United Nation’s Trusteeship system. Palau was the first to opt for ‘independent status,’ in 1978. However its Compact of Free Association was only approved in 1986, and not ratified until 1993 (entering into force on 1 October 1994). The Federated States of Micronesia adopted a constitution in 1979 and gained ‘independent status’ on 3 November 1986 under a Compact of Free Association with the US. The Marshall Islands gained ‘independent status’ on 21 October 1986 through a Compact of Free Association with the US. See, e.g., Central Intelligence Agency (US), World Factbook 2000. See also, Crawford, ibid., pp. 282-4.


156 E.g., Hannum, in Autonomy, Sovereignty, and Self-Determination, at pp. 40-41, argues:

The clear preference for independence as the normal result of exercise of the right to self-determination is evidenced by detailed requirements for the free and informed consent of the peoples concerned if either free association or integration is chosen. [...] Integration must be on the basis of “complete equality” between peoples of the territory and the independent country to which they are adhering, and it can only come about if the territory has attained “an advanced stage of self-government with free political institutions” and if the option of integration is chosen with “full knowledge” through democratic processes, “impartially conducted and based on universal adult suffrage.” There are no procedural requirements to be fulfilled for a non-self-governing territory to emerge as a sovereign state. [Citations omitted.]
Military annexation of territory, although historically permissible, is no longer such today.

4. "The Emergence Into Any Other Political Status Freely Determined by a People"

The 1970 Declaration sets out the fourth mode of self-determination as being "the emergence into any other political status freely determined by a people." This modality could be used to achieve an almost unlimited number of forms of self-determination, and thus may be the most promising of the four. However it has not yet been utilised.

In sum, of the four potential modalities for exercise of the right of self-determination only ‘free association’ and ‘the emergence into any other political status’ present clear possibilities today. In practice, however, even free association may be tainted because it can result in a kind of dependency. In addition, the most popular form of self-determination, that of ‘establishing a sovereign independent state,’ and the less popular form of ‘integration’ are both deeply problematic. The former threatens current independent states with the prospect of secession and the latter seems to entail a loss of independence, which in the past has been associated with colonialism. Further, the association of self-determination with the anti-colonial movement, although leading to incredible accomplishments in the past, may prove limiting today.

B. LIMITATIONS AFFECTING THE RIGHT

The anti-colonial focus of self-determination has prompted a number of scholars to suggest two general restrictions for present applications of the right. These are firstly, that the applicability of the right should be limited to “colonial” situations, and secondly, that the right only should be exercised once (i.e., to achieve independence). To these two restrictions may be added a third and fourth, related to self-determination’s association with, and juxtaposition against, statehood, respectively. The third restriction limits who or what may be entitled to exercise the right. It arises because international lawyers tend to impose state-like requirements upon any entity that wishes to exercise the right of self-determination, resulting in obvious problems of circularity—i.e., in order to self-determine so as to become an independent state, a people must first fulfill the criteria of statehood. The fourth restriction

159 Hannum, in Autonomy, Sovereignty, and Self-Determination, at p. 41, states about this provision: “This flexibility has not yet been utilized to justify emergence from dependent status to any unusual constitutional or other arrangements, but it does represent a rare and welcome recognition of the potential for new inter- and intra-state relations” (citations omitted).
arises from the way that self-determination has been viewed as being in opposition to other rules and principles (such as territorial integrity and sovereignty), and thereby has been greatly limited. Let us critically examine these potential restrictions of the right of self-determination.

1. ‘Colonial-Only’ Formulation

The first, ‘colonial-only’ restriction (also called the ‘Blue Water’ or ‘Salt Water’ thesis in order to refer to territories located overseas from the metropolitan state), views self-determination as being applicable only in Mandate, Trust Territory and non-self-governing territory situations. Such a restriction is indirectly supported by the 1960 General Assembly Resolution 1541 which, in dealing with the information required under Article 73 of the UN Charter for non-self-governing territories, emphasises geographical separation and ethnic or culturally distinctness. It is challenged, however, by the specific formulations of the right of self-determination in the UN Charter and various General Assembly resolutions and other international documents, which speak of self-determination as being a right available to “peoples” generally, or to “all peoples,” or even to “all peoples always.”

160 Buchheit, in Secession, at p. 18, also describes this restriction with the term “pigmentational self-determination.” Examples of statements supporting the ‘colonial-only’ approach may be found in: R.S. Bhalla, “The Right of Self-determination in International Law,” in Issues of Self-Determination, ed. W. Twining, 91-101 (Aberdeen: Aberdeen University Press, 1991), pp. 91-98, Swann, Minority Self-Determination, p. 189, Williams, International Legal Effects of Secession by Quebec, pp. 18-20 [although conceding that self-determination may also apply in situations of carence de souveraineté], Hannum, ibid., pp. 47-9 [external self-determination being limited to “freedom from a former colonial power,” and internal self-determination as being independence from “foreign intervention or influence”]. See also Cassese, Self-Determination, pp. 126-7 (n. 44) [listing scholars supporting the ‘colonial-only’ position]. Bhalla, in ibid., takes this view to the extreme by limiting the application of self-determination within colonial contexts to ‘indigenous’ peoples only (thereby excluding anyone who happen to have been relocated to the territory). For strong criticisms of these ‘Blue Water’ or ‘Salt Water’ theories see, e.g., Johnston, “Quest of the Six Nations Confederacy,” p. 24, Cass, “Re-Thinking Self-Determination,” pp. 29-30, Berry, Aboriginal Self-Determination Under International Law, ch. 2.

161 Principle IV of Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter: Annex (1960), states: “Prima facie there is an obligation ... to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.” Judge De Castro, in his Separate Opinion in the Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Rep. 16, at pp. 197-98, while discussing the issue of transfer of supervisory powers to General Assembly, comments that Art. 73 of the Charter has “general application.” However he seems to be referring only to Mandate, Trust and non-self-governing territories:

The text of Article 73 shows that the declaration regarding non-self-governing territories applies to “territories whose peoples have not yet attained a full measure of self-government”, without mention of any exception. It does not appear that anyone interpreting the text is entitled to exclude non-self-governing territories such as mandated or trusteeship territories.

Of course the obligations imposed upon the States administering mandated or trusteeship territories are wider than those provided in the case of other non-self-governing territories, but the declaration in Article 73, being general and supplementary, is applicable to all non-self-governing territories.

162 E.g., Charter of the United Nations (1945), Arts. 1(2) and 55 (“self-determination of peoples”), International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social, and Cultural Rights (1966), Arts. 1 (“all peoples”), Declaration on Principles of International Law Concerning Friendly
literal inconsistency of the ‘Blue Water’ approach is subject to ironic comment by Martin
Ennals, who states: “The question must also inevitably be raised as to why only people who
are under colonial domination should be entitled to exercise a right which is quite clearly
stated as applying to all.”163 Suggestions have been made that imposing a ‘colonial-only’
limitation involves a hypocritical double standard.164

2. ‘One-Shot’ Characterisation

A second restriction upon the right of self-determination suggests that the right may
only be exercised once. We could call this the ‘single exercise’ or ‘one-off’ theory of
applicability. Frankel succinctly formulates it as follows: “when a group becomes a separate
entity, its disaffected minorities are entitled to no further right of secession.”165 Justifications
for such a restriction rely upon analogies to the rule of pacta sunt servanda, but the logic of
such justifications has been deeply criticised.166 Other scholars have objected to the limitation

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163 E.g., Ennals, “Democracy and Self-Determination.”

164 For strong statements to this effect see, e.g., Johnston, “Quest of the Six Nations Confederacy,” p. 26,
90-99 [arguing that self-determination must apply not only to colonial peoples but also peoples subject to foreign
occupation (i.e., by force)] and 159 [concluding that “neither customary rules nor the [International] Covenants
confine self-determination to its anti-colonial dimension”].

165 Robert Frankel, “Recognizing Self-Determination in International Law,” p. 376. Accord: Anna Michalka,
“Rights of Peoples to Self-Determination in International Law,” in Issues of Self-Determination, ed. W. Twining,

166 E.g., Buchheit, in Secession, at pp. 21-2, when discussing the use of pacta sunt servanda as a basis for
preventing further exercises of self-determination, points out three flaws with this type of argument: (1) “it places
an unrealistic emphasis on the temporal identity of a community” (e.g., since people and nations change over
on the grounds that it is both arbitrary and incoherent.\textsuperscript{167} It also can be criticised on moral grounds.\textsuperscript{168}

Because of such views some argue that self-determination must be seen as a continuous right, one that does not expire after a single (possibly problematic) use. Some have gone so far as to argue that self-determination must be seen to work in a dialectical manner, gradually but continuously promoting ever further realisation of the aspirations of the peoples concerned.\textsuperscript{169}

3. Problematic Requirements For Being a “Peoples”

The third restriction, related to who or what may exercise a right of self-determination, may be examined from three different angles. On the one hand, international lawyers tend to impose state-like requirements upon any entity claiming to be entitled to exercise the right. Examples of applications of criteria similar to those found in the \textit{Montevideo

\textsuperscript{167} For strong criticisms of the ‘one-shot’ approach see, e.g., Rivera-Ramos, “Self-determination and Decolonisation,” pp. 124-25, Nafziger, “Self-Determination and Humanitarian Intervention,” p. 19, Chen, “Self-Determination and World Public Order,” p. 1292. Cassese, in \textit{Self-Determination}, at pp. 54-55, argues in the context of the \textit{International Covenants} that self-determination must be seen as a continuing right, not ending with independence. However, in \textit{ibid.}, at p. 73, in the context of discussion the 1970 Declaration on Friendly Relations he argues that “once a people has exercised its right to external self-determination, the right expires.”

\textsuperscript{168} E.g., Stavenhagen, in “Self-Determination: Right or Demon,” at p. 6, argues that self-determination has a moral as well as legal basis and therefore must be continuous in nature:

It is often argued that self-determination takes place only once, through plebiscites or other forms of legitimate, free political choice. But if there is a moral right to self-determination, surely it should be wielded continuously. What kind of human right can be exercised only once to be discarded for evermore? If there is a moral and political component to the concept, and not only a technical decision in international law, then self-determination, as other human rights, must be considered an open-ended ongoing process without point of closure. There may be practical reasons for limiting the number of times a certain population might be asked to vote on a referendum for independence or for joining the United Nations or approving the Maastricht Treaty, but there can be no valid reasons for limiting any people’s right to the exercise of self-determination, just as there can be no such reason to limit the practice of democracy to a single election.

See also, Shivji, “Right of Peoples to Self-determination,” p. 43, and Bengoetxea, “Nationalism and Self-Determination,” p. 146.

\textsuperscript{169} E.g., Rivera-Ramos, in “Self-determination and Decolonisation,” at p. 127, argues that self-determination should be seen as a continuous dialectic to overcome colonial or neo-colonial structures:

If only juridical and political decolonisation occurs—for example, the attaining of sovereignty—it is not unlikely that the lasting economic and ideological effects of the colonising process continue seriously to impair the capacity for self-determination of the former colonial peoples, as historical experience has demonstrated in the African and Latin American contexts. Yet, these partially decolonising processes may, at the same time, boost the capacity of a people for full self-determination, in the continuous exercise of which that people may proceed to complete its process of liberation or to advance to a higher level of enjoyment of collective freedom. It must be concluded, then, that the relationship between self-determination and decolonisation is not unidirectional, but dialectical. They are reciprocally conditioned. By virtue of the former the latter may be put into motion. But until the decolonising process is completed—to the extent possible under contemporary conditions—the self-determining capacity will remain limited, a potential in the process of being realised, and becoming realised to the extent that it is being exercised to bring to its full extent the process of decolonisation.
Convention include rejecting self-determination claims on the basis of: small populations, nomadic populations, insufficient territorial size, lack of political or economic viability, inability to conduct foreign affairs, or even on the basis of general concerns regarding the possible "negative effect" upon the international community of a particular people being allowed to self-determine (usually related to concerns about viability or regional stability). Applying such criteria might make sense if the claimant wished to become a sovereign state, but this will not always be the case. Also, the difficulty with such a position is that self-determination is a right of peoples, not of states, and one of its purposes is to allow a sub-state entity to become an independent state. If the 'peoples' already can fulfill the Montevideo Convention criteria then the right of self-determination is superfluous. The irony should be clear: most entities that can fulfill the test for statehood are not likely to need to exercise rights of self-determination; those that cannot are barred from even pressing a claim. Formulated in such a manner, the right becomes both circular and redundant. Also, although the viability of self-determining entities is an important issue, the real question should be "for what purpose?" Not all self-determining peoples seek independent statehood, so these criteria may be completely unrelated to the status sought. Applying Montevideo-type criteria seems illogical and unduly harsh for claimants pursuing less-than-statehood levels of self-determination. The potential viability of a self-determining entity clearly must remain a matter for international concern, as we cannot assist in the economic or social 'suicide' of a people. Nevertheless, tying all self-determination claims to statehood-type conditions appears unduly stringent. This is recognised in the strong wording of the 1960 Declaration on the Granting of Independence to Colonial

170 Convention on the Rights and Duties of States [Montevideo Convention] (1933) [discussed in Chapter 1, above]. For examples of criticisms of self-determination claims using such criteria see, e.g., Chen, "Self-Determination and World Public Order," pp. 129-135 [insufficient territorial size, lack of political or economic viability, inability to conduct foreign affairs], Frankel, "Recognizing Self-Determination in International Law," pp. 377-78 [lack of political or economic viability, inability to conduct foreign affairs, potential "negative effect"].

171 This is the puzzle of self-determination, which is an international legal right applicable to entities which themselves are not yet subjects of international law. Fitzmaurice makes this point clearly:

The initial difficulty is that it is scarcely possible to refer to an entity as an entity unless it already is one, so that it makes little juridical sense to speak of a claim to become one, for in whom or what would the claim reside? By definition, 'entities' seeking self-determination are not yet determined internationally, or the case would not arise. Can they therefore possess 'rights' under international law, and in what way, juridically, could the corresponding obligations be postulated? Alternatively, if they do possess such rights, they are entities which are already determined internationally, and the case has passed beyond, and is no longer on, the self-determination plane.


172 E.g., Buchheit, in Secession, at p. 230, reminds us that the "requirements for a viable, independent entity are not necessarily identical with those traditionally needed for Statehood." Viability entails some form of independence from the former state, but does not mean complete economic independence or military capability, both of which may be unrealistic today: ibid., p. 231.
Countries and Peoples, which makes clear that the "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence." \[174\] Several recently admitted United Nations Member States also seem to raise questions about the necessity of imposing strict criteria of viability.\[175\]

The second part of this restriction involves the difficulties of identifying a "peoples." Even if we are not going to require them to fulfil the *Montevideo Convention* criteria for statehood, what test can or should be imposed? This question is more difficult than it might seem because the most crucial component of any self-determination claim is for the claimant to gain recognition that it constitutes a peoples.\[176\] The difficulty here is that there is no established "test" regarding who or what might be a peoples.\[177\] This has led Jennings to comment wryly: "On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people."\[178\] Several attempts have been made to define a "peoples,"\[179\] and some of these definitions are fairly sophisticated.\[180\]
But none is broadly accepted. The result is that any self-determination claim can be scrutinised on the basis of a wide variety of subjective tests, from tests imposed by the claimant groups themselves (subjectively asserting the status as a peoples), to tests imposed by states and other international persons according to their own particular views and interests. The lack of a uniform test will pose problems for any self-determining entity.

The third difficulty regarding who or what may exercise the right could be described as the uni-directional focus of the right. The right is characterised in international law as one applicable to an entire, relatively unified “peoples,” rather than to a ramshackle collection of disparate groups. In order to express their claim to self-determination, therefore, a large variety of groups may be forced to unite on the basis of a simple common goal, such as independence. After a successful claim to self-determination, however, the differences between the various elements of the ‘peoples’ may re-emerge. When this happens, general international law tends to support whatever central authority comes to power, and may not question how this power is allocated within the new entity. The results can be dramatic, especially for women, who

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180 One of the most sophisticated formulations is that produced by the UNESCO Meeting of Experts in Paris in 1990:

A people for the rights of peoples in international law, including the right of self-determination, has the following characteristics:

1. A group of individual human beings who enjoy some or all of the following common features:
   a. a common historical tradition
   b. racial or ethnic identity
   c. cultural homogeneity
   d. linguistic unity
   e. religious or ideological affinity
   f. territorial connection
   g. common economic life;
2. The group must be of a certain number who need not be large (e.g. the people of micro states) but must be more than a mere association of individuals within a state;
3. The group as a whole must have the will to be identified as a people or the consciousness of being a people — allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness; and
4. Possibly, the group must have institutions or other means of expressing its common characteristics and will for identity.

As quoted in Jayawardhana, “The Right of Self-Determination,” pp. 4-5. See also, Grand Council of Crees (of Québec), Submission, pp. 19-20, and Berman, “Sovereignty in Abeyance,” p. 91. See generally, Berry, Aboriginal Self-Determination Under International Law, ch. 2 [suggesting a modified form of the above UNESCO definition, one that lessens the emphasis upon homogeneity and deals with the concerns about cultural specificity that may be raised by the forms of institutional expression required by the fourth prong of the test].

181 Also, as pointed out by Berman, in Ibid., at p. 93, even if a satisfactory, ‘objective’ definition of a “peoples” were to be agreed upon, an overly mechanistic and formal application of this definition could prove problematic. The two sides of such a definition must also be balanced: the subjective requirement for self-identity cannot be dispositive, but neither can more objective and formal requirements displace the essential need for self-definition.

182 Charlesworth and Chinkin, in Boundaries of International Law, at p. 154, comment that: “Throughout all the debates about the meaning of the right to self-determination, there has been little questioning of its equal application to, and meaning for, all those within the group” (emphasis added).
often seem to be considered ‘invisible’ as far as self-determination is concerned (the focus of the international community tending to be directed more towards ethnic or racial minorities). This problem has led Hilary Charlesworth and Christine Chinkin to argue that the “self” to which the right of self-determination attaches is a male one.

4. Zero-Sum Relation to Other Rights and Principles

The final limitation upon the right of self-determination is the way in which it is constantly framed in a kind of zero-sum opposition to other doctrines or rules of international law, including state sovereignty and territorial integrity. Despite the admonition of former UN Secretary-General Boutros Boutros-Ghali that “[t]he sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead,” they continue to do so. In fact, nearly all of the documents elaborating the right to self-determination contain strong statements explicitly requiring respect for the sovereignty, domestic jurisdiction and territorial integrity of existing states. The reason for such phrasing is clear. As discussed above, self-determination has

183 Charlesworth and Chinkin, in ibid., at pp. 154-55, explain:
The notion of a self-determining unit collapses many forms of diversity, but most particularly that of sex. The consequences of this limited definition are evident in the fact that apparently successful claims to self-determination typically fail to deliver the same level of personal freedom and autonomy for women as for men, despite there being in many cases a historical association between nationalist and feminist movements and a high degree of women’s participation in the decolonisation process. Indeed, in many cases it emerges that achievement of national self-determination has led to a regression in the position of women. Examples include Algeria’s independence from French colonial rule, the overthrow of the Shah in Iran and the transition to democracy in Eastern Europe. [Citations omitted].

See also, ibid., pp. 155-62 [where the authors engage in a detailed analysis of the similar challenges faced by Palestinian women in the ongoing process of Palestinian self-determination].

184 Charlesworth and Chinkin, in ibid., at pp. 162-3, state:
The right to self-determination attaches to ‘peoples’, groups that are defined by their history, ethnicity, culture or language. The fact that half of the group comprising the ‘people’ are accorded unequal status and are allowed little input into its decisions is not considered relevant at international law. The principle of self-determination is usually discussed as if there were a single relevant ‘self’, masking the fact that the most prominent identity is usually a construct of the most powerful players in the group. The ‘self’ international law allows to determine its political status and freely pursue economic, social and cultural development is male. Women as women are not seen as able to constitute a group of their own because of the historical linkage of personhood with manhood. [Citations omitted].


186 See, e.g., Covenant of the League of Nations (1919), Art. 15(8) [League Council prohibited from examining matters “solely within the domestic jurisdiction” of Member States—reproduced in footnote 47, above], Charter of the United Nations (1945), Art. 2(7) [non-interference in domestic jurisdiction], Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), paras. 6 and 7 [referring to respect for territorial integrity, equality, non-interference in internal affairs and the sovereign rights of all peoples—reproduced in footnote 22, above], the final two paragraphs of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United
the potential to be a revolutionary and disruptive doctrine, and so some limitations on the right are necessary. It must be remembered, however, that any such limitations must be merely instrumental in nature. There is, for example, no inherent value associated with territorial integrity *per se.*

Difficulties arise as a result of the particular way in which self-determination is juxtaposed with these conservative international legal doctrines. Their relation invariably creates a zero-sum situation, with only one 'side' having the potential to 'win.' Further, in cases where the application of the right might be universally accepted (i.e., colonies becoming independent), other conservative doctrines such as that of *uti possidetis* have greatly restricted the scope of the right in regions such as Africa, and more recently, in the former East European and former Soviet spheres. Because none of the relevant documents creates a

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Nations (1970) [stating that the Declaration does not authorize "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States..."—reproduced in footnote 26, above], Conference on Security and Cooperation in Europe (CSCE): Final Act [Helsinki Final Act] (1975), Principles I, III, IV and VI [dealing with "Sovereign Equality, Respect For the Rights Inherent in Sovereignty," "Inviolability of Frontiers," "Territorial Integrity of States," and "Non-Intervention in Internal Affairs," respectively], Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), para. 37 [asserting the supremacy of territorial integrity over minority rights], Charter of Paris for a New Europe (1990) [the section on "Friendly Relations Among Participating States," affirming *inter alia,* the applicability of self-determination "in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States"], Constitutive Act of the African Union (2000), Arts. 3 and 4 [respectively detailing the Union's objectives as including "(b) defend the sovereignty, territorial integrity and independence of its Member States"], and its principles as including "(a) sovereign equality and interdependence among Member States of the Union; (b) respect of borders existing on achievement of independence; (g) non-interference by any Member State in the internal affairs of another"

187 E.g., Johnston, in "Quest of the Six Nations Confederacy," at p. 28, comments:
If the objective [of advancing claims for paramountcy of territorial integrity] is to enhance the quality of international public order, the right of states to territorial integrity cannot be regarded as absolute. The principle does not possess intrinsic value; it makes no sense to protect territorial integrity for the sake of territorial integrity. Rather, it is a means to an end.


188 For such reasons scholars have tended to see self-determination as inapplicable to independent states except in such rare cases, as suggested for example by Cristescu, in *Right to Self-Determination*, at pp. 25-6, as those involving extreme subjugation of a peoples, by the invasion and occupation of their territory by another state.

189 *Uti possidetis* is a doctrine which re-imposes the previous (administrative) boundaries of a territory as its new international boundaries upon its independence. See, e.g., Cassese, *Self-Determination*, pp. 190-93. For more on the current status of *uti possidetis,* see the analysis of the case concerning the *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras; Nicaragua intervening), 1992 I.C.J. Rep. 351 (discussed in Chapter 8, above, in the section dealing with *condominia*). States in South and Central America, and later Africa, retained colonial boundaries upon independence as a result of the application of the principle of *uti possidetis.* See, e.g., Alfredsson, "Different Forms, If Any, of the Right to Self-Determination," p. 1 [discussing the African context and the way that the OAU has insisted "upon unchanged boundaries"]). Thornberry, "Self-Determination, Minorities, Human Rights," pp. 886-7 [discussing how "African views...stress the integrity of the State, even in cases of severe oppression of minorities," despite the inclusion of self-determination in the *African Charter on Human and Peoples' Rights* (1981)], Williams, *Secession by Quebec,* pp. 6-7 (n. 14). This principle recently re-emerged and was applied to the dissolutions of the USSR and Yugoslavia in Europe. See, e.g., *Opinion No. 2* (EC Arbitration Commission, Paris, 11 January 1992), reprinted in (1992) 3 E.J.I.L. 183-4, *Opinion No. 3* (EC Arbitration Commission, Paris, 11 January 1992), reprinted in (1992) 3 E.J.I.L. 184-5. For commentary on this new European application of *uti possidetis,* see, e.g., Alain Pellet, "The Opinions of the Badinter Arbitration Committee: A
hierarchy between the opposing positions, the limitations imposed by their dichotomous relationship remain significant. At best the opposing sides could exist as "complementary pairs." At worst they will create a zero-sum situation. The most interesting possibility for finding a way out of such a position is that offered by the United Nations' 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, which relates these opposing pairs in the following manner:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.

The use of the causal term "thus" allows us to read the Declaration as permitting self-determination to disrupt or impair the territorial integrity of sovereign states, if those states are not "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour." Nevertheless, this is only one reading of a


Note that some scholars have sought to create hierarchies between the opposing pairs. Cassese, in ibid., at pp. 174-6, argues that the principle of non-interference is limited by self-determination. He concludes on the latter page that

the principle of non-interference [is] inapplicable where the right of a people to self-determination is at stake. States are no longer bound to remain silent, regardless of how a government behaves towards the people within its jurisdiction. They can denounce the government's repressive measures and publicly expose how it treats those subjected to its authority. In addition, [...] States can directly interfere in the authorities' relationship with the people entitled to external self-determination by aiding and assisting those people. In short, it is well settled that, under international law, the principle of non-interference must yield to the right of States to concern themselves with a peoples' legitimate quest for self-determination. [Citations omitted.]

See, e.g., Chen, "Self-Determination and World Public Order," p. 1297, and Johnston, "Quest of the Six Nations Confederacy," pp. 27-29. That the articles of the UN Charter are supposed to be related in this way is illustrated by the section headed "General Remarks" in the report of the Rapporteur of Committee I of Commission I (which dealt with the relationship of the various clauses of the Charter):

The provisions of the Charter, being in this case indivisible as in any other legal instrument, are equally valid and operative. The rights, duties, privileges, and obligations of the Organization and its members match with one another and complement one another to make a whole. Each of them is construed to be understood and applied in function of the others.

[As quoted in Cristescu, Right to Self-Determination, p. 21].


For similar arguments see, e.g., Thornberry, "Self-Determination, Minorities, Human Rights," p. 876, and Buchheit, Seccession, pp. 92-3. Buchheit in ibid., at the latter page, states forcefully:

The notion embodied in this final clause is clearly a direct descendant of the belief repeatedly expressed in the writings of Locke, Jefferson, and Wilson that the legitimacy of government derives from the consent of the governed, and furthermore that consent cannot be forthcoming without the
non-binding General Assembly resolution, and does little to overcome the serious difficulties caused by the way in which the right generally tends to be framed as existing in opposition to other fundamental doctrines and international legal rights.

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In sum, although some attempt has been made to suggest ways in which these four limitations may be weakened or overcome, their durability is telling. In fact, international attitudes regarding the right of self-determination gradually seem to have moved towards a position of containment. The right has been most effective in situations where its application is supported by a strong political movement, such as that of decolonisation. Today, with fewer possible applications of this form of the right, self-determination has become less effective. The international community is now concerned with the potential of the right to challenge existing, sovereign, independent states. Such a situation requires a careful balancing of the needs of oppressed peoples, on the one hand, and the desires for stability on the part of the international community, on the other. Concerns will continue to be raised about recognising a right that has a high potential to destabilise the existing international system. Also, because the right of self-determination today must be applied to formally independent peoples, those currently seeking the right must formulate their claims in the context of the opposing, or at least divergent, claims of other groups around them. The latter may include those of both the wider state and of the smaller minorities existing within the territory sought by the self-determining unit. Aboriginal claims to self-determination are particularly controversial in this regard. Modern self-determination claims therefore tend

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enfranchisement of all segments of the population (although, interestingly, the declaration does not say 'without distinction as to sex'). By placing the language at the end of the paragraph in the form of a saving clause, the drafters have apparently affirmed a corollary to the 'consent of the governed' concept: if a government does not represent the whole people it is illegitimate and thus in violation of the principle of self-determination, and this illegitimate character serves in turn to legitimate 'action which would dismember or impair, totally or in part, the territorial integrity or political unity' of the sovereign and independent State. Finally, it does not seem that the drafters intended by the 'and thus possessed' clause to offer a complete statement of the requirements for conducting oneself in compliance with the principle. Rather, the need for a representative government should be seen as a continuation of the demands of the principle 'as described above' or, alternatively, as a necessary condition underlying their complete satisfaction."


194 E.g., Hannum, in Autonomy, Sovereignty, and Self-Determination, at p. 96, explains: Governments tend to equate all demands for 'self-determination' with independence and secession, and insistence on this formulation, even when an indigenous group desires a status less than full independence, may inhibit the resolution of claims that are not as wholly incompatible as they first appear. As noted in Chapter 3, 'self-determination,' as that term has been defined thus far by the United Nations, does imply the right (although not the necessity) of independent statehood; it also has been
to require us to balance the needs and rights of a wider variety of groups. In sum, the right of self-determination has become greatly restricted, both by the norms and rules of international law, and by the more complicated social and political contexts in which it is applicable.

III. FUTURE PROSPECTS: DEVELOPMENT OF THE INTERNAL ASPECT OF SELF-DETERMINATION

For the above reasons, external forms of self-determination, such as those involving claims to independent statehood through secession, are more likely to be problematic today. Internal forms, on the other hand, are becoming increasingly popular. Some aspects of internal self-determination, such as the ability of racial groups to appeal to the right to be able to participate equally in "national decision-making processes," arguably have achieved the status of customary international law. A recent Supreme Court of Canada decision, although denying Québec a legal right to secede from Canada, implicitly supports a variant of the internal right of self-determination. Of course problems of enforceability will arise for

restricted in practice to the colonial context. Thus, negative government reactions to indigenous demands for self-determination are not surprising. [Citations omitted.]

195 For more on the difficulties involved in balancing self-determination claims with the needs of the state and international society see, e.g., Buchheit, Secession, p. 234 [outlining the minimum obligation of a microstate under international law, namely, to provide effective jurisdiction and control over its territory]. An interesting framework for balancing rights of competing peoples is offered by Kirgis, in "Degrees of Self-Determination in the United Nations Era," at pp. 308-10.

196 E.g., Buchheit, in ibid., at pp. 234-5, argues that seceding entities must respect certain "basic normative principles" of international law.

197 Many authors have downplayed the secessionary aspects of the right and turned their focus to internal variations of it. See, e.g., Franck, "Democratic Governance," pp. 52, 55 and 59 [arguing that it is not "conceptually or strategically helpful" to link democratic entitlements to secession], and Cassese, Self-Determination [generally supporting internal as opposed to external or secessionary self-determination]. The Supreme Court of Canada, in Re Reference by the Governor in Council Concerning Certain Questions Related to the Secession of Quebec from Canada (1998) 161 D.L.R. (4th) 385 (S.C.C.), at pp. 437-38 (para. 126), comments:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. The Court held that the people of Quebec did not fall under the exceptional cases of being either a colonial or oppressed people, nor were they denied meaningful access to government, and therefore could not avail themselves of an external right to self-determination: ibid., pp. 441-42 (para. 136-8).

198 E.g., Cassese, ibid., p. 124. See generally, ibid., ch. 5.

199 For a brief discussion of the Québec claims prior to the Supreme Court of Canada decision, see ibid., pp. 248-54. In Re Reference by the Governor in Council Concerning Certain Questions Related to the Secession of Quebec from Canada (1998) 161 D.L.R. (4th) 385 (S.C.C.), at p. 394 (para. 2), the Supreme Court of Canada was asked three questions: (1) could Québec unilaterally secede from Canada under the Canadian Constitution, (2) could it do so under international law, and (3) in the event of a conflict between domestic and international law on
internal self-determination (just as they will for the proposed right to democratic governance examined in Chapter 11, below). But such problems may be mitigated by using the mechanisms already existing for international human rights treaty supervision. The inclusion of the right of self-determination in the two *International Covenants* is particularly significant in this regard, although the UN Human Rights Committee has yet to fully realise its potential.  

From the perspective of the current work, internal forms of self-determination could be used to help increase and strengthen democracy globally. In a striking phrase in the above-mentioned Supreme Court of Canada decision regarding Québec, “a sovereign people exercises its right to self-government through the democratic process.”  

Oppressed peoples in non-democratic states could invoke the right of self-determination to justify their demands for democratisation, as well as engender international support for such demands. Even here, however, self-determination will face similar limitations to those explored above, for the simple reason that an internal form of self-determination also brings international law into the

such a right of secession, which would take precedence? [My paraphrasing.] In answering these questions the Court unequivocally rejected arguments in favour of a unilateral right of Québec to secede from Canada, holding that no such right exists under the Canadian Constitution or under international law: *ibid.*, p. 449 (para. 155). Because of these findings it was not required to answer the third question: *ibid.*, p. 445 (para. 147). However, the Court also held that a clear majority vote in the province in favour of secession would require “principled negotiation with other participants in Confederation within the existing constitutional framework”: *ibid.*, pp. 446 (para. 149). Even though, as noted by the Court, in *ibid.*, at p. 424 (para. 87), a referendum vote in favour of secession would not *in itself* have legal effect (“a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession”), nevertheless it would create a reciprocal obligation towards negotiation:

The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. [...] The clear repudiation by the people of Québec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed [federalism, democracy, constitutionalism and the rule of law, and the protection of minorities].

*Ibid.*, pp. 424–25 (para. 88). A clear expression of the will of the people of Québec would neither impose a legal obligation upon Canada to allow Québec to secede, nor would it impose no obligation upon Canada (i.e., allowing Canada to ignore the vote of the people of Québec): *ibid.*, pp. 425–6 (paras. 90–92). Rather, negotiations would be necessary, and secession would entail constitutional amendment: *ibid.*, pp. 426 (paras. 92–93) [negotiations being necessary], 423 (para. 84) [secession possible through constitutional amendment] and 428 (para. 97) [“Under the Constitution, secession requires that an amendment be negotiated”]. In framing its answers in such a manner the Supreme Court of Canada articulates an interesting variant of the internal right of self-determination, one allowing the peoples of Québec and Canada to mutually determine their political destiny or destinies through ‘constitutionally-required’ negotiations.

200 See, e.g., Cassese, *Self-Determination*, chs. 3, 6 and 12 [discussing, *inter alia*, the elaboration of the right in the two *Covenants*, as well as both the problems and potential of its enforcement by the Human Rights Committee].

201 Be Reference by the Governor in Council Concerning Certain Questions Related to the Secession of Québec from Canada (1998) 161 D.L.R. (4th) 385 (S.C.C.), at p. 415 (para. 64). On the previous page of the judgement (para. 61), the Court noted that “[w]hile it has both an institutional and an individual aspect, the
basic affairs of sovereign, independent states. Precisely because both internal and external forms of self-determination tend to conflict with rules related to sovereignty (such as those regarding domestic jurisdiction, non-intervention and territorial integrity), the present work explores ways of tying democracy directly to the meaning of sovereignty. In doing so we may avoid some of the limitations faced by the right of self-determination simply by changing what it means to be a state and what it means to be a sovereign. Rather than juxtaposing sovereignty against self-determination in an attempt to increase democracy, democracy simply should be linked directly to sovereignty. Also, as seen in Chapter 8, above, the non-territorial possibilities of a democratic conception of sovereignty may even overcome the difficulties presented by doctrines such as territorial integrity. As a result, even though self-determination can (and should) be used to increase democracy at both national and international levels, I argue that greater energy should be dedicated towards changing sovereignty itself. Let us now examine another option for increasing democracy at the international level, namely, by making it a requirement for the recognition of new states.

democratic principle was also argued before us in the sense of the supremacy of the sovereign will of the people, in this case potentially to be expressed by Quebecers in support of unilateral secession” (emphasis added).
Chapter 10: Recognition of Sovereign States

In the previous Chapter we saw both the great potential of, and several of the possible difficulties associated with, the international law regarding self-determination of peoples. In this Chapter and the next let us examine two additional mechanisms to help implement democracy in the international sphere. The present Chapter will examine some of the developments suggesting that democracy is becoming, or has become, a requirement for the recognition of states. Chapter 11 will examine the scope and potential of a 'right to democratic governance' under international law. Put in context, the present Chapter examines a way in which democracy may be involved in the birth of the state; the next Chapter shows how democracy may continue to be important throughout the life of the state.

Let us examine these new recognition practices. New conditions of, inter alia, respect for democracy and human rights were imposed by the Member States of the European Community (EC) upon fifteen of the new states that emerged from the collapse of the USSR and Yugoslavia. Although all fifteen states could be subjected to scrutiny, for present purposes let us narrow our scope to the five ex-Yugoslav republics, particularly concentrating on the events leading up to, and immediately following, their recognition. These ex-Yugoslav republics are particularly suited for analysis for three reasons: (1) the events surrounding the dissolution of Yugoslavia were widely reported, (2) the recognition requests of the republics were subject to detailed legal scrutiny by a specially-created EC Arbitration Commission, and (3) the events surrounding the creation of these new states raise the issues of human rights and democracy in the most striking and challenging of contexts. The first section of the Chapter briefly places the recognition criteria related to human rights and democracy in their broader international legal context. The second section describes the actual EC recognition practice with respect to Slovenia, Croatia, Bosnia-Herzegovina, Macedonia and Serbia and Montenegro. The final section critically examines the effectiveness of this practice. Such an examination suggests that although importing democracy into the criteria for recognition of states may bring some benefits, that nevertheless significant practical and theoretical difficulties will remain.
I. STATE RECOGNITION, HUMAN RIGHTS AND DEMOCRACY

Although attempts have been made since the seventeenth century to connect human rights to statehood, pragmatic considerations prevented their playing a greater role until more recent times. Until the early 1990s theories of state sovereignty and the eminent, or reserved, domain of state jurisdiction limited the ability of human rights to have a direct impact upon statehood, per se. Human rights have imposed significant limitations upon the powers of states since the Second World War, but positivist legal theories qualified them as purely voluntary limitations. Under strong versions of such theories, human rights were matters for the individual state to adopt at its own discretion, and the manner and timing of fulfilment of human rights obligations remained matters for the sovereign to decide. As a result, except within the particular arrangements of a human rights treaty, any outside scrutiny or criticism of one sovereign’s human rights compliance on the part of another sovereign was both unwelcome and potentially violative of international law. Because of such understandings, states accepted human rights obligations with the knowledge that they themselves would be responsible for enforcement, or non-enforcement, of human rights. Moreover, they knew that the rules related to sovereignty and non-intervention would prevent other actors from playing a strong role in such matters. There have been some significant exceptions, including the few cases in which human rights abuses have been openly condemned by a number of states, or even where new states have been denied recognition at least in part due to human rights concerns. But overall, the direct influence of human rights upon state behaviour and state recognition has been limited by other doctrines and, more recently, by the political realities of the Cold War.


2 Of course the right of self-determination, as seen in the previous Chapter, challenged sovereignty prior to this period. In the present context, however, it is interesting to note that the international law regarding self-determination played almost no role in the events following the break up of the Soviet Union and Yugoslavia. See, e.g., Cassese, Self-Determination, ch. 10. Cassese concludes his discussion, in ibid., at p. 273, by arguing that the self-determination that occurred in these regions was almost entirely “outside the realm of both municipal and international law.”

3 Reisman, in “Sovereignty and Human Rights,” at p. 869, points out that “[u]nder the old concept [of sovereignty], even scrutiny of human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its ‘invasion’ of the sovereign’s domaine réservé.” Accord: Halberstam, “Copenhagen Document,” at p. 163.

4 E.g., Reisman, in ibid., at p. 869 (n. 11), discusses the international community’s refusal to recognize Rhodesia as a new state after the unilateral declaration of independence in 1965, non-recognition of South Africa’s occupation of Namibia, as well as the concerns about South Africa itself. He calls this process one of “inclusive international recognition.”

5 The two cases of Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. Rep. 57, and Competence of the General Assembly Regarding Admission
For these reasons the practice of the Member States of the EC in imposing human rights-type requirements for their recognition of the Yugoslav republics is especially striking. Although it is too soon to be able to say with any certainty what kinds of precedents have been established by these acts of recognition, their very existence is important. As demonstrated below, the EC practice at least reveals evidence of an attempt to condition state recognition (not merely diplomatic relations) upon, among other things, respect for human rights and democracy. Such developments, if further substantiated, could have a tremendous impact upon what it means to be a state. This is because traditionally the most important state recognition criterion was that of 'effectiveness,' a criterion that is more or less neutral in terms of the kind of political system it allows. However the EC practice presents the possibility of this criterion being replaced (or at least supplemented) by a multiplicity of criteria, including those of respect for human rights and democracy, and adherence to the rule

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\textit{to the United Nations, Advisory Opinion, 1950 I.C.J. Rep. 1}, reveal the strong effect of Cold War alliances in relation to admission of new states into the United Nations. The first opinion was sought after a stalemate came into existence between the Western and Eastern blocs regarding new members of the UN. Each side opposed the admission of any new states sympathetic to the other on the basis of political and ideological considerations. The International Court of Justice issued an opinion strictly interpreting the membership criteria of the \textit{Charter of the United Nations} (1945) found in Art. 4(1), which states: "1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." Constraining itself to the four corners of the text, the Court held that only the considerations expressly allowed by the \textit{UN Charter} could be taken into account. Political and ideological considerations were impermissible. However since the opinion was advisory in nature, its effect proved limited. A continuing stand-off between the two blocs in the Security Council caused the General Assembly to seek the second opinion from the Court, enquiring about its competence to admit new members without the authorisation of the Security Council. A strict textual interpretation was again provided, with the Court this time examining Art. 4(2) of the \textit{UN Charter}, which states: "2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council." The Court held that the \textit{Charter} required a recommendation from the Security Council before the General Assembly could act, such recommendation being a condition precedent to General Assembly action. Both of these cases reveal the strong divisions in the UN regarding the admission of new members, caused almost entirely by Cold War political ideologies, not the ability of these states to satisfy the Art. 4 criteria.

\footnote{It has been argued that the EC practice with respect to these newly-emerging states was merely related to the criteria for the establishment of diplomatic relations, not to state recognition, \textit{per se}. But the better view is that the practice cannot be so limited. Hillgruber, in "The Admission of New States to the International Community," takes the latter position, arguing that the EC behaviour did not follow the normal (political) rules for establishing diplomatic relations. Instead, it aimed at a more concrete legal judgement about the applicant's ability to be a member of the international community. This leads Hillgruber, in \textit{ibid.}, at pp. 493-94, to argue that the recognition of Bosnia-Herzegovina had a "constitutive, legally operative effect," which was necessary because otherwise it would not have been able to meet the requirements for statehood under international law: Recognition did not function merely as a refutable assumption that the criteria of statehood were met; it actually served as a substitute for these features, which were obviously missing. There can be no doubt that, despite its deficits, in particular its lack of effective power to rule throughout its territory, Bosnia-Herzegovina thus came into existence as a state in the sense of international law. Numerous Security Council resolutions emphasizing the sovereignty, territorial integrity and political independence of Bosnia-Herzegovina and calling for their universal acceptance bear witness to the fact that, after it had been admitted as a member of the United Nations, Bosnia-Herzegovina was regarded by the international community as a state protected by the prohibition of intervention and the use of force enshrined in international law.}

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of law.\textsuperscript{7} These developments would bring international legal scrutiny into the most basic, ‘domestic’ affairs of an entity, substantially relaxing the traditional divide between the international and national.\textsuperscript{8} They also would dramatically affect the kinds of choices new entities seeking to be states could make about their political and legal systems. This can be seen in the way that even though much of the EC practice focuses upon general respect for human rights—rather than upon democratic rights or democracy \textit{per se}—that it nevertheless inevitably supports a particular form of political association, namely, the liberal democratic model of statehood. This tendency is evident in the two CSCE (now OSCE) documents referred to in the recognition criteria, as well as in the general European Union movement towards promotion of democracy, both discussed below. Whether such tendencies would prevail if human rights and democracy-related criteria were adopted more broadly, outside of the European context, is difficult to say. This could be a very welcome development. But because of the concerns raised in previous Chapters, we must remain cautious about any developments that may narrow the permissible versions of democratic statehood.\textsuperscript{9}

Keeping this caveat in mind, the potential implications of this EC practice are striking. By importing human rights and democracy into the requirements of state recognition, this practice may dramatically affect such things as the relations of human rights and statehood, the meaning of eminent or reserved domain, and more generally, what it means

\textsuperscript{7} Note that the imposition of conditions upon an entity before allowing it to become a member of the international community is not a new development. The states of Montenegro (once independent), Romania and Serbia, for example, were placed under significant restrictions regarding their military capacities as well as were required not to discriminate against minorities, immediately after they were recognised as independent by the Treaty of Berlin of July 13, 1878. They were also restricted in their abilities to do such things as nationalise property, impose tariffs and duties, control fisheries and restrict passage of foreign nationals. See e.g., Fenwick, \textit{Wardship in International Law}, pp. 15-17.

\textsuperscript{8} From the constitutive view of recognition no state can exist until recognition has been accorded, and thus no violation of the international rules against non-intervention in domestic affairs can occur as a result of any recognition practice. From the declaratory view, however, the state exists \textit{prior to recognition}, and thus the EC’s recognition practice would violate these same rules. This difficulty leads Hillgruber, in “The Admission of New States to the International Community,” at p. 501, to argue strongly that the recognition of these states by the EC must have a constitutive quality. Otherwise the EC would have been violating international law:

\begin{quote}
Unless this [EC recognition practice] is to be regarded as a violation of international law on the part of the existing states laying down these conditions—which in view of the duration and consistency of this state practice does not seem to be a convincing approach—this ‘unequal treatment’ can only be explained in terms of international law if it is assumed that, before their admission as members of the community of states, the new state entities are not yet subjects of international law, i.e. do not have external sovereignty with respect to third states, and that they only become subjects of international law by the legal act of recognition. Thus, as far as the preconditions of their international recognition are concerned, they cannot rely on the prohibition of intervention under international law.
\end{quote}

Hillgruber’s strong constitutive view leads him to argue, in ibid., at p. 502, that the EC used its recognition criteria as a means of advancing international law: “the practice of recognition serves as a testing ground to promote the international ‘legal culture’; the recognition procedure is a suitable means for this because acceptance by the existing states is necessary in order for the new states to acquire international legal personality.”

\textsuperscript{9} See the comments in Chapter 4, above, about the perils of democratic uniformity. See also the similar caveats in the following Chapter.
to be a state. By involving democratic norms at the moment of the birth of a new state, such a recognition process would seem to provide an ideal mechanism for bringing forward a democratic conception of sovereignty, at least with respect to states. Unfortunately, as will be seen, such a benign result has not (yet) occurred in practice, at least in the case of the republics of former Yugoslavia.

II. THE EC AND THE EX-YUGOSLAV REPUBLICS

Let us begin our analysis by glancing briefly at some of the broader political, or perhaps realpolitik, factors surrounding the EC recognition practice. These factors are important because they determined when, and how, the EC Member States recognised the ex-Yugoslav republics. Then, in the second section let us examine the particular legal mechanisms through which human rights requirements were formally imposed upon the former Yugoslav republics. In the third section let us look at the scope of the application of the EC criteria, which included the states emerging both from the USSR and Yugoslavia. In the fourth section we can turn to critically examine the actual application of the EC recognition criteria to the five republics, particularly focusing upon the written opinions of the Arbitration Commission. In the final section we will examine the practical effects of the EC practice for these former Yugoslav republics, looking at the general human rights trends for each new state. As will be seen, the practical consequences of this practice must cast their own light upon its overall meaning.

A. POLITICAL CONTEXT

A few comments should be made about the general political events taking place immediately prior to the EC recognition processes. These events were very complex. For present purposes, let me highlight four of the fundamental tensions that shaped the European approach to Yugoslavia. Firstly, the Yugoslav conflict occurred during the extended period of disintegration of the Eastern bloc, and more particularly, the collapse of the Soviet Union. This substantially affected the mood of the international community. Western and European states were particularly nervous about the potential such changes might have for regional and even global instability. In such a context the EC did not wish to aggravate the process by prematurely recognising the Yugoslav republics, and this consideration affected its practice. Nevertheless, as a second and conflicting factor, significant pressure was placed upon international, and especially European, leaders to bring a peaceful resolution to the conflict. As the civil war developed in Yugoslavia, reports of the horrific levels of violence were widely disseminated and these had an impact upon regional and international views. Third
and fourth, global loyalties were divided between the various actors involved in the Yugoslav conflict. On the one hand, overt Russian and Greek sympathy existed for the Serbian nationalists. On the other hand, strong Islamic support was displayed for the Bosnian Muslims.10

All four of these factors influenced the international community’s attitudes towards Yugoslavia, but the interplay of the first two factors was perhaps most vital to the recognition process. On the one hand, states were reluctant to recognise any newly-emerging states in Yugoslavia because of strong fears about the effects of such actions upon the stability of the former USSR. This was made more problematic by the early claims of some of the Yugoslav republics to sovereign independent status (rather than to the ‘softer’ forms of autonomy-type status that would have been preferred by the Eastern bloc). Even before the EC’s recognition Guidelines were issued in December 1991, for example, Croatia and Slovenia held referenda and declared their independence from the SFRY. In fact, to appease EC concerns they voluntarily accepted self-imposed three-month moratoria on implementing their independence declarations.11 Although the other republics of Bosnia-Herzegovina,12 Macedonia, and

11 Rich, ibid., pp. 39-40. See generally, Keesing’s Record of World Events, especially the years 1990 and 1991. It may be helpful at this point to briefly summarise the pre- recognition events surrounding Slovenia and Croatia, as reported in Keesing’s Record of World Events.

Slovenia achieved its independence gradually. The Slovenian Assembly decided in September 1989 to affirm Slovenia’s sovereignty and right of secession from the Socialist Federal Republic of Yugoslavia (SFRY). Ibid., 1989, pp. 36899-90. It issued a formal declaration on July 2, 1990, in which it proclaimed the full sovereignty of the Slovenian republic. Ibid., 1990, p. 37622. Then the Slovenian Assembly asserted jurisdiction over the Slovene territorial defence force (civil units akin to the US National Guard), under its new constitution of September 28, 1990. Ibid., 1990, p. 37790. On December 23, 1990, Slovenia held a referendum on secession from Yugoslavia, in which a 93.5% turnout voters mandated the republican government to declare “an independent and sovereign state” if no agreement on restructuring Yugoslavia was reached within six months by the republics. Ibid., 1990, p. 37924. Hostilities deepened between the republics. The federal authorities, following a 9 January 1991 federal presidential order, required all “unauthorised” armed units (i.e., republican territorial defence forces and police), to surrender their arms to the Yugoslav National Army (JNA). Croatia and Slovenia refused to comply, but all sides stood down. The Yugoslav constitutional court annulled the key articles of Slovenia’s July 1990 sovereignty declaration as unconstitutional. Ibid., 1991, p. 37973. A Croatian-Slovenian defence pact was concluded on January 20 (released February 8), in which both republics agreed to declare full independence in the event of an armed attack by the JNA. On February 20, 1991, the Slovene Assembly adopted a resolution on the “disassociation of Slovenia from Yugoslavia” and set in motion concrete steps towards secession. Ibid., 1991, p. 38019. Yet at the same time the six republics continued to discuss the future of Yugoslavia, with a series of meetings on March 28, 1991, producing an agreement to hold a referendum throughout Yugoslavia. However, there was substantial disagreement about when to hold the referendum, as well as about whether Slovenia needed to hold a second one. Ibid., 1991, p. 38163. Armed conflicts continued between federal and republican forces in both Croatia and Slovenia, leading to a unilateral declaration of independence by both republics on June 25, 1991. Fighting subsequently intensified. Ibid., 1991, p. 38274. After combat in Slovenia in early July, the well-organised Slovenian Territorial Defence Force repelled the JNA. Ibid., 1991, p. 38373. On October 7, 1991, the self-imposed three-month moratorium on independence that followed the declarations of Slovenia and Croatia ended. Slovenia introduced its own currency on October 8, and all Yugoslav ambassadors of Slovenian origin resigned on October 17. The Yugoslav National Army agreed to withdraw its forces from Slovenia by October 25. Ibid., 1991, p. 38513.

Croatian independence was more difficult to achieve. On July 25, 1990, the Croatian parliament approved twelve constitutional changes which were perceived by Serbs as being detrimental to their interests. A
Montenegro, as well as the autonomous regions of Vojvodina and Kosovo, and the self-declared ‘autonomous regions’ of the ‘Serbian Republic of Krajina’ and ‘Sandzak,’ took longer to assert their independence from Serbia, nearly all asserted some form of sovereignty during the 1990-91 period. With so many entities seeking independence, the recognition of consequential backlash occurred in Croatia on the part of Serbian minority leaders, who proclaimed the sovereignty and autonomy of all Croatian Serbs. Ibid., 1990, p. 37622. These Croatian Serbs (the so-called Serbian National Council), purported to establish an ‘autonomous region’ of areas of Croatia in which the Serbs were in the majority. Ibid., 1990, p. 37789. On December 21, 1990, the Croatian Assembly promulgated a new constitution which proclaimed Croatian sovereignty and enshrined a right to secede from Yugoslavia. Sovereignty was said to extend to control over armed forces, diplomatic relations and international agreements. The Assembly was boycotted by ethnic Serbian deputies. Ibid., 1990, p. 37924. In early January 1991 hostilities deepened between the republics and the federal authorities following the above-mentioned federal presidential order requiring all “unauthorised” armed units to surrender their arms to the JNA. Ibid., 1991, p. 37973. On February 21, 1991, Croatia’s Assembly approved resolutions asserting the primacy of Croatia’s constitution and laws over those of the federation. The resolutions also set out a procedure for Yugoslavia’s dissolution into sovereign states, including a Croatian right to participate in such a sovereign association. A Croatian-Serbian defence pact was released on February 8, in which both republics agree to declare full independence in the event of an armed attack by the JNA. On February 28, 1991, a group of Serb-dominated municipalities in Croatia unilaterally declared their region’s separation from Croatia (as the “Serbian Autonomous Region of Krajina”), and their desire to unite with Serbia, Montenegro and the Serbian population of Bosnia-Hercegovina. Ibid., 1991, p. 38019. Violence broke out between Croatian authorities and Serb minorities in the Croat town of Pakrac on March 1-2, 1991. Croatian riot police were deployed, but repulsed by JNA troops, leaving Serbian authorities in control of the ‘autonomous region’ (March 2-3, 1991). Ibid., 1991, p. 38108. On April 1, 1991, the “Serbian Autonomous Region of Krajina” decided to become part of Serbia, but this was not endorsed by the Serbian Assembly on April 2. JNA troops were increasingly deployed in Croatia, ostensibly for peacekeeping. Croatia feared a form of creeping military takeover and announced the establishment of a de facto republican army—the Croatian National Guard Corps—on April 11, 1991. Ibid., 1991, p. 38163. Increasing conflicts occurred in Croatia, especially around the ‘autonomous region.’ The JNA was placed in a state of full combat alert. The Collective State Presidency banned non-federal military units (i.e., republican forces), in Croatia on May 9, 1991. Croatian President Tudjman refused to endorse disarmament. A referendum was held in the ‘autonomous region’ of Krajina on May 12, 1991, in which 95% of the registered electorate voted, 90% of whom were in favour of remaining a part of Yugoslavia. Another referendum was held throughout Croatia on May 19, 1991, in which 83.6% voted, 93.2% of whom were in favour of the proposal that Croatia “as a sovereign and independent country which guarantees cultural autonomy and all civic rights to the Serbs and members of the other nationalities in Croatia, may with other Republics join a confederation of sovereign states.” In the same referendum 92.2% voted against Croatia remaining part of the Yugoslav federal state. Ibid., 1991, p. 38203-4. Croatia unilaterally declared its independence from Yugoslavia on June 25, 1991. Fighting subsequently intensified. Ibid., 1991, p. 38274. On October 7, 1991, the self-imposed three-month moratorium on independence following the Croatian declaration ended. Croatia officially severed relations with Yugoslavia on October 8, 1991. Ibid., 1991, p. 38513.


12 Note that there are two common spellings of Bosnia-Hercegovina—the one just used and “Bosnia-Hercegovina.” I will use either spelling, in keeping with the usage of the source being discussed.

13 Kosovo’s Serbian-banned Provincial Assembly proclaimed a “Constitution of the Republic of Kosovo” on September 13, 1990. Koeing’s Record of World Events, 1990, p. 37726. On September 26-30, 1991, Kosovo’s (banned) Assembly held a referendum on sovereignty, in which there was a 87.01% turnout and 99.87% approval of Kosovo sovereignty. On October 19, 1991 a provisional coalition government was elected and this was recognised by Albania on October 22. Ibid., 1991, p. 38513. The Macedonian Assembly unanimously adopted a declaration of the republic’s sovereignty on January 25, 1991, allowing itself the right to self-determine as well as to secede from Yugoslavia. Ibid., 1991, p. 37973. Macedonia held a referendum on September 8, 1991, in which 75% voted (boycotted by many ethnic Albanians), 95% voting in favour of a “sovereign and independent Macedonia with a right to enter into a union of sovereign states of Yugoslavia.” Immediate secession was not contemplated. Ibid., 1991, p. 38420. The ‘Serbian Autonomous Region of Krajina’ asserted the right to separate
one or more of them could have encouraged others to push aggressively for immediate secession from Yugoslavia.\textsuperscript{14} The stakes were high for any act of recognition. Consequently, European Community states and Western States were wary about expressly recognising the sovereign independence of any republic.\textsuperscript{15} In fact in its earlier attempts to deal with the situation the EC specifically sought to continue relations with a \textit{united} Yugoslavia rather than accept the possibility of independence for individual republics.\textsuperscript{16}

However the severity and close proximity of the conflict pulled the European Community in another direction, making it unwilling to stand back and do nothing. Member States of the EC wished to play an active role in helping to resolve what was becoming the bloodiest conflict in central Europe since the Second World War.\textsuperscript{17} Even prior to the

\textsuperscript{14} It is important to notice that the sovereignty assertions on the part of all of these republics \textit{need not have led to independent statehood} as they were made in the context of an overhaul of the entire Yugoslav federal system. Negotiations were held between all of the republics about the future form of Yugoslavia, with the alternatives mainly being seen to be those of dissolution, or a loose form of sovereign-to-sovereign federation/confederation. Milosevic started the Yugoslav federal transformation for the purposes of removing autonomy from Kosovo \textit{within a federal system}. The process, however, took on a life of its own. See, e.g., \textit{ibid.}, 1990, pp. 37621 and 37725 (Serbian constitutional changes affecting Kosovo’s special autonomous status), 37923 (elections for all Yugoslav republican assemblies taking place in April, November and December, 1990, paving the way for a new federal or confederal arrangement), and 37973 (inter-republican talks starting on January 10, 1991, adjourned the same day, resumed on January 31, but again collapsing). Even the Slovenian referendum and Croatian constitutional changes of December 1990 would have allowed confederal relations short of independence. \textit{Ibid.}, 1990, p. 37924. In fact, until the end of March 1991, a series of meetings were held specifically to discuss a referendum on Yugoslavia’s future. \textit{Ibid.}, 1991, p. 38163.

\textsuperscript{15} The earlier ‘recognition’ pronouncements of August 1991 about the Baltic states of Latvia, Lithuania and Estonia were specifically not \textit{phrased as such} by the EC or US. The EC used terminology indicating that they “warmly welcomed the restoration of sovereignty and independence” and were willing to “establish diplomatic relations ... without delay” [\textit{Bull. EC} 7/8-1991 point 14.23], and the US welcomed the “establishment of diplomatic relations.” Neither used the term “recognition,” \textit{per se}: Rich, “Recognition,” p. 38. Thus, as summarised by Rich, in \textit{ibid.}:

\begin{quote}
In Western capitals around the world there was concern not to give a green light to the forces calling for the dismemberment of the USSR because of fears over instability in a nuclear armed superpower. At the time, President Gorbachev was still trying to maintain some form of centre. It was thus in the USSR’s interest also to limit the precedential value of the independence of the Baltic states and although he had earlier described Western recognition of Baltic independence as ‘hasty’, President Gorbachev stated in an interview with CNN on 1 September that the independence of the Baltic states would be consistent with his approach to Soviet reform. [Citations omitted.]
\end{quote}

\textsuperscript{16} See, e.g., Renaud Dehousse, “The International Practice of the European Communities: Current Survey, European Political Cooperation in 1991” (1993) 4 \textit{E.J.L.} 141-56, pp. 153-55 (reproducing a number of statements by the EC, at first stipulating that EC relations must be with a \textit{united} Yugoslavia, and then backing down to accept the possibility of independent republics).

\textsuperscript{17} Even before the conflict escalated, the EC expressed its desire to play a role in Yugoslavia. For example, in the final communiqué of the Rome Summit of the European Council (1990) the Council stressed that it assumed a

\begin{flushright}
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formulation of the Declaration and Guidelines (the two documents creating a framework for recognition), the European Community clearly indicated its desire to play the role of principal mediator by establishing the Peace Conference on Yugoslavia and a special Arbitration Commission to help settle related disputes.\(^\text{18}\) Of course EC interests in resolving this conflict were not entirely altruistic.\(^\text{19}\) Nor were the EC reactions generally effective.\(^\text{20}\) Nonetheless, a genuine humanitarian impulse seems to have motivated them.\(^\text{21}\)

In brief, various factors \textit{favourable} to the EC recognising these entities as states were juxtaposed against other factors clearly \textit{unfavourable} to such recognition. The desire to end bloodshed and to stop a regional conflict was checked by the desire to maintain international stability in the relations between the EC and a dying superpower.\(^\text{22}\) Such concerns regarding international stability may have been mistaken, but their consequences for EC behaviour are evident; at least early on, the EC and the international community downplayed the scale of the conflict in the former Yugoslavia in order to attempt to assert some sort of control over the dismantling of the USSR. Only after the Ukraine asserted independence, and this independence was approved by other states (most notably by President Yeltsin of Russia, in early December 1991), did EC Member States feel able to take a more active role in


\(^\text{19}\) European leaders were party driven by self-interest—they were deeply concerned that the conflict might spill over into the entire region as a result of the potential for clashes between the Russian and Greek support for the Serbs, and the Islamic support for the Bosnian Muslims. See, e.g., Dinan, \textit{Ever Closer Union}? , pp. 483-4.

\(^\text{20}\) The European Community issued a variety of threats to remove economic aid from Yugoslavia (directed mainly at stopping Serbian military aggression), as well as brokered a number of short lived cease-fires. E.g., \textit{Keesing’s Record of World Events}, 1991, pp. 38081 (threat to suspend aid), 38204 (continuing aid conditional upon resolution of ethnic conflicts and furtherance of economic and political reform), 38274 (flurry of diplomatic activity on the part of the EC on May 30-31, 1991, which is ready to help a democratic, reformed Yugoslavia, with unchanged internal and external borders; June 28, 1991 EC-brokered cease-fire falls apart within 24 hours), and 38373 (EC Foreign Ministers impose arms embargo and freeze EC aid on July 5, 1991).

\(^\text{21}\) This humanitarian motivation may be indirectly confirmed by the EC’s subsequent, substantial assistance to these states. See the charts on the European Commission’s ‘External Relations’ web site, which break down financial assistance figures by republic as well as by category of assistance: “1991-1999 EU assistance to South-Eastern Europe & Western Balkans—Figures,” as available at http://europa.eu.int/comm/external_relations/see/figures/see_balkans_support_91_99.htm (accessed 23 July 2001).

\(^\text{22}\) But cf. Türk, in “Recognition,” at p. 68, who argues that the EC may have been mistaken in its caution regarding Yugoslavia, stating that “there is no reason to believe that the smooth transition from Soviet Empire into the Commonwealth of Independent States in 1991 was in any significant way influenced by the approach taken by the Western states.”
recognising the Yugoslavian republics.\textsuperscript{23} That being said, they reacted quickly. The EC Guidelines and Declaration emerged less than two weeks after the Ukrainian recognition and the Member States of the EC and the special Arbitration Commission began applying them almost immediately.

\section*{B. LEGAL FRAMEWORK}

The mechanisms used by the EC to impose requirements related to human rights and democracy included two European Community declarations, which set out the conditions for recognition, and a specially-created Arbitration Commission which adjudicated compliance with those conditions. The two declarations, issued by the EC Foreign Ministers on 16 December 1991, were (1) the Declaration on the ‘Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union’ (the “Guidelines”), and (2) the Declaration on Yugoslavia (the “Declaration”).

The Guidelines required the applicant entities to have “constituted themselves on a democratic basis” as well as made recognition by the EC Member States dependent upon respect for democracy and human rights.\textsuperscript{24} The precise human rights and democratic

\footnotesize


In compliance with the European Council’s request, Ministers have assessed developments in Eastern Europe and the Soviet Union with a view to elaborating an approach regarding relations with new states.

In this connection they have adopted the following guidelines on the formal recognition of new states in Eastern Europe and in the Soviet Union:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new States, which requires:

- respect for the provisions of the \textit{Charter of the United Nations} and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights

- guarantees for the rights of the ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE

- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement

\hfill \textsuperscript{388}
requirements imposed by the Guidelines were those contained in the Charter of the United Nations, and the commitments set out in two CSCE (now OSCE) documents—the Final Act of Helsinki and the Charter of Paris. These latter commitments were stressed to be “especially with regard to the rule of law, democracy and human rights.” The reference to the Helsinki Final Act in the Guidelines was important. Although the Final Act is primarily aimed at state-to-state relations and mainly embodies political rather than legal commitments, it does attempt to ensure respect for a number of fundamental human rights and freedoms. These include the freedoms of “thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.” These rights and freedoms are both

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acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability

— commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its Member States will not recognise entities which are the result of aggression. They would take into account the effects of recognition on neighbouring States. The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements. [Emphasis added.]

25 The full name of the Final Act of Helsinki is the Conference on Security and Cooperation in Europe (CSCE): Final Act (1975) [hereafter Helsinki Final Act]; that of the Charter of Paris is the Charter of Paris for a New Europe (1990) [hereafter Charter of Paris].

26 In Section VII of the Helsinki Final Act, entitled “Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief,” the following rights are to be ensured:

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development.

Within this framework the participating States will recognize and respect the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience.

The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

They will constantly respect these rights and freedoms in their mutual relations and will endeavour jointly and separately, including in co-operation with the United Nations, to promote universal and effective respect for them.

They confirm the right of the individual to know and act upon his rights and duties in this field.

In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.

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clarified and expanded in the Charter of Paris. Importantly for our purposes, the Charter of Paris particularly emphasizes the need to strengthen democracy in the context of human rights

The Helsinki Final Act also has provisions regarding: the sovereign equality of states, refraining from the threat or use of force, inviolability of frontiers, territorial integrity, peaceful resolution of disputes, non-intervention in internal affairs, equal rights and self-determination of peoples, co-operation among states, and fulfilment in good faith of obligations under international law. Other parts of the Act mainly deal with confidence-building measures and aspects of security and disarmament, as well as economic, scientific, technological and environmental cooperation. The Helsinki Final Act does not expressly refer to the promotion of democracy per se, but its reference to various democracy-related human rights and instruments that embody those rights may allow it to be compatible with such a task.

In the section of the Charter of Paris entitled “Human Rights, Democracy and Rule of Law,” the following human rights commitments are elaborated:

We undertake to build, consolidate and strengthen democracy as the only system of government of our nations. In this endeavour, we will abide by the following:

- Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an over-mighty State. Their observance and full exercise are the foundation of freedom, justice and peace.

- Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.

- Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.

- We affirm that, without discrimination,
  - every individual has the right to freedom of thought, conscience and religion or belief,
  - freedom of expression,
  - freedom of association and peaceful assembly,
  - freedom of movement,
  - no one will be:
    - subject to arbitrary arrest or detention,
    - subject to torture or other cruel, inhuman or degrading treatment or punishment;

- everyone also has the right:
  - to know and act upon his rights,
  - to participate in free and fair elections,
  - to fair and public trial if charged with an offence,
  - to own property alone or in association and to exercise individual enterprise,
  - to enjoy his economic, social and cultural rights.

- We affirm that the ethnic, cultural, linguistic and religious identity of national minorities will be protected and that persons belonging to national minorities have the right freely to express, preserve and develop that identity without any discrimination and in full equality before the law.

- We will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights.

- Full respect for these precepts is the bedrock on which we will seek to construct the new Europe.

Our States will co-operate and support each other with the aim of making democratic gains irreversible.

See also the Charter’s section entitled “The Human Dimension,” ibid. Other provisions of this document deal with economic liberty and responsibility, friendly relations amongst participating states, security, unity, economic co-operation, the environment, culture, and the Mediterranean region. The Charter of Paris also sets up an organisational structure for the CSCE, including a Council, a Committee of Senior Officials, a Secretariat, Conflict Prevention Centre, Consultative Committee, Office for Free Elections, and Meetings of Experts. This structure was solidified when the Conference on Security and Co-operation in Europe (CSCE) changed its name to the
promotion and protection, and thus enables the entire EC recognition process to be connected with democracy promotion and consolidation.

The EC's Declaration served a different, more procedural role than that of the Guidelines. It set up a time-frame for the applications as well as required the Yugoslav republics to specify whether they: (1) were applying for independent statehood, (2) accepted the conditions in the Guidelines and the human and minority rights provisions of the draft Convention, and (3) supported the continued assistance of the UN and the EC's Conference on Yugoslavia to resolve the conflict.28 Interestingly, the final paragraph of the Declaration specifically required the republics to relinquish any territorial claims, as well as related propaganda, with respect to "a neighbouring Community state." This provision was clearly

"Organization for Security and Co-operation in Europe" (OSCE, effective 1 January 1995) after the 1994 Budapest Summit. Along with the change to OSCE, the institutions were "renamed Ministerial Council (instead of CSCE Council), Senior Council (formerly the CSO) and Permanent Council (instead of Permanent Committee)". Organization for Security and Co-operation in Europe (OSCE), "Chapter 2: History," in OSCE Handbook: Online, as available at http://www.osce.org/publications/handbook/2.htm (accessed 23 November 2000). Note however, that it remains difficult to characterise the OSCE as an international organisation, properly speaking. See, e.g., Miriam Sapiro, "Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation" (1995) 89 A.J.I.L. 631-37.


The European Community and its Member States discussed the situation in Yugoslavia in the light of their Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union. They adopted a common position with regard to the recognition of the Yugoslav Republics. In this connection they concluded the following:

The Community and its Member States agree to recognise the independence of all Yugoslav Republics fulfilling all the conditions set out below. The implementation of this decision will take place on 15 January 1992.

They are therefore inviting all Yugoslav Republics to state by 23 December whether:

— they wish to be recognised as independent States
— they accept the commitments contained in the above-mentioned Guidelines
— they accept the provisions laid down in the draft Convention—especially those in Chapter II on human rights and the rights of national or ethnic groups—under consideration by the Conference on Yugoslavia
— they continue to support
— the efforts of the Secretary General and the Security Council of the United Nations, and
— the continuation of the Conference on Yugoslavia.

The application of those Republics which reply positively will be submitted through the Chair of the Conference to the Arbitration Commission for advice before the implementation date.

In the meantime, the Community and its Member States request the UN Secretary General and the UN Security Council to continue their efforts to establish an effective cease-fire and promote a peaceful and negotiated outcome to the conflict. They continue to attach the greatest importance to the early deployment of a UN peace-keeping force referred to in UN Security Council Resolution 724.

The Community and its Member States also require a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities
meant to address Greek concerns about Macedonia. Importantly, the Declaration reaffirmed the formal requirement that all applicants must respect the Guidelines, and thereby human rights, as one of the conditions for recognition. 29

The precise legal effect of the Guidelines and the Declaration is slightly complicated because the European Community as a regional organisation did not itself have the competence to recognise new states. Therefore these instruments were not binding upon Member States as a matter of EC law. Rather, Member States retained their sovereign discretion over recognition matters. 30 However, between the EC Member States themselves the Guidelines and Declaration created solid commitments to one another. In this way, even though not legally binding, these two declarations were influential in the subsequent recognition practices of the individual Member States. In fact, the Guidelines and the resulting recognition decisions of the arbitral tribunal may have powerfully affected when, and under what conditions, the EC Member States exercised their sovereign rights to recognise the newly emerging states. This can be seen, for example, in the reactions of EC states to Slovenia, Croatia and Macedonia. Germany wished to unilaterally recognise Slovenia and Croatia as early as the beginning of September 1991, and other states wished to recognise Macedonia before the official EC policy would permit it. 31 Yet none of these states did so. Rather, the EC Member States substantially complied with their own Community-driven recognition process, even though the act of recognition remained within each individual state’s sovereign prerogative. As a result, I would argue that the Guidelines, although technically non-binding, proved to be extremely influential.

Another second complication, however, is regarding the legal nature of the human rights and democracy-related commitments contained in the Guidelines and Declaration. It

versus a neighbouring Community State, including the use of a denomination which implies territorial claims.

29 Rich, in “Recognition,” at p. 44, points out that “[t]his method of requiring an application for recognition which is examined by an arbitrator and then decided upon according to a set timetable is virtually unprecedented in recognition practice.”


On behalf of the European Union, the Presidency expresses appreciation for the agreement signed yesterday by the FRY and FRYOM.... This development ... opens the way to recognition by the member States, in accordance with their respective procedures, of the Federal Republic of Yugoslavia as one of the successor States to the Socialist Federal Republic of Yugoslavia. [Emphasis added.]

31 See, e.g., Dinan, Ever Closer Union?, pp. 486-88. After a 5 July 1991 EC Foreign Ministers meeting that imposed an arms embargo and froze EC aid to Yugoslavia, EC members started to assume differing attitudes about whether to recognise Slovenia and Croatia (as pressed by Belgium and Denmark). Germany stepped away from its earlier, firm ‘anti-recognition’ policy by adopting the position that the peoples of Europe had to be free to choose their own future. Keesing’s Record of World Events, 1991, pp. 37873-4. Subsequently, in early September 1991, Germany expressly warned the other EC states that it would unilaterally grant recognition to Croatia and Slovenia if fighting persisted: ibid., p. 38420.
will be recalled that these commitments were political in nature, not legal, in their original CSCE context. Their inclusion in the equally non-binding (as a matter of EC law), Guidelines and Declaration would not seem to change their status. Were they therefore non-binding with respect to the applicant states? The answer might seem to be affirmative, as two non-binding commitments would seem unlikely to create a binding one. But perhaps these commitments could be understood to be binding if their subsequent acceptance was understood to create a legal obligation by the applicant entities. Such a suggestion is controversial, both because it presumes an international legal personality on the part of the applicant entities sufficient to make such an international legal undertaking, and because it glosses over the intentions of the recognising states, who may have meant to merely impose political obligations.\textsuperscript{32} Nevertheless, I would argue that if the EC’s Guidelines and Declaration together can be taken to formulate legal conditions for recognition, the unilateral acceptance of such commitments as legally binding ones by the applicant states could have created legally enforceable obligations (albeit perhaps only crystallising after the republics obtained international personality). In any event, the EC’s Guidelines and Declaration either established significant international legal obligations, or alternatively, strong political obligations, for the states emerging from former-Yugoslavia to respect human rights, democracy and the rule of law.

C. Broader Scope: USSR and Yugoslavia

The Member States of the European Community applied the Guidelines to territories in both the former USSR and former Yugoslavia. They used them to recognise fourteen states in the period between December 1991 and mid-April 1992, and one state later, in 1995. These states included (in chronological order): the Ukraine, Armenia, Kazakhstan, Belarus, Moldova, Turkmenistan, Azerbaijan, Uzbekistan, Croatia, Slovenia, Kyrgyzstan, Tajikistan, Georgia, Bosnia-Herzegovina,\textsuperscript{33} and the Former Yugoslav Republic of Macedonia (FYROM).\textsuperscript{34} Four states emerged before the Guidelines were established. Three of those

\textsuperscript{32} Such difficulties could be avoided if we assume that human rights obligations can operate through the processes of state succession, or are binding as a matter of customary international law, or that the applicant entities engaged in unilateral acts (or unilateral declarations), when accepting such obligations. See the related discussion in footnotes 112 and 113, below, regarding state succession to human rights obligations and the possible customary international legal status of human rights.


\textsuperscript{34} On 4 May 1992 the EC expressed the willingness of its Member States to recognise the Former Yugoslav Republic of Macedonia (FYROM) “as a sovereign and independent State, within its existing frontiers and under a name that could be accepted by all parties concerned,” but on 26-27 June 1992 the European Council went on to
states—Latvia, Lithuania and Estonia—were recognised without specific human rights requirements (at least at the formal level of state recognition). But the fourth, the Ukraine,
was required to adhere to Guideline-type requirements as part of the process of entering into diplomatic relations with some countries. Since Russia was understood to be continuing the international legal personality of the Soviet Union it was not required to abide by the Guidelines. The Federal Republic of Yugoslavia (FRY), made up of the republics of Serbia and Montenegro, also presented an anomaly. The FRY claimed to be a continuation of the original Socialist Federal Republic of Yugoslavia (SFY), and therefore refused to accept the recognition requirements imposed by the Guidelines criteria. According to FRY, only its


36 Rich, in ibid., at p. 41, provides the example of Canadian negotiations to enter into diplomatic relations with the Ukraine, which imposed the requirements, inter alia, of respect for the Helsinki Final Act, the Charter of Paris, and full respect for human rights.


The Union of Soviet Socialist Republics was an original Member of the United Nations from 24 October 1945. In a letter dated 24 December 1991, Boris Yeltsin, the President of the Russian Federation, informed the Secretary-General that the membership of the Soviet Union in the Security Council and all other United Nations organs was being continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States.

38 The recognition of the Federal Republic of Yugoslavia (FRY) raises difficult issues because FRY claimed to be either a continuation of, or successor state to, the former Yugoslavia (SFY). The new ‘Federal Republic of Yugoslavia’ identity emerged on 27 April 1992: Federal Republic of Yugoslavia, “Introduction,” as available at http://www.gov.yu/start.asp?je=E (accessed 24 July 2001). However its status as a state appears to have continued. Hillgruber, in “The Admission of New States to the International Community,” at p. 499, argues that the international community had no doubt about the Federal Republic of Yugoslavia’s status as a state during this period. Merely its identity was subject to dispute:

The same [pattern of ‘diplomatic’, rather than real recognition] is true of the Federal Republic of Yugoslavia in the period between its ‘foundation’ (27 April 1992) and its ‘recognition’ by the EC Member States (April 1996), as the EC Member States and the United States only disputed the claim made by the Federal Republic of Yugoslavia as to its identity, and not its status as a state under international law. They treated the Federal Republic as a legal personality capable of acting under international law with all the rights conferred and obligations incumbent on states under general international law. As diplomatic relations were continued, albeit on a lower level, the Federal Republic of Yugoslavia was granted the active and passive right of legation and was also certified as having the competence to conclude treaties, at the latest by the Dayton Agreements. It is in this sense that it was recognized as a subject of international law right from the beginning or in stages by implied conduct by those states that rejected its claims as to its identity. In contrast, the significance of the mutual sending of ambassadors after the declarations made in April 1996 was merely that of full ‘diplomatic recognition’ of the Federal Republic of Yugoslavia by the EC Member States.

Matthew C.R. Craven, in “The Problem of State Succession and the Identity of States Under International Law” (1998) 9 E.J.L. 142-62, at p. 160, makes a similar assessment of the situation, pointing out that the disagreement about the status of FRY was one of identity, not personality:

[The disengagement from the federation of Slovenia, Croatia, Bosnia-Hercegovina and Macedonia, left in place the remaining republics of Serbia and Montenegro. The approach of the Badinter Commission, and also apparently the UN, was to argue that the SFY had ceased to exist as a state in virtue of the fact of dismemberment. But to accept that would be to say that Yugoslavia had ceased to exist as a state, despite the fact that it continued to possess, in the form of the FRY, all the material requirements for existence. The truth is that at no stage did the FRY lose, in its entirety, independence, territory, population or government: it continued to possess all these attributes, albeit in a reduced form. It is also interesting to note, in that regard, that no states actually withdrew recognition from Yugoslavia, or subsequently the FRY, at any stage.

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identity, not its status as a state, had changed on 27 April 1992. As a consequence of this position, and because of the human rights abuses perpetuated by the FRY regime in Kosovo, the Federal Republic of Yugoslavia did not obtain the benefits of full diplomatic and other official relations with EC Member States until 2000.\textsuperscript{39} Thus in total, out of the nineteen possible candidates for statehood arising out of the dissolution of the USSR and Yugoslavia (leaving out the continuing states of Russia and the FRY), sixteen new states were asked to follow the Guidelines or Guideline-like requirements before they would be considered for recognition by the Member States of the EC (the remaining three having emerged before the Guidelines were created). These requirements included commitments to respect a large number of basic human rights as well as the more general practices of democracy and the rule of law. Even though the Guidelines and Declaration, technically speaking, were not binding upon EC Member States, and even though the Helsinki Final Act and the Charter of Paris originally were intended to impose only political commitments, as argued above the entire process could be seen to impose binding obligations on the part of the applicant states. If so, as a result of this process these sixteen states legally undertook to respect and promote human rights, democracy and the rule of law.

D. APPLICATION TO THE INDIVIDUAL YUGOSLAV REPUBLICS

Let us see what such obligations meant in practice. We are aided here by the fact that each applicant was required to seek formal rulings from the EC’s Arbitration Commission

What this suggests is that a distinction needs to be drawn between transformations that result in the extinction of the state, strictly understood, and those that result merely in a change in identity. In the case of Yugoslavia, what is at issue is not so much whether the FRY is a state, but whether it is the same as, or different from, the SFRY. [Citations omitted.]

Craven also notes that the UN and ICJ considered FRY continuously bound by its treaty obligations during this period. \textit{Ibid.}

(under the provisions of the Declaration on Yugoslavia). All six former republics responded to the EC Declaration but only four sought recognition. Of the four, Croatia and Slovenia were recognised by the EC on 15 January 1992, Bosnia-Herzegovina on 7 April 1992, and Macedonia in December 1995. All were accepted after approval by the Arbitration Commission, but with the latter having faced significant delays due to a conflict with Greece over the use of the name “Macedonia.” Let us examine the decisions of the Arbitration Commission with respect to each applicant in order to attempt to gauge the importance place upon human rights and democracy requirements for EC-wide recognition or non-recognition.

1. Slovenia

Slovenia’s application was approved in Opinion No. 7 of the Arbitration Commission. Its compliance with the relevant human rights standards was assessed on the basis of evidence regarding the provisions of Slovenia’s Constitution, its Declaration of Independence, its application for recognition of 19 December 1991, and its Basic Constitutional Charter. Roughly half of the Commission’s decision was dedicated to human rights and minority rights requirements and special attention was paid to Slovenia’s ability to satisfy Chapter II of the ‘draft Convention’ alluded to in the EC’s Declaration on Yugoslavia. As a result, on balance human rights would seem to have been considered an important condition for Slovenia’s recognition by the Arbitration Commission.

2. Croatia

Croatia’s application was reviewed in Opinion No. 5 of the Arbitration Commission, but was found to be deficient. The republic was required to further supplement its

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42 Because such an analysis relies solely upon the text of the Arbitration Opinions, it cannot provide a complete account of the importance of the conditions of the Guidelines and Declaration. Nevertheless, since these Opinions had important justificatory and legitimating functions—as revealed in both the manner in which they were written and their public availability—they may be argued to be of substantial relevance. Thus, even if the Opinions do not provide a complete account of the practice, they nevertheless provide an important one.


44 For the full text of the Declaration, see footnote 28, above. After examining this material the Arbitration Commission stated that “the Republic of Slovenia satisfies the tests in the Guidelines ... and the Declaration on Yugoslavia”: Opinion No. 7, ibid., at p. 84.

45 Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community and its Member States (Paris, 11 January 1992), reprinted (1993) 4 E.J.I.L. 76-77. In contrast to the opinion dealing with Slovenia,
Constitutional Act so as to satisfy the provisions of the draft Convention before full approval could be granted. This deficiency was deemed to be satisfied after Croatia’s President wrote to the President of the Arbitration Commission, “confirming Croatia’s acceptance in principle” of the Chapter II, Article 2(c) provisions of the draft Convention (granting ‘special status’ to minorities).\textsuperscript{46} Since an otherwise satisfactory application was made conditional upon further human rights guarantees, Croatia’s application may be seen to provide further evidence of the important role played by human rights requirements in the recognition process.\textsuperscript{47}

3. Bosnia-Herzegovina

The application for recognition by the Socialist Republic of Bosnia-Herzegovina (SRBH) was flatly rejected in Opinion No. 4 on the basis of there being insufficient evidence of the “will of the peoples ... to constitute the SRBH as a sovereign and independent state.”\textsuperscript{48} This was due to the fact that the Serbian minority in Bosnia-Herzegovina (making up roughly one-third of its population), had voted in a plebiscite for a “common Yugoslav state.” This same Serbian minority also had passed a resolution calling for the formation of a “‘Serbian Republic of Bosnia-Herzegovina’ in a federal Yugoslav State,” and had proclaimed the independence of this “Serbian Republic of Bosnia-Herzegovina.”\textsuperscript{49}

Since Bosnia-Herzegovina’s application was rejected primarily because of its difficulties in determining the will of the populace, the Commission offered the potential for re-assessment if a referendum were to be held.\textsuperscript{50} Such a referendum was held from March 29 above, the current opinion is brief and contains little reference to positive acceptance of human rights requirements, mainly confining itself to mentioning that the President of the Republic has indicated “the Republic’s acceptance of the Guidelines” in his answers to questions of the Arbitration Commission: \textit{ibid.}, at p. 76. In fact, nearly a third of the opinion is spent analysing Croatia’s lack of compliance with Chapter II of the draft Convention. As a result, the opinion states that the Croatian Constitutional Act of 4 December 1991 (dealing with human rights, freedoms, and the rights of national and ethnic communities and minorities), “does not fully incorporate the provisions of the draft Convention” and that therefore that Croatia must supplement this Act so as to satisfy the provisions: \textit{ibid.}, p. 77. However the opinion concludes by stating that “subject to this reservation, the Republic of Croatia meets the necessary conditions for its recognition” and thus in effect granted conditional acceptance.


\textsuperscript{47} Note, however, that Germany’s clear resolve to unilaterally recognise Croatia and Slovenia raises questions about the effectiveness of Opinion No. 5. See, e.g., Dinan, \textit{Ever Closer Europe?}, pp. 486-7.


\textsuperscript{49} \textit{Ibid.}, p. 75. See also the historical factors described in footnote 13, above.

\textsuperscript{50} In the last paragraph of the opinion, \textit{ibid.}, at p. 76, the Commission states: “This assessment could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of the citizens of the SRBH [Socialist Republic of Bosnia-Herzegovina] without distinction, carried out under international supervision.”
to April 1, 1992, but was boycotted by the Serbian minority. Despite such difficulties, the EC and US began to consider the desirability of recognising Bosnia-Herzegovina for other reasons. The situation in the former Yugoslavia was deteriorating dramatically and there was some evidence that the recognition of Croatia—coupled with the implementation of a UN Protection Force—had produced a calming effect. The EC and US “began to consider the possibility of recognizing Bosnia and Herzegovina as a means of averting the sort of violence that had afflicted Croatia.” The EC and US issued a joint statement declaring their willingness to recognise Bosnia-Herzegovina on 10 March 1992. It was recognised a little less than a month later, on April 7, 1992. By this date, the recognised ‘state’ of Bosnia-Herzegovina was in the midst of a bloody, full-scale war of secession.

Bosnia-Herzegovina’s case provides equivocal evidence of the value of human rights for recognition. On the one hand, the EC’s choice to freeze the recognition process because of the lack of participation by the Serb minority would seem to place high value on respect for the rights of minorities. But on the other hand it would seem that the eventual recognition of Bosnia-Herzegovina was dictated by other concerns. Also, the legitimacy of this later recognition is challengeable because the deficiencies in minority participation had not been corrected. As a result of such ambiguities, the most interesting thing about Opinion No. 4 is its listing of the extensive human rights undertakings offered by the Presidency and Government of Bosnia-Herzegovina. Opinion No. 4 reviews evidence indicating the republic’s acceptance of the commitments found in the Guidelines, Declaration and draft Convention, as well as its acceptance and undertaking to “apply the United Nations Charter, the Helsinki Final Act, the Charter of Paris, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and all other instruments guaranteeing human rights and freedoms.” Furthermore, the Constitution of the SRBH guarantees “equal rights for the ‘nations of Bosnia-Herzegovina—Muslims, Serbs and Croats—and the members of other nations and ethnic groups living on its territory,’” and in its application the government of the SRBH went so far as to offer to enter into a federal arrangement in a “new Yugoslav Community” if certain conditions were met. What the actual effect of these...
extensive guarantees by Bosnia-Herzegovina was upon the EC recognition practice, however, is unknown.56 It is difficult to determine whether, on the one hand, the combination of SRBH human rights guarantees and the referendum’s outcome, or on the other the threat of escalating violence, most prompted US and EC recognition.

4. Macedonia

In contrast, the application of the Former Yugoslav Republic of Macedonia was clearly supported in Opinion No. 6.57 The Arbitration Commission considered a variety of statements and declarations from the Macedonian government as well as provisions from its Constitution, which taken together provided that: the republic was an equal legal successor to the rights and obligations of the Socialist Federal Republic of Yugoslavia (thus giving effect to the Guideline human rights criteria), it had set up a special Council for Inter-Ethnic Relations to guarantee the rights of ethnic and national groups and minorities, it had accepted the draft Convention mentioned in the Declaration, and through its recently-adopted Constitution it had implemented a large number of minority protection rights.58 Nevertheless, its actual recognition was substantially delayed because of conflicts with Greece over use of the word “Macedonia” in the name of the new state.59

Of interest regarding this opinion is the low level of reference to general human rights as opposed to minority rights. More striking, the opinion revealed an overwhelming concern on the part of the EC to have the Republic of Macedonia confirm that it had no territorial ambitions. Macedonia was required to respect the inviolability of borders and not to engage in hostile propaganda against a neighbouring EC Member State.60 The latter concern clearly reflected the Greek influence upon the EC recognition process, which is also implicit in the final paragraph of the Declaration on Yugoslavia.61 The Arbitration Commission even held that “the use of the name ‘Macedonia’ cannot therefore imply any territorial claim against another State.”62 Consequently, Macedonia’s eventual recognition would not seem to provide

56 Its effect upon actual respect for human rights has been limited, however, as illustrated in Figures 10.1 and 10.2, below.


58 Ibid., pp. 78-9.

59 See also footnote 34, above.

60 Ibid., pp. 78-9. This was taken very seriously by Macedonia, which amended its Constitution to include provisions explicitly stating that (1) it had no territorial claims against neighbouring states, (2) could not change its borders except in accordance with the Constitution, the “principle of voluntariness” and generally accepted international norms, and (3) would not “interfere in the sovereign rights of other states and their internal affairs”: ibid., p. 80.

61 See the final paragraph of the Declaration, reproduced in footnote 28, above.

62 Opinion No. 6, ibid., p. 80.
strong evidence of the importance of human rights to the EC recognition process. Rather, the delays it experienced in being recognised indicate that human rights considerations were less important than political ones.63

5. Serbia and Montenegro

Serbia and Montenegro did not seek recognition. Both argued instead that that they were entitled to continue their combined legal personality because they had existed as independent states before joining the Socialist Federal Republic of Yugoslavia (SFRY). Serbia and Montenegro asserted that they had not relinquished their international legal personality in the intervening period and were therefore entitled to re-assert such personality if the SFRY ceased to exist.64 For this reason when the Assembly of the SFRY promulgated the Constitution of the Federal Republic of Yugoslavia (FRY), it claimed to have transformed the SFRY into the FRY, made up of the two republics of Serbia and Montenegro.65

This argument caused the Arbitration Commission some difficulty when it came to considering the FRY claim, as in its first opinion it had ruled that Yugoslavia was in a process of dissolution.66 Thus an Interlocutory Decision was required to dispose of challenges to the Commission’s competence to hear these matters, and only then could Opinions 8, 9 and 10 go on to resolve several questions about the status of FRY. Opinions 8 and 9 concluded, respectively, that the process of dissolution of SFRY was now complete, and that all of the succession of states problems brought about by this dissolution must be solved by peaceful agreement (by means of inquiry, mediation, conciliation, arbitration or judicial settlement). Opinion 10 concluded that FRY could not be considered the sole successor to SFRY, and therefore must be deemed to be a new state. As such, according to the Commission, it must fulfil the recognition Guidelines in the same manner as the other republics.67

63 The UN’s admission of Macedonia on the condition that it be provisionally referred to as the “former Yugoslav Republic of Macedonia” has been argued to have been contrary to the provisions of the Charter of the United Nations (Art. 4), and the 1948 opinion of International Court of Justice, Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. Rep. 57. See, e.g., Igor Janev, “Notes and Comments: Legal Aspects of the Use of a Provisional Name for Macedonia in the United Nations System” (1999) 93 A.J.I.L. 155-60. See also the discussion of this case in footnote 5, above.


65 Ibid., p. 53. See also the discussion in footnote 38, above.


Because of FRY’s peculiar situation, the Arbitration Commission did not formally assess any human rights requirements for Serbia and Montenegro in these opinions. Moreover, even though the republics were said to be subject to the Guidelines and Declaration on Yugoslavia criteria in any future applications, no such criteria were formally applied to FRY because it never sought recognition. Rather, its precise legal status with respect to EC Member States seems to have developed in stages. On April 9, 1996, for example, the European Union described FRY as “one of the successor states to the Socialist Federal Republic of Yugoslavia” after an agreement was signed between FRY and the Former Yugoslav Republic of Macedonia. This description was made, however, in the context of generally opening up the possibility of FRY’s subsequent recognition by EC Member States. Guideline-type criteria were mentioned in connection with potential EC Member State recognition, as the EU Presidency’s declaration specified that the FRY’s recognition depended upon a “constructive approach” on its part to, inter alia, “full respect for human rights, minority rights and the right to return of all refugees and displaced persons and the granting of a large degree of autonomy for Kosovo within the FRY.”

The late and only partial application of such criteria, mainly as a result of squabbles over its identity, is especially interesting in light of the fact that the seeds of the dissolution of Yugoslavia were sown in FRY territory. The conflict started in the Serbian province of Kosovo and continued to bear bitter fruit there until the end of the millennium. Kosovo’s human rights situation therefore was, and should have remained, of the utmost importance to the region as a whole. One could argue that human rights should have been the paramount consideration in the EC’s relations with the Federal Republic of Yugoslavia. In a similar manner, the Arbitration Commission’s non-application of the principle of self-determination

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69 Declaration by the Presidency, ibid.

70 Continuing violent clashes between riot police and civilians in Kosovo in January 1990, led to the deployment of Yugoslav National Army units in the province on February 20, 1990. This was followed in July 1990 by a Serbian constitutional referendum, which supported the creation of a new constitution that would effectively end Kosovo’s special autonomous status. This latter referendum had a generally high voter turnout, except in the province of Kosovo where only 25% of the population voted (mostly Serbs). Keesing’s Record of World Events 1990, pp. 37173, 37255, 37621. The Slovenian and Croatian declarations of sovereignty almost immediately followed these events. Ibid., p. 37622. See also the historical summary in footnote 13, above. Human rights violations in Kosovo in 1999 led to NATO air strikes against both Serbian troops in Kosovo and Serbia generally.
to the situation of Kosovo is equally striking. An effective implementation of human rights or self-determination norms might have defused the later Kosovo conflict. It certainly would have improved the general FRY human rights record. In sum, as with Macedonia, the political and strategic issues connected with FRY seem to have taken precedence over human rights and democratic norms in EC-FRY relations.

In conclusion, the results of the concrete application of the Guidelines recognition criteria to all of the republics of former Yugoslavia yield mixed hopes for the importance of human rights requirements as a general condition for recognition. The actual EC practice only supports the cases of Slovenia and Croatia as providing favourable evidence of the centrality of human rights to recognition. Bosnia-Herzegovina’s recognition yields conflicting evidence. Macedonia’s recognition provides a mainly unfavourable precedent, and the relations of EC Member States with Serbia and Montenegro minimally affect these developing recognition standards. At the very least, the overall practice reveals widespread inconsistencies.

E. EFFECTS OF EC RECOGNITION

What were the practical consequences of EC recognition for human rights standards in these republics? Although this is too large a topic to cover in detail here, a sample of recent international human rights reports helps to reveal two divergent patterns. On the one hand, all of the former-Yugoslav republics (except the Federal Republic of Yugoslavia) took positive steps to promote human rights by becoming parties to a variety of treaties shortly after gaining independent statehood status (i.e., within roughly a year or less for most treaties). Figure 10.1, below, illustrates this trend by contrasting recognition dates and treaty accession/succession dates for the five republics:

71 See, e.g., Hillgruber, “The Admission of New States to the International Community,” pp. 508-9 (critically discussing the EC’s non-application of the principle of self-determination to Kosovo).

72 As summarised by Rich (writing in 1993), in “Recognition,” at p. 56:

There has been widespread recognition of a state which has no control over one third of its territory (Croatia). A country has been admitted to the UN while it was clear that its government had no effective control over any areas including the capital city (Bosnia and Herzegovina). A putative country (Macedonia) is being denied recognition because a neighbouring country objects to its name even though it meets all traditional criteria and appears to meet the conditions set by the EC.

Note, however, that Türk, in “Recognition,” at pp. 69-70, argues that the Arbitration Commission “was accurate and consistent in its opinions” and that only the political organs of the EC were responsible for the inconsistency.

This figure reveals that Bosnia-Herzegovina, Croatia, Macedonia and Slovenia all significantly increased their treaty-based human rights commitments shortly after recognition by EC Member States. Macedonia’s increase closely followed its acquisition of Membership in the United Nations.

On the other hand, the contrasting trend has been one of a general failure of these ex-Yugoslav republics to respect human rights on the ground. Following their recognition they all continued to grapple with significant human rights abuses, lapses in the rule of law, and weak democratic institutions. At a formal level, most of the new states did not file, or filed years late, the reports that were required for the same human rights treaties they had just joined.\(^76\) At a more substantive level, citizens of all of the former Yugoslav republics


\(^75\) The Former Yugoslav Republic of Macedonia was subject to piecemeal recognition by the Member States of the EC between April 1993 and December 1995. The latest possible date for Community-wide recognition appears to be that of 22 December 1995, when the Council of the European Union approved a negotiating mandate for the Commission to negotiate a trade and co-operation agreement with the FYRM. See the notes in footnote 34, above.

\(^76\) See Human Rights Internet, "Volume 5: Central and Eastern Europe," in *For the Record 2000*. Bosnia and Herzegovina, for example, had the following record of report submission: initial reports for ECOSOC due 30 June 1995, initial and second reports for ICCPR due 5 March 1993 and 1998, initial through third reports for CERD due 16 July 1994, 1996, and 1998, initial and second periodic reports for CEDAW due 1 October 1994 and 1998,
continued to suffer under state-tolerated (and sometimes state-masterminded) conditions of ethnic discrimination and violence, police brutality, inadequate and corrupt legal systems, widespread electoral fraud, impoverished economic conditions, and vast crime-related ‘shadow economies.’

More interesting, although much harder to gauge accurately, are the long-term post-independence human rights trends of these states. It would be difficult, if not impossible to causally connect these negative trends to the particular human rights requirements of the EC recognition process. The ongoing military conflicts and the social difficulties that followed them would have had enormous implications for each state’s ability to promote and protect the human rights of its citizens. Keeping such factors in mind, generally speaking the evidence appears to indicate that the EC recognition process did not make much of a difference in increasing practical respect for human rights. On the rather ‘rough and ready’ scale used by Freedom House to monitor and assess political rights and civil liberties in the world the former Yugoslav republics have not, generally speaking, dramatically improved in their respect for human rights. After initial periods of instability (immediately following independence), most of the new states settled into consistently low levels of respect for political rights and civil liberties. Things have improved slightly in the last couple of years,
but the overall status of the states in the region primarily remains “partly free.” It should be noted that the internal FRY province of Kosovo ranked worst in the region, as seen in Freedom House’s tables dealing with “Disputed Territories”: Freedom House, “Table of [Disputed] Territories: Comparative Measures of Freedom,” in Freedom in the World 1999-2000, and idem., “Table of Disputed Territories: Comparative Measures of Freedom,” in Freedom in the World 2000-2001. Kosovo’s respect for both political rights and civil liberties was ranked 6 out of 7 (7 being the worst), giving it an overall status of “not free.”

Figure 10.2: ‘Freedom in the World Ratings’ for the Republics (1989-98 and 1999-2001)

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It should be noted that the internal FRY province of Kosovo ranked worst in the region, as seen in Freedom House’s tables dealing with “Disputed Territories”: Freedom House, “Table of [Disputed] Territories: Comparative Measures of Freedom,” in Freedom in the World 1999-2000, and idem., “Table of Disputed Territories: Comparative Measures of Freedom,” in Freedom in the World 2000-2001. Kosovo’s respect for both political rights and civil liberties was ranked 6 out of 7 (7 being the worst), giving it an overall status of “not free.”


The Freedom House surveys, in ibid., rank each state on a scale of 1 to 7 for political rights and civil liberties (with 1 being the highest, and 7 the lowest or worst), and as falling under a status of either being “free” (F), “partly free” (PF), or “not free” (NF). In Nations in Transit 1998 each country report is divided into nine categories which are factored into the final year ratings, namely, the categories of political process, civil society, independent media, governance and public administration, rule of law, corruption, privatisation, macroeconomics and microeconomics. Figure 10.2 does not reproduce these more detailed categorisations. For an explanation of the methodology of the Freedom House report see Charles Graybow, “Explanatory Notes,” in ibid., as available at http://www.freedomhouse.org/mit98/graybow.html (accessed 14 November 2000). Note that Graybow urges caution regarding the economic ratings (due to the tendency of some countries to inflate their progress for external consumption), and also warns that the country “ratings ... should be taken as comparative or ordinal, not absolute.”
As this figure illustrates, only Croatia dramatically improved in its levels of respect for political rights and civil liberties, and only Slovenia consistently came close to the high levels of protections available in Western and European countries. Bosnia-Herzegovina’s relative increase is weakened because it still faces tremendous ethnic divisions.\(^3\) It also requires basic assistance from foreign peacekeeping forces and international authorities.\(^4\) Slovenia’s consistently high human rights ratings may have less to do with active attempts on the part of its government to improve human rights, and rather more to do with two other factors: (1) Slovenia’s quick and efficient military campaign against the Yugoslavian National Army (lessening the duration and after-effects of the war), and (2) its subsequent vigorous efforts at compliance with European Union membership requirements.\(^5\)

More generally, for many of the new states that arose from the former USSR and former Yugoslavia, the international community has tended to prioritise economic and

\(^3\) After the General Framework Agreement for Peace in Bosnia-Herzegovina (the Dayton Accords) ended the 1992-95 civil war, Bosnia and Herzegovina was divided into two entities: a Muslim Croat Federation and an Serbian Republic. But as clearly set out in the Freedom House report section entitled “Bosnia and Herzegovina,” in Nations in Transit 1998, ed. A. Karatnycky, A. Motyl, and C. Graybow, these two entities barely co-operate in practice:

In general, however, political and governmental institutions in Bosnia and its two entities operate with limited transparency. The governments of Bosnia and the entities generally try to prevent opposition media from gaining access to official news and information, with the result that the official media’s interpretation of such news is generally the only view that the public receives.

Virtually all of the joint institutions of Bosnia barely function. Bosnian Serbs have been particularly obstinate in boycotting meetings of the joint presidency. In general, the country’s national institutions have accomplished little. They have reached agreement on vital issues—such as a common passport, citizenship matters, and the composition of the diplomatic service—only under duress.

In the Serbian Republic in 1997, the power struggle between President Biljana Plavsic and Radovan Karadzic resulted in the division of many institutions into factions supporting Plavsic, who is based in Banja Luka, and Karadzic, who is based in Pale. While the situation has improved somewhat, much of Bosnian Serb territory remains under the control of war criminals and criminal underground leaders, and there is little semblance of a working government.

\(^4\) Foreign involvement in Bosnia-Herzegovina remains high. A NATO-led Implementation Force (IFOR) served in Bosnia to implement the peace agreement and was replaced by the smaller NATO-led Stabilization Force (SFOR). Under the Dayton Accord peacekeeping forces are given ultimate authority to monitor broadcast media. As a result, the Dayton Accord countries’ High Representative has power to regulate broadcast media, and this power was invoked in May 1997 in relation to elections. See ibid.

\(^5\) See the historical overview regarding Slovenia in footnote 11, above. In Adrian Karatnycky, Alexander Motyl, and Charles Graybow, eds., Nations in Transit 1998, the impact of Slovenia’s efforts to become a member of the EU is covered in passing. Slovenia signed an Association Agreement with the European Union in 1996 and consequently has been undertaking various EU-readying processes, such as those concerned with regionalization, land ownership, and fiscal policies. Ibid. Slovenia is not in the list of states scheduled for accession in 2002, but the European Council has noted its “satisfaction with the substantive work undertaken and progress which has been achieved in accession negotiations” with it: Helsinki European Council, “Presidency Conclusions,” 10-11 December 1999, Doc/99/16, as available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action=gettxt stigma&doc=DOC/99/160/RAPID&lg =EN (accessed 16 November 2000).
security concerns at the expense of human rights.\[^{86}\] Shallow and formal, in contrast to deep and substantive, human rights requirements have been deemed sufficient for the Council of Europe, which is eager to bring these states back into the Western European fold.\[^{87}\] Such relaxed human rights standards are striking when one considers that the Council itself acknowledges significant defects in the human rights regimes of these states.\[^{88}\] The European

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\[^{86}\] E.g., Human Rights Watch, in its summary regarding “Europe and Central Asia: Human Rights Developments,” in *World Report 1999*, comments:

> While the international community touted the need for regional stability and a regional approach to security concerns, governments such as the United States and the member states of the E.U. often ignored the regional security threat posed by human rights violations and indicated no recognition that the failure to insist upon accountability for atrocities in one country or region often fueled abuses in another.

In Human Rights Watch, “Europe and Central Asia Overview,” in *World Report 2000*, further criticisms are levied against the EU and OSCE for their economic and security-driven agendas, in the face of human rights rhetoric:

> Yet despite the backtracking on human rights protections throughout the region, the US government and the European Union squandered economic and diplomatic leverage, granting lucrative trade benefits to the countries of the region. The Organization for Security and Cooperation in Europe—the regional body most active in Central Asia—paid lip service to human rights, but increasingly pursued a policy largely devoid of a human rights strategy, seeking instead to focus on its efforts on economic development, the environment, and security—uncontroversial issues that were of interest to the governments of Central Asia.

\[^{87}\] E.g., Human Rights Watch, in “Europe and Central Asia Overview,” in *World Report 2000*, reports:

> The strain on the [European Court of Human Rights] and its authority was troubling as its jurisdiction extended to new signatory states with seriously defective human rights records and neither the political will nor the rule of law culture necessary to implement the court’s decisions. This included Georgia, which gained admittance in April, but repealed important legal reforms only one month after gaining membership. This threat to Council of Europe standards was compounded by pressure for premature admission of applicant states, especially Bosnia and Herzegovina, Armenia, and Azerbaijan. In May, the Parliamentary Assembly, in consultation with the Office of the High Representative, identified eight conditions for admission to the Council of Europe that Bosnia could and should meet by September. In September, one of the Parliamentary Assembly’s rapporteurs, Swiss parliamentarian Peter Bloetzer, reported that the eight conditions had not been met but recommended nonetheless that the Council of Europe prioritize only four of those conditions. Arguing that Council of Europe admission would help solidify the Serb, Muslim, and Croat confederation, Bloetzer pressed for admission of Bosnia as early as January 2000, notwithstanding the fact that the Bosnian authorities had persistently demonstrated limited political will to live by Council of Europe norms. Meanwhile, applications for admission remained pending for Armenia and Azerbaijan, with Council of Europe officials suggesting they might be admitted in 2000 because the two countries could not be made to wait forever, not because they had demonstrated any particular commitment to implementing Council of Europe principles.

\[^{88}\] Bosnia and Herzegovina, for example, has been allowed much leeway despite deep deficiencies in its human rights regime, as seen in the following comments by Human Rights Watch, in “Bosnia and Herzegovina,” in *ibid.*:

> In December 1998, the Eminent Lawyers’ Report on Bosnia and Herzegovina concluded that the human rights situation in Bosnia and Herzegovina did not conform to Council of Europe standards. In April, the rapporteurs of the Political Affairs Committee and the Legal Affairs Committee again drew attention to significant shortcomings in this respect. On May 26, the Political Affairs Committee published a list of conditions to be fulfilled by September 1999, including adoption of a permanent election law, compliance with the national human rights institutions, cooperation with the ICTY, restructuring of the police, and implementation of housing laws. Although significant progress had been made on some of these issues, Bosnia and Herzegovina still did not meet the conditions articulated by the council, and further progress was needed. The rapporteur of the Political Affairs Committee, in his report of August 1999, came to a similar conclusion. Meanwhile, the Council of Europe’s representation in Bosnia continued its activities on freedom of expression, trafficking of women, legal reform, prison systems, and other issues.

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Union has followed a similar conciliatory approach in its recent relations with the region.\textsuperscript{89} So too has the US, which was particularly concerned with obtaining support for its NATO intervention in Kosovo.\textsuperscript{90} These practices indicate that Europe and the West seem to have accepted lesser standards with respect to human rights and democracy for the ex-Yugoslav republics because of strategic and economic considerations. Low standards, it might be added, that would not be acceptable elsewhere.\textsuperscript{91} In sum, there appears to have been limited progress in increasing respect for human rights following the EC recognition process.

How should this subsequent pattern affect our analysis of the EC’s human-rights related recognition process? On the one hand it could lead to deep cynicism. Because all of these republics were recognized under the Guidelines, some in spite of significant human rights problems, we may be led to deeply question the practical relevance of the EC recognition policy. Indeed, one could argue that these human rights obligations amounted to no more than ‘ink on paper.’ At the very least the aftermath of the EC recognition process requires us to be cautious regarding the strength of the conclusions that can be drawn from it. At best we might argue that a bold new human rights policy for recognition was tested in the harshest of circumstances, circumstances which necessarily weakened its effectiveness. Seen in this light, \textit{any} success would be significant. At worst we could say that the human rights

\textsuperscript{89} E.g., in “Europe and Central Asia Overview,” in \textit{ibid}. the following critical passage describes the way that the EU sacrificed human rights concerns for regional support for NATO’s bombing campaign:

The human rights component of the European Union’s (E.U.) relations with the countries of Eastern Europe, the Balkans, and the newly independent states repeatedly gave way in 1999 to competing political and economic interests. First, in exchange for their support of the NATO attacks on Serbia, the E.U. developed for the countries of southeastern Europe a new “Stabilization and Association Process,” as part of the E.U.-led International Stability Pact for South Eastern Europe. Particularly for Croatia, Bosnia and Hercegovina, Albania, and Macedonia, the new process held out the promise of substantially enhanced trade and assistance benefits, while seeming to downplay the political criteria contained in the E.U.’s prior “regional approach” to relations with those countries.

Note, however, that the EU has been more cautious with Croatia’s application for Council of Europe membership, and even denied it assistance under the PHARE reconstruction programme due to insufficient progress on human rights and democracy. \textit{Ibid.}

\textsuperscript{90} E.g., Human Rights Watch, “Macedonia,” in \textit{ibid}. provides the following information:

Macedonia was a crucial base of operations for NATO during its air campaign in Yugoslavia, although offensives were never launched from the country. As of October, 7,000 NATO forces, members of the Kosovo Force (KFOR), were still in the country providing logistical support to the mission in Kosovo. NATO stated that it would respond to any attempts by Yugoslavia to threaten Macedonia’s security. […]

As in previous years, the United States maintained close relations with the Macedonian government, even though three new political parties were in power. Mutual concerns centered on the Kosovar crisis and Macedonia’s role in the NATO campaign against Yugoslavia, which made the U.S. government hesitant to criticize the Macedonian government’s human rights record, especially the unlawful treatment of Kosovar Albanian refugees.

\textsuperscript{91} Marks, in \textit{The Riddle of All Constitutions}, at p. 50-52, makes this point in the context of criticising Schumpeter’s minimalist vision of democracy, described as ‘low intensity democracy.’ She argues that this minimalist vision is currently being recycled and applied to post-communist and developing states. In \textit{ibid}, at pp. 67-9, she also argues (following David Kennedy), that the West has imposed a two-track system of economic and political development upon Eastern Europe, with the latter suffering under systems the West would not tolerate.
requirements of the Guidelines were, practically speaking, irrelevant in their application to the former Yugoslav republics. The cases of Bosnia-Herzegovina and Macedonia both would seem to support the latter argument. Bosnia-Herzegovina was recognised despite its clear inability to satisfy the Guidelines, whereas Macedonia was not recognised, even though it fulfilled all relevant requirements.

But perhaps a cynical view of the EC recognition policy with respect to the ex-Yugoslav republics is too easy, even short sighted. This is because regardless of the particular results in the Yugoslav case the mere attempt to impose human rights criteria upon state recognition could have far-reaching implications. The European Community set a unique legal precedent in recognition theory, even if the actual implementation of the Guidelines was inconsistent. This is why the formal aspects of this recognition practice, namely, the texts of the Guidelines and Declaration and the opinions of the Arbitration Commission, are so important. As precedents they can shape the direction of the future recognition practice of the EC, and more broadly, may help shape the 'discourse' of international recognition practice in general. Of course such precedents must be viewed cautiously, and must be balanced against the low or even declining human rights standards in most of the states after independence. Nevertheless they remain important because, as pointed out by Karen Knop, human rights were brought not only into the particular dialogues between the European Community and the states seeking recognition, they also were brought into the overall discourse of recognition theory.

In relation to the EC, for example, it should be noted that the general requirements of support for human rights, democracy and the rule of law, have since been incorporated into the Common Foreign and Security Policy (CFSP) provisions of the Treaty on European Union. This makes them relevant to the Member States of the EU as well as to the relations

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92 Knop, in “The 'Righting' of Recognition,” at p. 48, cautions that she is “not suggesting that minority rights were the only factor, or even the decisive factor, in the Community's decisions to recognize new states in Eastern Europe and the Soviet Union. To proclaim the triumph of human rights through recognition in regions ravaged by civil war would be a macabre distortion of reality.”

93 Knop, ibid., describes these features of the recent EC recognition practice:

First, rights emerged as a new strain in the discourse of recognition. Observance of the right of self-determination and minority rights became part of the rhetoric of legitimacy for recognition. Second, rights became part of the dialogue, if a dialogue manqué, between the recognizing Community and the republic seeking recognition. A state's demand for recognition was no longer a request for the acknowledgment of a fait accompli. Instead, recognizing the rights of the people as a whole to self-determination and the rights of minorities became an integral part of the process of recognizing the state. Recognition thus oscillated between the fields of international law and international human rights law.

94 Articles 6(1) and 11 of the Consolidated Version of the Treaty on European Union (i.e., after the Treaty of Amsterdam), state:

Article 6
between Member and non-Member states in CFSP areas. Conditions regarding human rights and democracy increasingly are being inserted into EU agreements with non-Member States.\textsuperscript{95} Additionally, democratic institutions and a commitment to human rights are now pre-requisites for becoming a new member of the EU.\textsuperscript{96} Moreover, the EC recognition precedents with respect to the former Yugoslav republics could be invoked beyond the European sphere. The principles invoked in the Guidelines and decisions of the Arbitration Commission, including self-determination and \textit{uti possidetis}, are potentially of universal application.\textsuperscript{97} Further, even though the EC approach may not be necessary for some contexts (arguably the Yugoslav situation could have been covered by the normal rules of state succession as Yugoslavia was part of the CSCE framework and bound to the same human rights treaties), it clearly has the potential of attaching new and much-needed levels of scrutiny to

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1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. [...]  

\textit{Article 11} 

1. The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be: 

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter; [...] 

- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders; [...] 

- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. 

2. The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. [...] 

The Council shall ensure that these principles are complied with. 


\textsuperscript{96} See, e.g., Dinan, \textit{Ever Closer Union?}, pp. 478-80 (discussing applications by Hungary, Poland, and then Czechoslovakia, as well as the recommendations of the 1993 Copenhagen summit). 

\textsuperscript{97} Rich, “Recognition,” pp. 60-61. At page 63 the same author goes on to state: 

As the underlying principles informing the actions of the international community in the cases of the break-up of the USSR and Yugoslavia are of general application, it will be difficult to limit their application to a single geographic area (Europe) or to a type of nation with a particular method of internal organisation (federalism). Yet there is no disposition in the international community to open the door to numerous claims of independence and secessionist actions throughout the world. Lying uncomfortably between these principles and the practice of \textit{realpolitik} is a wide grey area in which international law finds itself. 

recognition processes. By bringing human rights and recognition together the European Community (and the US) emphasised human rights commitments in a much more serious, more interventionist manner than done before. This has led Karen Knop, for example, to extrapolate that the addition of human rights standards to state recognition effectively brought human rights into the central meaning of what it is to be a state. More restrictively, we could certainly say that it brings human rights into what it means to become a state. In any event, there is some hope that human rights and democratic norms could become part of the general law of state recognition as well as of the more specialised law dealing with the membership of international organisations. Let us look critically at some of the consequences of such developments.

III. GENERAL CONSEQUENCES OF ADDING HUMAN RIGHTS AND DEMOCRACY TO STATE RECOGNITION CRITERIA

Certain difficulties may arise as a result of the specific manner in which the European Community attempted to add human rights and democratic conditions to recognition. Let me raise five. The first and simplest criticism of the EC process, clearly illustrated in the cases involving the Yugoslav republics, lies in the lack of consistent application of human rights standards. By bringing human rights into play but at the same time making their application incoherent, the usefulness of the EC precedent in other contexts may be diminished. Secondly, the practice can be criticised for injecting a policy element into state recognition. The realpolitik elements in the EC recognition process—revealed in Bosnia-Herzegovina’s premature recognition, Macedonia’s much delayed one, and the inclusion of such vague standards as “the political realities in each case” in the Guidelines themselves—must bring substantial uncertainty into recognition practice. By injecting clear policy elements the EC precedent in fact challenges the reasonably well-settled tendency of states to base their state recognition decisions upon the

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98 Under the Vienna Convention on Succession of States in Respect of Treaties (1978), the principle of continuity of treaty obligations applies to all successor states unless falling within the category of a ‘newly independent state,’ which according to Article 16 is not bound by them (the ‘clean slate’ approach). "Newly independent state" is defined in Art. 2(f) as “a dependent territory for the international relations of which the predecessor state was responsible” (meaning old colonies). Succession of states in cases of separation of parts of a state is covered by Art. 34, which provides for continuity of treaty obligations. See generally, Menno T. Kamminga, “State Succession in Respect of Human Rights Treaties,” (1996) 7 E.J.I.L. 469-84.

99 Knop, in “The ‘Righting’ of Recognition,” at p. 55, comments that "even if human rights guarantees are seen as simple succession to treaty obligations, the interactive approach taken to them would seem to represent a deeper and more interventionist commitment.”

100 Knop, in ibid., at pp. 37-38, argues that because recognition is so closely tied to statehood, the addition of human rights standards to recognition effectively brings human rights into the central meaning of what it is to be a state. It "projects these obligations onto the very idea of the state as the paradigmatic subject of international law."
fulfilment of the traditional criteria for statehood. In bringing other, political factors to bear the EC appears to confuse the main legal purpose of recognition—establishing the existence of the legal status of statehood—with its political component, which merely describes the willingness of the recognising state to enter into political and other relations with the recognised state. Whether one adheres to the 'declaratory' or 'constitutive' theory of recognition, each theory pre-supposes some standard test for establishing the legal existence of a state. Neither can do without a legal recognition component. In this way the EC practice may be problematic because it erodes the existing 'objective' standards for statehood. By weakening the understanding of recognition as the acknowledgement of the establishment of a legal fact, the EC recognition process may also encourage violations of international law through premature recognition (which infringes the sovereignty of the original state). This arguably occurred when the European Community recognised Bosnia-Herzegovina, since at the point of recognition the Arbitration Commission had merely ruled that Yugoslavia was in a "process of dissolution," and only later did it rule that the dissolution was complete.

Such criticisms, however, may be countered in two ways. Firstly, by bringing human rights and democracy into recognition this practice may be said to be expanding the legal criteria for statehood, rather than inserting new policy elements. It could be said to be adding democratic and human rights requirements to our understanding of what it means to be a state. If seen in this

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101 As summarised by Rich, in "Recognition," at p. 55: "There have always been exceptions to the rule, but the international community had generally come to accept the traditional criteria for statehood as the proper means for taking decisions on recognition." See also, Kelsen, "Recognition in International Law," pp. 607-8; Mahmoudi, "Recognition," pp. 136-7. Note, however, that these traditional criteria were amoral. The conditions that the EC added to its recognition practice therefore can be seen as an attempt to insert a moral quality in the area. If so, inconsistencies in their application may decrease or remove such moral qualities. As noted by Rich, in "Recognition," at p. 64: "the enemy of such a moral stand is inconsistency, the very factor the traditional criteria tried to avoid."

102 E.g., Mahmoudi, in "Recognition," at p. 144, argues that when the EC dealt with Yugoslavia: "Recognition in this case was not deemed, as is normally the case, as a simple declaration of fact. It was a means of effectively influencing the situation." See generally, Kelsen, "Recognition in International Law" (describing the differences between the legal and political aspects of recognition theory).


104 Thus, as argued by Kelsen, in ibid., at p. 610: "[R]ecognition of a community as a state, even though it does not fulfill the conditions laid down by international law, is a violation thereof. If, for instance, part of an existing state tries to separate itself by revolution, and another state recognizes this part of the state as a state before the conditions prescribed by international law are fulfilled, the recognizing state infringes upon the right of that state against which the revolutionary attempt at separation is directed."

105 In Opinion No. I, issued on 20 November 1991, the Arbitration Commission ruled that "the Socialist Federal Republic of Yugoslavia is in the process of dissolution": (1992) 3 E.J.I.L. 183 (emphasis added). Bosnia-Herzegovina was recognised by the EC on 7 April 1992. But only in Opinion No. 8, issued on 4 July 1992, did the Commission ruled that "the process of dissolution of the SFRY ... is now complete and that the SFRY no longer exists." See Rich, "Recognition," p. 50, and (1993) 4 E.J.I.L. 88, respectively.
manner, the EC practice simply brings further *legal* criteria to bear on state recognition. Secondly, one could argue that the formal legal/non-legal division implied by these criticisms has rarely, if ever, existed. The practice relating to recognition of states provides several examples of non-recognition based upon criteria outside of those formally used to determine statehood. Therefore additional criteria may not be quite so problematic.

These responses, however, lead us to the third difficulty with the EC practice. This is that conditioning recognition on anything other than certain defined and basic criteria for statehood may prove problematic because it leaves open the door for a variety of abuses. Not only have these additional conditions—from respect for human rights, to the rule of law, to the environment, to the freedoms of the market—been argued to have "no ground in international law," but they also could lead to imposition of particular value systems or ideologies. In this sense, although the actual Guidelines requirement for subscription to certain human rights standards may be beneficial, other standards, such as requirements for free market capitalist economic systems, might lead to wider ideological impositions as well as to significant difficulties for the states concerned. Dianne Otto, for example, has written critically about the effects of such ideological impositions in the context of women’s rights. She argues that the ‘Westernization’ of Eastern European and Soviet bloc countries following their subscription to democracy, human rights and the rule of law standards actually created greater inequality for women by imposing, amongst other things, narrower visions of the roles of women in these societies. Clearly any future EC-style recognition practice will have to guard against such difficulties. As articulated in earlier Chapters, requirements for adherence to human rights and

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106 See, e.g., Reisman, “Sovereignty and Human Rights,” p. 869 (n. 11) [providing the examples of Rhodesia in 1965, South Africa’s occupation of Namibia, and later treatment of South Africa itself].

107 Mahmoudi, “Recognition,” p. 155. Rich, in "Recognition," at pp. 55-6, reminds us that “[i]t had been thought that the setting of conditions with respect to such matters as religious practices, the level of ‘civilisation’ and the applicable political system were improper because they implied a value judgement about how the new state should be organized” (citations omitted).

108 Both the Helsinki Final Act and the Charter of Paris specifically include sections envisaging capitalist free market economies, which would be applicable to these new states. See, e.g., the section in the Helsinki Final Act entitled “Co-operation in the Field of Economics, of Science and Technology and of the Environment” and the sections in the Charter of Paris entitled “Economic Liberty and Responsibility” and “Economic Co-operation.” The full text of both of these documents is available on-line through the on the OSCE web site at [http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm](http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm) and [http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm](http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm), respectively (both accessed 15 November 2000).

109 Otto, in “Challenging the ‘New World Order,’” at pp. 386-94, argues that the new Western liberal ideologies resulted in: (1) the removal of quota systems for women political candidates (decreasing the number elected), (2) increases in poverty (which most impacts women), (3) restrictions upon women’s control over reproduction (and abortion), and (4) an overall decrease in social and economic rights. Note that Otto is not saying that the former communist systems were superior to Western-style ones. Her point is merely that the sudden imposition of Western social and commercial values in this period of transition dramatically diminished women’s rights: *ibid.*, at p. 395.
democracy must be carefully applied so as not to discourage the development of new and promising visions of democracy.

Fourthly, even if one favours the idea of imposing certain values upon states (i.e., regarding respect for human rights and democracy), recognition doctrine may be problematic simply because it is inadequate for this purpose. The decision to recognise or not recognise a state is a very blunt and cumbersome tool to promote human rights because it utilises an all-or-nothing process, one that occurs very rarely, and does not necessarily hold responsible those at whom it is aimed.110 This is the reason why the more political process of recognition of governments reveals such varied state behaviour—with some states using non-recognition as a means of coercion, but most preferring to only implicitly recognise a new government (thereby maintaining greater flexibility for their subsequent relations). The latter ‘soft,’ or implicit, forms of recognition allow the recognising state to retain the ability to engage in subtler forms of diplomatic persuasion, ones that are not possible with a simple act of recognition/non-recognition. Also, the act of not recognising a state or government may prove ineffective at punishing those in power—who in most cases will continue to rule despite the lack of international co-operation. The case of the FRY provides a telling, if merely analogous, example here. Non-recognition can in fact harm most the people one is trying to assist by legally isolating those in power.111 Further, such recognition practices may be unnecessary if the laws regarding state succession already bind new states to the same human rights treaty obligations that were binding on their predecessor states.112 Additionally, if any of the relevant rights are customary international legal ones, then all states will be bound to them regardless of formal acceptance (unless they can prove that they have been persistent objectors, which would be difficult in the case of a new state).113

110 Crawford, Democracy, p. 22.
111 See, e.g., ibid., pp. 21-2.
112 Menno T. Kamminga, in “State Succession in Respect of Human Rights Treaties” (1996) 7 E.J.I.L. 469-84, at pp. 482-3, reviews state practice, the pronouncements of international human rights tribunals and international organisations, and concludes:

State practice during the 1990s strongly supports the view that obligations arising from a human rights treaty are not affected by a succession of States. This applies to all obligations undertaken by the predecessor State, including any reservations, declarations and derogations made by it. The continuity of these obligations occurs ipso jure. The successor State is under no obligation to issue confirmations to anyone. Consent from other State parties is not required. Individuals residing within a given territory therefore remain entitled to the rights granted to them under a human rights treaty. [Citations omitted].


Nevertheless, a response to such criticisms is simply to acknowledge that the imposition of human rights requirements at the moment of recognition may be insufficient. This does not detract, however, from the utility of such practices as a first step in an ongoing process of supervision and enforcement. This brings us to the fifth and final problem, namely, that of enforceability. As illustrated by the break-up of Yugoslavia, such ‘guidelines’ may be less than effective on the ground during the recognition process, and may be difficult to enforce against recalcitrant states after recognition. In effect, they may bring human rights into the equation at the moment a state is created or recognised, but prove insufficient to keep those rights in focus later on. This can be seen in the lack of post-recognition enforcement of the Guidelines criterion for democratic governance. Some of the recent Freedom House surveys mentioned above show that out of the twenty-five new states that emerged in Central and Eastern Europe and the former Soviet Union, only eighteen had electoral democracies by the end of 1996. This number dropped to seven when assessed under the tougher criterion of being a “consolidated democracy” in 1998. By 2001 it had improved slightly, with ten consolidated democracies being listed. Nevertheless, the overall pattern suggests that cautious approach, referring to the provisions of the Universal Declaration of Human Rights as “either constituting general principles of law or representing elementary considerations of humanity”: Principles of Public International Law, 5th ed., p. 575. For a collection of essays about the peculiar problem of reservations to human rights treaties, see J.P. Gardner, ed., Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions (London: British Institute of International and Comparative Law, 1997).

114 Adrian Karatnycky, in “Political and Economic Reform in East Central Europe and the Independent States: A Progress Report,” in Nations in Transit 1997 (New York: Freedom House, 1997), as available at: http://www.freedomhouse.org/nit/intro_karatnycky.html (accessed 21 June 1997), states: “Of the twenty-five countries surveyed in this report, eighteen were electoral democracies at the end of 1996.” According to the report, the eighteen electoral democracies were Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, Albania, Croatia, Macedonia, Ukraine, Russia, Moldova, Georgia, and Kyrgyzstan; the seven that had not had free and fair elections and that were led by non-elected leaders were Azerbaijan, Armenia, Belarus, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan. In Nations in Transit 1998, only seven of twenty-eight countries were considered to be “consolidated democracies”: Poland, the Czech Republic, Hungary, Lithuania, Slovenia, Estonia and Latvia. The other twenty-one were ranked as either “transitional governments” (Mongolia, Bulgaria, Romania, Macedonia, Moldova, Russia, Croatia, Ukraine, Georgia, Kyrgyz Rep., Albania, Armenia, Yugoslavia, Bosnia, Kazakhstan and Azerbaijan), or “consolidated autocracies” (Tajikistan, Belarus, Uzbekistan and Turkmenistan). All of the previous countries are listed in descending order, from best to worst democratic conditions. See “Table A: Rankings and Classifications—East Central Europe and NIS,” of Adrian Karatnycky, “Nations in Transit: From Change to Permanence,” in Nations in Transit 1998: Civil Society, Democracy and Markets in East Central Europe and the Newly Independent States, ed. A. Karatnycky, A. Motyl, and C. Graybow, as available at http://www.freedomhouse.org/nit98/karat.html (accessed 16 November 2000).

115 See, e.g., “Table B: Nations in Transit 2001 Political and Economic Classifications,” in Nations in Transit 2001: Civil Society, Democracy, and Markets in East Central Europe and the Newly Independent States, ed. A. Karatnycky, A. Motyl and A. Schnitzer (New York: Freedom House, 2001), at p. 26 (also available at http://freedomhouse.org/research/nattransit.htm). Although the precise ordering of the countries changed from the 1998 report, the seven consolidated democracies remained the same and were joined by Slovakia, Bulgaria and Croatia (all of which moved from the “transitional governments” category). Tajikistan was the only “consolidated autocracy” to move up into the transitional governments category. Inexplicably, Mongolia was not included in the 2001 statistics.
linking human rights and democracy as requirements for recognition may not be sufficient to yield effective democratic practices.\textsuperscript{116}

In sum, the inclusion of human rights and democracy requirements in the law regarding recognition of states could prove helpful in promoting democracy globally, but the recent European Community recognition practice does not provide us with an ideal model for doing so. Difficulties revealed in the EC practice include its inconsistency, its limited effectiveness with respect to actual human rights violations, and its clear lack of tangible follow up mechanisms. The EC recognition requirements arguably encouraged no more than ‘paper’ respect for human rights in several of the new states. Could the result have been different, or could it be in the future? It is difficult to speculate. There are significant drawbacks involved in using the blunt tool of recognition to try to enforce respect for human rights and democracy. Nevertheless, such a tool, if supplemented by ongoing human rights monitoring and greater enforcement powers, could be a valuable means of increasing democratic practices in new states. From this point of view the EC practice may have been insufficient rather than wrong-headed. It thereby reveals another potential mechanism for gradually and incrementally increasing democracy at the international level. Importantly, because democracy may help to promote and ensure respect for certain fundamental rights, as well as can help to create knowledge, even the most deficient implementation of human rights and democracy may eventually flourish. With the ongoing support and continuous (friendly) scrutiny of the European Union, Bosnia-Herzegovina, Croatia, Macedonia, Slovenia and the Federal Republic of Yugoslavia may gradually develop increasingly democratic political systems.

Having examined a mechanism by which the international community has attempted to impose human rights and democratic requirements upon states at the moment of their creation, let us turn to the international legal practice said to support a continuing requirement for democracy, one applicable during the lives of states. This is the potential right to democratic governance.

\textsuperscript{116} As summarised by Mahmoudi, in “Recognition,” at p. 159, “[t]he continued use of violence in Serbia, Croatia and Bosnia-Herzegovina bears witness to the fact that the international community and particularly the EC misjudged the situation when using recognition as a peace-making tool.”
Chapter 11: A Right to Democratic Governance

In the previous Chapter we examined an attempt to bring democracy and human rights into the requirements for recognition of states. In the present Chapter let us look at a development that spans both general international law and international human rights law, namely, the potential for a “right to democratic governance” under international law. Such a right could create an explicit and fundamental connection between statehood, sovereignty and democracy, and thus be central to the democratic conception of sovereignty set out in the present work. However there are two main difficulties associated with this right. Firstly, as discussed below, it does not yet exist, either as a matter of customary or conventional international law. Secondly, a vision of democratic governance as a human right may limit the potential for further development of democracy at the international level. Simply by being moulded into a human right, democratic governance takes on a different character. This point is counterintuitive and hence the present Chapter dedicates considerable space to discussing the limitations inherent in viewing democratic governance as a human right. Such limitations are not fatal to the right to democratic governance, however, and the evidence suggests that some form of this right will come into being in the future. As a result, the critical commentary that follows should be read more as friendly scepticism or constructive criticism than an overall denial of the potential value of the right (especially in its more ‘aspirational’ form). Before examining the evidence supporting a right to democratic governance in the second section, and critically examining the limitations of this right in the third, let us first briefly review some of the practical and theoretical hurdles involved in conceptualising such a right in international law.

I. Resistance of General International Law to the Right to Democratic Governance

The applicability of democratic ideals to the international sphere, especially in the fields of politics and international relations, is not new. Many human rights treaties enshrine democracy-related rights and legal arguments in favour of upholding democratic forms of governance (albeit mainly in the context of encouraging the availability of military intervention for such purposes), have been heard fairly consistently from some quarters for
the last couple of decades. Nevertheless express arguments for the existence of an international legal right to democratic governance are fairly recent. The fact that we hear such arguments at all is in many ways surprising. It is surprising because international law has been generally resistant to the notion of democracy, if not outright hostile to it—by precluding, for example, international legal scrutiny into what it considers the 'internal affairs' of states. Until recently, for instance, the form of political system chosen by a state automatically qualified as a domestic matter, one falling within its reserved domain. Although this exclusion has been at least partially removed (with, for example, apartheid no longer being an acceptable form of government), for a variety of reasons international law scholars and international leaders have been reluctant to accept the possession of a democratic system of governance as being a meaningful requirement for states. Equally, democratic standards have not been applied to international institutions or international relations generally. Such intransigence at the international level has a variety of causes. Gregory Fox, for example, outlines some of the challenges to having rights of political participation accepted as an international legal standard as including the belief that "the structure of national political systems is fundamentally an issue for individual states to decide," the fact that "national elections are themselves a relatively recent phenomenon," and the acceptance of unelected governments as legitimate representatives by the international community.

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2 See, e.g., Crawford, Democracy, p. 9. Crawford, in ibid., at pp. 8-10, lists six examples of why international law traditionally has been unreceptive to democracy: (1) it assumes that the executive has comprehensive power in internal affairs, (2) national law, even democratically established, provides no excuse for failure to comply with international obligations (raising issues of executives binding an elected Parliament without its approval), (3) the executive government has nearly exclusive control over availability of international remedies, (4) the principle of non-intervention extends to non-democratic regimes, (5) self-determination cannot modify established territorial boundaries, and (6) government has virtually unlimited power to bind the state for the future. See also the discussion of the 'statist' nature of international law in Knop, "Re/Statements: Feminism and State Sovereignty in International Law."
3 Hannum, ed., in Documents on Autonomy and Minority Rights, at pp. xv-xvi, is cautious about saying that the 'internal affairs’ exclusion has been entirely removed:

The nearly universal acceptance of international human rights obligations has effectively removed basic human rights from the realm of 'domestic jurisdiction,' but international norms certainly do govern every aspect of a government’s relationship with its citizens. In particular, the form of government adopted by a state should result from the free choice of its citizens, not from the application of an international yardstick. Yet reference to 'free choice' does implicate internationally accepted obligations related to participation, equality, and due process.

4 See, e.g., Otto, “Challenging the ‘New World Order.'" pp. 376-77 (discussing the anti-democratic nature of the United Nations, UN Charter, and a variety of international organisations), Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law" (1991) 85 A.J.I.L. 613-45 (discussing, inter alia, the gender inequalities of international organisations).
5 Fox, “The Right to Political Participation in International Law,” pp. 249-50. See also Crawford, Democracy, pp. 8-10.
II. EVIDENCE SUPPORTING THE RIGHT

Since a significant body of literature exists which describes and assesses the evidence supporting a right to democratic governance in some detail, let me simply provide a brief overview of this evidence. In doing so, it will be helpful to analyse the evidence under the two general categories of conventional and customary international law. These categories are important because treaties and custom are the two main sources of international law, and they create binding international legal obligations in different ways. Treaties allow states to create binding obligations in a conscious, formal and consensual manner, but the quality and content of the legal obligation produced varies according to particular terms of the treaty. Also, there are a number of specific requirements for treaty formation that must be met, as well as situations in which states may be allowed to suspend or terminate their obligations. Perhaps most important to the present discussion, the precise wording of an international agreement must be subjected to careful scrutiny. Even if a treaty guarantees the entire minimum set of human rights that are necessary to support democracy (such as those discussed in Chapter 3), that treaty may not support a further, more general right allowing individuals to require their government to be democratic. To establish a customary international legal right, on the other hand, evidence of sufficient state practice and opinio juris must be established. The difficulties that arise here are those involved in ascertaining whether both the quantity and quality of state behaviour in support of a new rule has occurred. Opinio juris sive necessitas, literally translatable as "belief (or opinion) of law or of necessity," brings with it this qualitative component because only the types of practice that are engaged in because the state believes that it is legally obligated to do so can be evidence-

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6 For further discussion see the seminal pieces by Franck and Crawford, "Democratic Governance" and Democracy, respectively, as well as later works including Thomas M. Franck, Fairness in International Law and Institutions (Oxford: Clarendon, 1995), ch. 4, Fox, "The Right to Political Participation in International Law" (both in the Proceedings of the American Society of International Law and in the subsequent piece in Fox and Roth, eds., Democratic Governance and International Law), Carothers, "Empirical Perspectives on the Emerging Norm of Democracy in International Law," Goodman, "Democracy, Sovereignty, and Intervention," and Marks, The Riddle of All Constitutions. See generally, Fox and Roth, ibid.


of customary law. Let us first look at the conventional evidence favouring a right to
democratic governance under international law.

A. **TREATY-BASED RIGHTS TO DEMOCRACY**

Firstly, it must be noted that there is no directly binding treaty that creates a full-
fledged right to democratic governance, *per se*. Nevertheless, many of the components of
such a right exist in numerous binding human rights treaties around the world, treaties which
codify and elaborate the most important rights necessary for a democratic system. An early
example of one of these human rights treaties is the 1908 Central American Treaty of Peace. More recent and influential examples include the *International Covenant on Civil and Political Rights*, the *Convention on the Political Rights of Women*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Charter of the Organisation of American States*, the *American Convention on Human Rights* (and its subsequent *Additional Protocol*), the *European Convention on Human Rights* (and its first Protocol),
*African Charter on Human and People’s Rights*, and the *Inter-American Democratic Charter*. These treaties protect the kinds of rights that would be preconditions for a right to
democratic governance, such as rights and freedoms concerning thought, conscience, opinion,
expression, peaceful assembly, association, participation in government and public affairs.

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10 Mendelson, in *ibid.*, at p. 195 defines *opinio juris* as meaning “a belief in (or claim as to) the legally
permmissible or obligatory nature of the conduct in question, or of its necessity” (emphasis omitted).

11 Art. 1 of the *Central American Treaty of Peace* [*Treaty of Washington*] (1908), states:
The Governments of the High Contracting Parties shall not recognize any other Government which may
come into power in any of the five Republics as a consequence of a *coup d’etat*, or a revolution against
the recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.

12 For discussions of the way in which these treaties underpin a right to democratic governance see, Crawford,
was adopted on September 11, 2001, during the Twenty-Eighth Special Session of the General Assembly of the OAS,

13 For a useful tabular comparison of the rights protected in many of these treaties see Scott Davidson, *Human Rights*
(Buckingham: Open University Press, 1993), Appendix I, pp. 193-6. Details of the relevant articles of these
instruments include, in chronological order: *Charter of the Organization of American States* (1948), Art. 5 [duty to
promote “the effective exercise of representative democracy”]; *Convention for the Protection of Human Rights and Fundamental Freedoms* [*European Convention*] (1950), Art. 10 [right to freedom of expression], Art. 11 [right to freedom of peaceful assembly and freedom of association]; *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* [*Protocol to the European Convention*] (1952), Art. 3 [states undertake to hold free elections at reasonable intervals by secret ballot]; *Convention on the Political Rights of Women* (1952),
Art. 1 [entitlement to vote], Art. 2 [eligible for election], Art. 3 [eligible to hold public office]; *International Covenant on Civil and Political Rights* (1966), Art. 19 [right to hold opinions without interference, right to
freedom of expression], Art. 21 [right of peaceful assembly], Art. 22 [right to freedom of association], and Art. 25
[right to take part in public affairs, to vote, to have access to public service]; *American Convention on Human Rights* (1969), Art. 13 [right to freedom of thought and expression], Art. 15 [right of assembly], Art. 16 [right to
freedom of association], and Art. 23 [rights to take part in public affairs, to vote and to be elected in universal
secret ballot elections, and to have access to public service]; *Convention on the Elimination of All Forms of
Discrimination against Women* (1979), Art. 7 [equal rights to vote, participate in and be eligible for election,
They also provide the more solid guarantees that would flesh out such a right, including the rights of citizens to hold, to vote in, and to otherwise take part in, periodic elections. These treaties also provide some ‘enforcement’ mechanisms, such as allowing state parties to challenge one another for any treaty breaches (including violations of democracy-related rights). Several allow individual rights of petition to human rights commissions or tribunals. Additionally, the wide, near-universal adherence to these human rights treaties, taken as a group, guarantees that almost every state is at present bound to respect many of the rights essential for democracy.14

The effectiveness of these treaties, however, is limited in three ways: they are binding only upon states parties, the rights they contain must be exercised in accordance with the particular terms of the treaty, and these same rights are protected (enforceable) only in the manner provided by the treaty.15 Despite their limitations and the fact that none of these treaties establish a right to democratic governance, per se, they must be greeted with some enthusiasm, particularly in light of the anti-democratic tendencies of international law mentioned earlier. They represent another limited, but important, step towards creating a right to democratic governance. Let us turn to the second potential basis for such a right, that of customary international law.

B. CUSTOMARY RIGHTS TO DEMOCRACY

A customary right to democratic governance has the potential to be more robust than a treaty-based one, as it would be globally applicable and not subject to state reservations.16 Arguments for the existence of such a right require proof of state practice and opinio juris.17

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14 E.g., Jack Donnelly, in Universal Human Rights in Theory and Practice (London: Cornell University Press, 1989), at p. 2, argues that the two International Covenants and the Universal Declaration of Human Rights are so widely accepted that they have achieved an “international normative universality.” See also, ibid., pp. 23-25.

15 See generally, Scott Davidson, Human Rights (Buckingham: Open University Press, 1993).


17 For more on the creation of customary international law, see the sources listed in footnotes 7 and 9, above. The Court in The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), 1969 I.C.J. Rep. 3, at p. 44 (para. 77), summarises:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence
1. **Limited State Practice**

No incontrovertible state practice exists to support a right to democratic governance under international law, if we take such a right to support broad society-wide claims to democracy, ones that could enable the re-holding of elections or the ousting of illegitimate regimes.\(^{18}\) No case has been brought before the International Court of Justice alleging the violation of such a right, for the simple reason that only *states*, not peoples or populations, may be parties before that body. No population has justified its rebellious behaviour or called for support from the international community solely on the basis of such a right. Nor has any state formally condemned another state solely on the basis of violating such a right. Certainly, strong concerns have been expressed when states undergo non-democratic transitions. Pakistan provides a recent example and Haiti an earlier one.\(^{19}\) Also, a state’s possession of a non-democratic form of government has been a factor in refusing ‘most favoured nation’ trading status, or in imposing limited economic sanctions. The restrained, even non-existent, trading relations between some states and China and Cuba provide examples. However none of these cases provoked international concern solely as a result of democratic deficiencies. Such deficiencies played only one part in such cases, with other factors, from strategic concerns to refugee crises, often playing more significant roles. Claims regarding rights to democracy or democratic governance also frequently seem to have been heard in the context of broader, more complex legal arguments. For example, they tend to be linked to better-established customary international legal rights such as the right of self-determination. Finally, customary claims based upon treaty practice are limited because by their very nature they tend to revolve around specific rights, such as an individual’s right to vote, and are not based upon general arguments about violations of a society’s right to democracy.\(^{20}\) For such reasons, no directly supportive state practice for a right to democratic

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\(^{18}\) See the further elaboration of the possible forms of this right below, starting at p. 431.

\(^{19}\) For a detailed examination of the UN-sponsored intervention in Haiti, justified, *inter alia*, on the basis of disruptions of democracy see, Donoho, “Evolution or Expediency.”

\(^{20}\) See for example the Inter-American human rights practice described below, starting at p. 427.
governance exists at present. Let us examine some of the more indirect sources of state practice and *opinio juris* that could assist in the creation of such a right.

2. **Custom Derived From Treaties**

Treaties may themselves be the starting point for the development of a new customary rule. The various treaties mentioned above may provide evidence both of state practice (i.e., states applying democratic rights to themselves and others), as well as possible proof of a belief that such behaviour is required by a customary rule of international law. However, *opinio juris* is harder to prove from treaty provisions because one must distinguish between actions done in pursuance of binding treaty commitments and those done independently of such commitments. Only the latter will assist in establishing a customary rule.

3. **Custom Derived From Non-Binding Instruments**

Other evidence that could help to establish a customary international legal right to democratic governance includes the variety of non-binding international instruments that have arisen in the area, such as the resolutions and declarations of the United Nations and regional bodies. These resolutions and declarations are not binding *per se*, but over time they can provide evidence of state practice and *opinio juris* and thereby assist in the formation of customary international law. Several decisions of the International Court of Justice,

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21 In rejecting arguments that Art. 6 of the Geneva Convention on the Continental Shelf (1958), providing for the use of the equidistance principle in shelf delimitation, had become part of customary international law, the Court in *The North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands), 1969 I.C.J. Rep. 3, examined the relevance of the practice of both those states that were, and those that were not, parties to the *Convention*. The Court stated in *ibid.*, at pp. 43-4 (para. 76):

To begin with, over half the States concerned, whether acting unilaterally or jointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not one shred of evidence that they did and ... there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

22 See generally, Franck, “Democratic Governance,” pp. 63-9 (summary of the various international and regional declarations and decisions supporting electoral rights). Note that the Preamble of the new Constitutive Act of the African Union (2000) contains the following passage: “DETERMINED to promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law.” *ibid.*, also states that two of the objectives of the Union are to:

(g) promote democratic principles and institutions, popular participation and good governance;

(h) promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments....

23 E.g., Brownlie argues, in *Principles of Public International Law*, 5th ed., at p. 14, that “when [UN General Assembly Resolutions] are concerned with general norms of international law, then acceptance by a majority vote
including the Advisory Opinion on Western Sahara, the Case Concerning Military and Paramilitary Activities in and against Nicaragua, and the Advisory Opinion regarding the Legality of the Threat or Use of Nuclear Weapons, have used United Nations General Assembly resolutions in this manner.24 An early example of a declaration that elaborates democratic rights is the United Nations’ Universal Declaration on Human Rights.25 Other examples can be found in the American Declaration of the Rights and Duties of Man and the Declaration on a Code of Conduct for Inter-African Relations.26 More recently, the Conference on Security and Co-operation in Europe (now ‘Organization for Security and Co-operation in Europe’ or ‘OSCE’), has produced a large number of documents supporting the right to participate in free and open elections.27 The Document of the Copenhagen Meeting of

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"[O]pinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled ‘Declarations on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’. The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."

Note however, that Shaw, in International Law, 4th ed., at pp. 90-91, indicates that the latter comment by the Court "may well have referred solely to the situation where the resolution in question defines or elucidates an existing treaty (i.e. Charter) commitment." In Legality of the Threat or Use of Nuclear Weapons, ibid., at pp. 254-55 (para. 70), the Court described the role of such resolutions as follows:

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule.

25 E.g., Universal Declaration of Human Rights (1948), Art. 19 [right to freedom of opinion and expression], Art. 20 [right to freedom of peaceful assembly and association], and Art. 21 [right to take part in government, to have equal access to public service, and the will of the people being the basis of authority of government, as expressed in universal, periodic elections by secret or free vote]. Reisman, in "Sovereignty and Human Rights," at p. 868, argues that as a result of enshrining democratic rights in article 21 of the Universal Declaration, a "fundamental international constitutive document," that "[i]n international law, the sovereign had finally been dethroned."

26 E.g., American Declaration of the Rights and Duties of Man (1948), Art. 4 [freedom of opinion], Art. 20 [right to participate in government of his country, directly or through representatives, and “to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free"], Art. 21 [freedom of assembly], Art. 28 [rights can only be limited “by the just demands of the general welfare and the advancement of democracy"], Art. 32 [duty to vote in the popular elections]; Declaration on a Code of Conduct for Inter-African Relations (1994), Art. 4 [democracy linked to protection of identity of a people].

the Conference on the Human Dimension is especially significant here, as it is much more specific in its elaboration of the meanings of democracy and democratic governance than other existing human rights instruments. It specifies in some detail what the OSCE considers to be the appropriate standards in this area. In a similar vein, the Parliament of the European Union adopted a recommendation on 19 January 1996, calling upon the Council to “make respect for democracy and human rights a guiding principle” of its common foreign and security policy. The Organisation of American States also has been very active in this area.
It must be remembered, however, that all of these instruments, because non-binding, are useful towards the formation of customary law only to the extent that they encourage or provide evidence of state practice and *opinio juris*. Although some instruments, such as the Universal Declaration of Human Rights, may have taken on a customary status of their own, it would be difficulty to conclude that they have produced enough practice and *opinio juris* with respect to the particular area of democracy promotion and preservation so as to support a right to democratic governance under international law. Democratic shortfalls in the Americas, and Europe’s minimalist approach towards applying the CSCE/OSCE standards to the states that emerged from Yugoslavia and the USSR (as seen in the previous Chapter), would seem to undercut the value of their respective regional declarations.

4. Custom Drawn From Related Doctrines

Nevertheless, a customary international legal right to democracy may draw additional support from various related legal rights and developments. These include the existence of, and practice surrounding, the right of self-determination of peoples (which arguably supports a right to democratic governance as part of its ‘internal’ aspect), and the practice and institutionalisation of election monitoring. Also, the judgements and rulings of human rights tribunals at both national and international levels help to buttress and flesh out the meaning of some of the components of a right to democratic governance. Some of these judgements, for example, elaborate the meaning of the right to freedom of expression and


31 Franck, “Democratic Governance,” pp. 52-6 (going so far as to argue, at page 52, that self-determination is the “historic root from which the democratic entitlement grew”); Crawford, *Democracy*, pp. 6-7. See generally, Cassese, *Self-Determination of Peoples*.

electoral rights. A few comment more broadly upon the meaning of democracy as a whole.\textsuperscript{33} The Inter-American system has been particularly notable for its elaboration of the meaning of democracy through its non-binding declarations, treaties and their subsequent legal interpretations. Both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have examined the meaning of democracy in the context of the relevant provisions of the \textit{Charter of the Organization of American States} and the \textit{American Convention on Human Rights}.\textsuperscript{34}

Such developments have been argued by Thomas Franck to be connected under the "single fabric" of democratic entitlement, thereby potentially supporting a broad right of democratic governance.\textsuperscript{35} Franck recently expanded this position by arguing that the three pillars of democracy, legitimacy and the rule of law create an emerging right of "good governance," one owed not only to their own people but to the world as a whole.\textsuperscript{36} Such developments would greatly support a right to democratic governance, even if this right remains nascent, rather than actual, at present.

5. \textbf{The Possibility of Democratic Intervention}

Finally, there is a limited amount of state practice and scholarship supporting a 'right of democratic intervention,' or in other words, a right to establish or protect democracy by

\textsuperscript{33} See, e.g., Crawford, \textit{Democracy}, pp. 5-6, 17-18 and n. 20; Franck, "Democratic Governance," pp. 61-3. Such juridical practice could include the rulings of the Commission on Human Rights, the Human Rights Committee, the European Commission on Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.


\textsuperscript{35} Franck, in "Democratic Governance," at pp. 61-77, sets out a strong case for both the determinacy and customary status of electoral rights and rights to freedom of expression (at pp. 64 and 61, respectively, although electoral rights are only "becoming a customary legal norm"). In \textit{ibid.}, at p. 77, he poses the rhetorical question "How coherent ... is the normative canon of democratic entitlement?" He then answers: "Our examination of global and regional texts and processes will reveal that the rules pertaining to self-determination, freedom of expression and the right to participate in free and open elections are closely interwoven strands of a single fabric."


Today, it is becoming more commonplace that governments, to be entitled to sovereign prerogatives, must acknowledge the inalienable rights of their own people. More to the point: governments increasingly acknowledge that they owe the obligations of good governance to their own populations, but also to all governments, all people, \textit{erga omnes}. While democracy, governmental legitimacy and the rule of law have long been the formal rights of persons in some nations, enshrined, however imperfectly, in their constitutions, processes and institutions, it is only recently that good governance is becoming a global entitlement recognized by international law, monitored by international institutions and implemented through collective measures. [Emphasis in original.]
This right would not be the same as a right to democratic governance, as it would be more limited and, effectively speaking, concerns rights and obligations of bodies outside of the relevant state. The right is one of the intervenor, rather than the intervention. As will be argued below, it may in fact be inimical to a right to democratic governance, and consequently should be greatly restricted or even rejected.

However, if the existence of some form of a right to democratic intervention could be established, it would provide further (albeit problematic) evidence of a move towards a customary status for democracy. Examples of a right to democratic intervention have been said to include the uses of armed force in Panama, Haiti and possibly Grenada (the latter involving intervention but not explicitly on a democratic pretext). These examples, which involve the concrete actions of states and international organisations, could amount to evidence of state practice. However each incident generated significant political and legal controversy and the Haitian intervention was explicitly treated as exceptional in nature.

Since state practice needs to be done in conjunction with the belief that this behaviour is required by international law (i.e., opinio juris), it is doubtful that these examples support the

37 Reisman, for example, in “Sovereignty and Human Rights,” at p. 871, argues for a right to pro-democratic invasion by outside armed forces, stating that this would not violate a state’s sovereignty unless “one uses the term anachronistically to mean the violation of some mystical survival of a monarchical right that supposedly devolves jure genium on whichever warlord seizes and holds the presidential palace or if the term is used in the jurisprudentially bizarre sense to mean that innaminate territory has political rights that preempt those of its inhabitants” (citations omitted). Accord: Tom Farer, Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere’s Prospect, Essays on Human Rights and Democratic Development 1 (Montreal: International Centre for Human Rights and Democratic Development, 1993), pp. 27-36 (speaking in the context of the OAS); Halberstam, “Copenhagen Document,” p. 167. Halberstam, in ibid., at pp. 167, argues further that the CSCE’s Copenhagen Document authorises a right of pro-democratic intervention under certain conditions: “if (1) there is a freely elected government, and (2) it is either barred from taking office or deposed by violent means, other states have not only a right but a responsibility to restore it to power and, if necessary, to use force to that end.”

38 Reisman, “Sovereignty and Human Rights,” pp. 873-4 [justifying US intervention in Panama as restoration of democracy]; Crawford, Democracy, p. 18 and n. 68 [citing authors that justified the Panama invasion as a form of democratic intervention]; Pierce, “The Haitian Crisis,” pp. 489-95 [Haitian example as further evidence of the legality of collective international intervention, through the UN or regional organisations, to restore elected governments]; Donoho, “Evolution or Expediency” [describing Haiti as an example of democratic intervention, albeit an ambiguous one]; William C. Gilmore, The Grenada Intervention: Analysis and Documentation (London: Mansell Publishing, 1984) [discussing the general history of the Grenada intervention as well as justifications advanced at the time].

39 The vast majority of states participating in the intervention in Haiti specified that it was an exceptional situation, one which should have little or no precedential value. As a result, paragraph 2 of the United Nations Security Council Resolution on Authorization to Form a Multinational Force Under Unified Command and Control to Restore the Legitimately Elected President and Authorities of the Government of Haiti and Extension of the Mandate of the UN Mission In Haiti, S.C. Res. 940 (31 July 1994), specifically recognises “the unique character of the present situation in Haiti and its deteriorating, complex and extraordinary nature, requiring an exceptional response” (emphasis added). In the same resolution, in para. 4, the Security Council, acting under Chapter VII of the Charter, authorises “Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership” (thus permitting military intervention).
creation of a separate customary right to intervene. Also, the International Court of Justice in the Nicaragua case rejected the use of force as being an appropriate mechanism for protecting human rights generally, as well as held that it did not constitute a justifiable method for enforcing democratic commitments. Again, as argued below, forcible implementation of democracy may be counterproductive.

C. CONCLUSION: NASCENT STATUS OF RIGHT

Despite their value as indicators of the direction of development of the law, these conventional and customary bases do not support the existence of a right to democratic governance at present. The treaty practice is perhaps the most significant, although no treaty as yet establishes a full-fledged right to democratic governance. Components of such a right clearly do exist in rudimentary form between state parties to particular treaties. Whether such commitments are enforceable depends upon a variety of factors—from the ratification and domestic incorporation of the treaty to the willingness of the states involved to uphold the right. As far as practical effectiveness is concerned, enforceability is also dependent upon such unrelated factors as the material and technical resources available to the state—resources, for example, that will enable it to hold full and impartial democratic elections. Before a customary right to democratic governance can be established greater evidence of state practice and opinio juris appears to be needed. The same human rights treaties are helpful here, but cannot themselves establish the requisite opinio juris. The declarations and other instruments of the UN and regional organisations, particularly the OSCE and OAS, most clearly flesh out the essential ingredients for a right to democratic governance but are

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40 E.g., Crawford, Democracy, at pp. 18-20, argues that such a right is not supported by state practice, with the examples offered having been arbitrary. Further, he argues that in any event such a right would be counterproductive (“democracy is not something that can be installed by a foreign force in a few days”). Franck, in “Democratic Governance,” at pp. 83-5, argues that democratic entitlement—at least to the point of allowing election-monitoring—may trump the principle of non-interference, but that nevertheless unilateral military action to promote democracy must be rejected, with only intervention authorised by the UN Security Council or regional arrangements at the request of a legitimate government being acceptable.

41 See the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, 1986 I.C.J. Rep. 14, pp. 134-5 (para. 268), and 133 (para. 262), respectively. Paragraph 268 is reproduced in footnote 77, below. In the relevant passage in paragraph 262 the Court states: “Of its nature, a [democratic] commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign state.”

not themselves binding. Even though the *sum* of such rights as self-determination, rights to freedom of speech and electoral rights might amount to a form of democratic governance, the various rights themselves leave much to be desired.\(^43\) The piecemeal nature and general inconsistency of these various practices must prevent their satisfaction of the burden of proof required to conclusively establish a customary right to democratic governance. There does not appear to be the requisite “constant and uniform usage [practice], accepted as law,” or practice “both extensive and virtually uniform” for the existence of such a customary right.\(^44\) In sum, although there are clear signs that an international legal right to democratic governance is *in the process of being created* (i.e., a right *de lege ferenda*), an enforceable and generally applicable international legal right to democratic governance cannot be said to exist at present.

**III. THE POTENTIAL MEANING OF A RIGHT TO DEMOCRATIC GOVERNANCE**

If we are to assume that such a right may emerge in the future, is it possible to say anything about what *kind* of right it would or should be? This question requires us to establish what a right to democratic governance might mean.\(^45\) As a practical matter, at least in its earlier stages, its meaning would not likely include the complete set of democracy-related rights described in the above treaties and non-binding declarations. Rather, a right to democratic governance likely would start out as a minimum set of rights, perhaps simply consolidating the particular rights and duties that most states are presently bound to respect (i.e., those overwhelmingly accepted under treaty and customary law). What set of rights would

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\(^43\) E.g., Simpson, in “Imagined Consent,” at pp. 124-7, argues that the rights of self-determination and free speech lack determinacy and content in international law and thus are not strong enough to support a further right of democratic governance.


In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

See generally the texts referred to in footnote 7, above.

\(^45\) See generally, Chapters 3 and 4, above, for more extensive discussion of the meaning and nature of democracy.
it include? Some scholars have attempted to create a consensus about this matter by describing the minimum requirements for a right of democratic self-governance under international law. They have done so by combining parts of well-accepted customary and conventional law.  

Hurst Hannum, for example, has described the “elements” of popular participation recognised at the international level as including: the right to self-determination, the right to education, the right to take part in cultural life and the conduct of public affairs, minority rights, trade union rights, family rights, the right of association and peaceful assembly, freedom of thought, conscience, religion, opinion, expression, and information. The Inter-American Commission on Human Rights has also formulated a succinct list of rights and freedoms that it considers pre-requisites for democratic government, including freedoms of expression, association, assembly, and the rule of law.

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46 E.g., Crawford, Democracy, pp. 4-5 (referring to the norms elaborated in the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human Rights, and the Universal Declaration on Human Rights); Grossman, “Remarks,” p. 259 (referring to the developments in the Organisation of American States, and specifically the Declaration of Santiago to support an emerging norm in this area); Pierce, “The Haitian Crisis,” pp. 490-91 (setting out a “substantive” view of democracy). Hannum, in Autonomy, Sovereignty, and Self-Determination, at p. 116, discusses the Algiers Declaration as having similar effect, arguing that democratic participation is a key impetus behind self-determination:

This position [of democratic participation as being fundamental] is essentially that adopted in the Universal Declaration of the Rights of Peoples, adopted at a nongovernmental meeting in Algiers in 1976 (hereinafter cited as “Algiers Declaration”). After reiterating the right of every people to self-determination, the Algiers Declaration states:

‘Every people has the right to have a democratic government representing all the citizens without distinction as to race, sex, belief or colour, and capable of ensuring effective respect for the human rights and fundamental freedoms for all.’

The declaration goes on to provide that “[a]ny people whose fundamental rights are seriously disregarded has the right to enforce them, ... even, in the last resort, by the use of force,” perhaps consciously reflecting the right “to rebellion against tyranny and oppression” mentioned in the Preamble of the Universal Declaration of Human Rights.

Halberstam, in “Copenhagen Document,” goes even further, arguing that the instrument in her article’s title gives signatory states a right to reinstate freely elected governments by force, if necessary.

47 Hannum, ibid., pp. 113-14 (summarising a report presented to the Commission on Human Rights (1985) that tried to interpret the phrasing “popular participation,” as suggested by the language of Art. 21 of the Universal Declaration of Human Rights and Art. 25 of the International Covenant on Civil and Political Rights). See also, Fox, “Political Participation,” pp. 251-52 (discussing requirements for a “free and fair election” and the potential requirement of party pluralism).


The close relationship between representative democracy as a form of government and the exercise of the political rights so defined, also presupposes the exercise of other fundamental rights: ‘...the concept of representative democracy is based on the principle that it is the people who are the nominal holders of political sovereignty and that, in the exercise of that sovereignty, elects its representatives—in indirect democracies—so that they may exercise political power. These representatives, moreover, are elected by the citizens to apply certain political measures, which at the same time implies the prior existence of an ample political debate on the nature of policies to be applied—freedom of expression—between organized political groups—freedom of association—that have had the opportunity to express themselves and meet publicly—freedom of assembly. At the same time, if these rights and freedoms are
In the present work we examined the meanings of democratic governance and democracy, in Chapters 1 and 3, respectively. In the first Chapter the term "democratic governance" was used to describe the set of institutional structures and practices that allow a democratic group to regulate and make decisions about their lives using a democratic process. This set must enable and support a participatory governing body, subject to free and fair elections and certain rule of law and human rights limitations. In Chapter 3 the requisite rights and freedoms for democracy were said to include: the rights of equality, non-discrimination and peaceful assembly, the rights to vote, to hold public office, to take part in government and public affairs, and to have access to public service; the freedoms of thought, conscience, opinion, expression and association. Additionally, democracy requires the provision of a minimum standard of education as well as respect for the principles of personal autonomy, inviolability and dignity of the person. Finally, these rights and freedoms must be strong enough to ensure that the government is elected in free and fair elections, by secret ballot or free vote, at reasonable intervals, and on the basis of universal suffrage.

A "right to democratic governance" therefore could be defined as the human right or international legal right to have and to exercise the above democratic rights, freedoms, structures and practices, continuously. The political and legal institutions required for a right of democratic governance need not be defined in detail, as they could come in a variety of shapes and forms. In fact, many of the democratic systems around the globe could be used to implement the right. The structural breadth of this elaboration of the right is purposeful. As argued in Chapter 1, and as argued again below, it is vital to provide enough institutional flexibility to allow further experiments with democracy. The parochial and narrow visions of democracy sometimes offered by hegemonic powers must be resisted. A broad formulation to be exercised, there must be a juridical and institutional system in which laws outweigh the will of leaders and in which some institutions exercise control over others for the sake of guaranteeing the integrity of the expression of the people's will—the rule of law. [Citation omitted.]


49 For analysis and description of the various forms of democratic institutions see generally, Lijphart, Patterns of Democracy; David Held, Models of Democracy, 2nd ed. (Stanford: Stanford University Press, 1996); David Held, ed., Prospects for Democracy.

50 Writers in democratic theory understandably tend to use examples from their own domestic political system. Since many of the international legal scholars working in the field are from the United States, the US system tends to be used as an example par excellence of democratic governance. E.g., Thomas Franck, in "Legitimacy and the Democratic Entitlement," at p. 26, uses the US Declaration of Independence to illustrate the concepts of 'democratic entitlement' and the democratic 'standards' of the community of states. But such examples must be used with caution, as although the US has a very solid, historically well-established democracy, it may not be a model suitable for, or wanted by, other states. The vote-counting difficulties of the 2000 United States presidential elections reveal that even the most well-established democracies may require re-tuning from
of the right to democratic governance, or of democracy generally, will enable us to further flexibly develop these concepts.\textsuperscript{51} An important common feature of all such mechanisms for implementing a right to democratic governance, however, must be their respect for, and their ability to protect, the above set of rights and freedoms. As far as the availability of the right, if a right to democratic governance is thought of as being analogous to a human right then it should be more or less \textit{continuous} in nature. Precisely because it would require \textit{continuous} democratic checks on the 'internal' affairs of states, however, a right to democratic governance in many ways could be more 'subversive' and far-reaching than other international legal rights, such as the right to self-determination.\textsuperscript{52} Democracy, unlike self-determination, cannot be a one-off process. As will be seen, the continuous potential of the right to democratic governance is both exciting and deeply problematic. A weakness inherent in this broad formulation is that its very flexibility will bring its own set of problems. A broadly formulated right to democratic governance, for example, potentially could be used a tool for other, unrelated interests. By being so inclusive it could fall prey to trends such as those that connect democracy to things such as free trade and capitalist economics systems—even though neither of these need be related to, or even helpful for, democracy. I will return to these points below.

\section*{IV. \textbf{Associated Difficulties and Limitations}}

In the same constructively critical manner in which we looked at the democratic criteria for state recognition in the last Chapter, let us now look at some of the difficulties that might be posed by a right to democratic governance under international law.

\begin{footnotesize}
\begin{itemize}

\item Broad formulations also encourage broader acceptance. But this may have the effect of watering down the right so much as to make it almost meaningless. Alston, in “Conjuring Up New Human Rights,” at p. 613, after summarising problems with some recently proposed human rights, including “inordinate vagueness,” points out that:

\begin{quote}
Indeed, to a considerable extent, it is their chameleon-like quality that has facilitated the degree of consensus support they have received. Thus, states have been able to vote in favor of the relevant resolutions without thereby committing themselves to any precise normative formulation or to any specific measures for the effective realization of the norm.
\end{quote}

\item This has not been the case with the development of mainstream self-determination theory, which has been argued by some to allow rights of self-determination to expire or lapse, once exercised. As witnessed in the subsequent developments affecting many of the newly-independent countries, this kind of outlook can result in forms of government that are significantly unrepresentative. See generally, Cassese, \textit{Self-Determination}.
\end{itemize}
\end{footnotesize}
A. NEW RIGHTS AND ‘QUALITY CONTROL’ ISSUES

The first question, raised whenever a new human right is being formulated, is one regarding its usefulness. In other words, will a right to democratic governance add anything to the set of human rights that currently exists in international law? Unfortunately, this question is not always asked, as seen in the recent, startling increases in the number of new human (and other) rights that are being advocated by international lawyers. Some of these new rights have raised concerns with international lawyers for being impractical, trite, or simply because of the way in which an unconstrained increase in the number of human rights may water down the value of human rights generally. Philip Alston, for example, has expressed his difficulties with both the increases in the number of proposed human rights, as well as with the anarchic and haphazard nature of such rights proposals. He illustrates his comments by looking at such new rights as those to a clean environment, to development, to peace, and to popular participation. In his view there are significant weaknesses in the process through which these rights have been created:

[T]he process by which new rights have recently been proclaimed has generally suffered from the following shortcomings: there has been no prior discussion, not to mention analysis, of the major implications of the proposed innovation; there has been no attempt to seek comments from governments, specialized agencies or nongovernmental organizations; there has been no request to the [UN] Secretariat or any other expert group for advice on technical matters relating either to the general principles involved or to the specific formulations proposed; there has been no explicit recognition of the fact that a new human right was being proclaimed; and there has been insufficient debate on the basis of which to ascertain, with some degree of precision, the real intentions underlying the affirmative votes of states.

Such processes lack both thorough analysis and critical reflection. Alston suggests that in order to resolve such difficulties we should strengthen the procedural safeguards involved in the creation of new human rights. He therefore calls for a kind of ‘quality control’ regarding such proposals. In terms of the right to democratic governance, although Alston might find such a right unobjectionable on philosophical grounds, he likely would have significant

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53 The most ridiculous right identified in Alston’s piece, “Conjuring Up New Human Rights,” at p. 611, is that of a ‘human right to tourism.’

54 In ibid., at p. 607, Alston explains that the “reason for serious concern with respect to current trends arises not so much from the proliferation of new rights, but rather from the haphazard, almost anarchic manner in which this expansion is being achieved. Indeed, some such rights seem to have been literally conjured up, in the dictionary sense of being ‘brought into existence as if by magic’” (citation omitted).

55 Ibid., p. 613.

56 Using a humorous analogy from French wine certification, Alston calls for an appellations contrôlées system for the process of human rights creation. He argues for a combination of substantive and procedural safeguards, with emphasis upon the latter. Ibid., pp. 618-21.
reservations regarding its non-satisfaction of the kinds of procedural requirements he advocates. The actors developing the right to democratic governance are not subjecting it to the kinds of rigorous scrutiny and vetting processes available through the International Law Commission, the UN Commission on Human Rights, or the United Nations generally. Such scrutiny, even if unlikely to define the right with much greater precision, would at least help to ensure a minimum standard of legality in the creation of the right. It would also help provide the moral authority that can result from following legal and widely participatory procedures. For such reasons, when advocating a right to democratic governance we must ask ourselves firstly, whether it provides additional guarantees to those offered by other human rights, and secondly, whether this right is being properly scrutinised through the appropriate human rights creating processes. I will return to the first question below. The second appears to be answered in the negative.

B. CONFLICTS BETWEEN RIGHTS

A second set of difficulties arises because the right to democratic governance is formulated as a right, like a human right. The difficulties associated with such a formulation are (1) that it will likely create conflicts between equal levels of rights (i.e., democratic rights being opposed to other human rights), and (2) that these conflicts can in turn diminish the value of either democracy or human rights, depending upon which is prioritised.

1. The Question of Trump

Precisely by being articulated as a single, broad, legal right, democracy takes on a different meaning. This is because democratic processes in most states are checked by certain basic human rights (e.g., freedom of speech) without which they cannot function. Politics is checked by law and vice versa. When democracy itself is viewed as a right, however, it falls

57 See, e.g., ibid., p. 613 (discussing the controversy over the ‘right to popular participation’ as formulated by the UN Commission on Human Rights).
58 See, e.g., ibid., pp. 617-18 (discussing the ILO vetting procedures).
59 Cf. ibid., p. 609. For an explanation of how legality itself can have a moral value, see MacCormick, “Natural Law and the Separation of Law and Morals.”
60 Alternative formulations could be used. A less individual human rights-oriented model for a right to democratic governance, for example, could follow the general outlines of the right to self-determination under international law. The latter right cannot be claimed by an individual, or even a large group, but must be invoked by a ‘people,’ in a limited number of situations (mostly in the colonial context). Unlike normal human rights, self-determination also has no effective treaty-based enforcement mechanism, and thus tends to be more abstract and aspirational, than concrete and easily attainable. The present Chapter focuses more on the human-rights oriented model since this is the one that scholars raising the possibility of a right to democratic governance seem to have in mind. These scholars do not espouse a weak and limited form of right, but rather a robust, human rights-oriented one.
61 E.g., Nino, “Epistemological,” p. 49.
within the structures of international human rights law, and thus potentially becomes entangled in the kinds of rights conflicts that take place between individual human rights. Let me use a fictional example to illustrate this point. Imagine a situation where irregularities in ballot counting lead to an indeterminate result, one that is only resolved by the application of political conventions or by an ad hoc agreement between the two main parties. In such a situation, the democratic process has not directly produced the result, but political necessities (deadlines, the expense of calling another election, etc.), have resulted in the selection of one candidate. If democratic governance is viewed as a human right, then in addition to any constitutional challenges to the election result (which may be avoided, by the way, if the parties have properly followed a constitutional convention), any individual could apply to a court (or specially designated democratic tribunal) and demand further ballot recounts or an entirely new election. Yet the latter demands would not only cause inconvenience to the other citizens of the state. They might violate some of their basic human rights, such as the right to take part in government (which effectively would be suspended until a government is chosen), or the right to freedom of expression (if the subsequent election is held without the chance for a second campaign, etc.).

In such a situation, democratic rights would need to be balanced against other rights. Moreover, they would become subject to the same sorts of rights conflicts experienced in regular human rights cases. These conflicts arise because the government, in making a law that violates an individual’s rights, is frequently attempting to implement or uphold the rights of other individuals or broader society-wide goals. The difficulty arises because even though the international human rights system ranks rights in some ways, it does not provide for a clear ‘trump’ between most rights, and would not automatically allow either democracy or another right to take priority.

How could we resolve such a rights conflict? There are three possible options: (1) use a careful judicial balancing test (as used, for example, in human rights cases in some countries), (2) prioritise democratic rights, or (3) prioritise normal individual human rights. The first option merely dilutes or delays the difficulty. Let us look at the problems raised by the other two.

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62 This kind of need for further campaigning and issue clarification was squarely raised by the U.S. Presidential election of 2000. After it became clear that a disproportionate number of ballots had been spoiled, one option would have been to re-do the entire election (nation-wide, or Florida-wide). If this had been attempted, many voters would have desired further information from the two main candidates since the closeness of the margin separating Bush and Gore was caused largely by an unexpectedly large vote for Ralph Nader. In a secondary vote, many of those originally supporting Nader would likely have reconsidered their position and therefore would have needed further information about the other two candidates.

63 “Trump” is a term used in card games to indicate a card that takes precedence over other cards, thus winning the hand. It is defined in the Oxford English Dictionary Online under “trump n.” as: “1. a. A playing-card of that suit which for the time being ranks above the other three, so that any one such card can ‘take’ any card of another suit; spec. the card, usually that last turned up by the dealer, determining this suit; also, pl. (formerly also in sing.), the suit thus determined.” My usage in the context of human rights is to illustrate the situation of one right taking precedence, or trumping, another right.
If we prioritise democracy, allowing democratic rights to trump other human rights, then society will come to expect, and be able to manage, certain delays associated with elections or democratic processes. Election results will become less stable or certain (since they will be more easily challengeable), but the overall democratic process may be more carefully administered as a result. Such a form of ‘trumping’ already occurs in a limited manner for non-derogable rights in human rights treaties such as the American Convention on Human Rights (1969). Article 27 of the Convention prohibits suspension of rights related to juridical personality, life, humane treatment, the family, the child, nationality, participation in government, a name, freedom from slavery, freedom from ex post facto laws, and freedom of conscience and religion. If a right to democratic governance were added to this list then a citizen could require her or his government to re-do any elections or other democratic processes at any time. It would not matter if the government was in a state of emergency or dealing with other pressing difficulties. Democracy could never be derogated from and would therefore be a very strong right. One negative side-effect of such prioritisation for new and fragile democracies, however, might be the way in which the instability caused by frequent democratic re-assessments could produce further political upheaval. This in turn could threaten democracy and even lead to a return to dictatorship. Nevertheless, on balance perhaps such an upheaval would be rare. Democratic rights as trumps thus at worst merely might cause delays and inconveniences, and at best produce a robust version of democracy.

But let us imagine a situation in which there are strong reasons not to allow democratic choices to trump individual rights. What if, for example, a majority or even a super-majority democratically decided to implement a piece of legislation that violates one of the other non-derogable rights, such as the right to a family? It is not difficult to imagine

Ronald Dworkin most famously raises the idea of rights as ‘trumps’ in his work Taking Rights Seriously (London: Gerald Duckworth and Co., 1978). But my usage of the idea is substantially different. Dworkin argues that every legal case can be decided by identifying a determinative legal right. This argument is sophisticated because it distinguishes between legal arguments based upon justifications of principle (which trace back to rights), and justifications of policy (which trace back to collective or communally held goals), with only the former being acceptable for judicial reasoning. Because principles help us identify determinative rights, Dworkin argues that judicial discretion is so limited as to be almost non-existent, and that every legal question has a ‘right answer.’ See generally, ibid., chs. 1 (discretion) and 4 (rights, principles and policy). My argument is simpler in that it envisages a situation in which one human right comes into conflict with another human right of the same order or value. My question then is whether one right can ‘trump’ or take precedence over the other, and in this sense I assume the lack of a prima facie ‘right answer.’ Dworkin would fundamentally disagree with the possibility of such a situation arising. He would likely argue that appeals to arguments of principle must establish that one legal right is correct, and therefore that such appeals will answer the question. See generally, ibid., Ronald Dworkin, Law’s Empire (Cambridge, Mass.: Harvard University Press, 1986), and Stephen Guest, Ronald Dworkin (Edinburgh: Edinburgh University Press, 1992). For my critical assessment of Dworkin’s ability to resolve conflicting claims of deeply divided communities, see David S. Berry, “Interpreting Rights and Culture: Extending Law’s Empire” (1998) 4 Res Publica 3-28.

Summary of rights in Art. 27(2) of the American Convention on Human Rights. Note that the Inter-American Court has held that the right of habeas corpus, or amparo, is similarly non-derogable: Habeas Corpus in
legislation in densely populated countries limiting couples to one or two children—thus violating family rights, privacy rights and possibly religious freedoms.  

Here difficulties arise because there is the potential for a clash between two non-derogable rights. Such a conflict between a right to democratic governance and the other human right then would have to be adjudicated or balanced, rather than solved through a simple trump. We fall back into the first option.

2. Majority Rule

What about the third solution, that prioritising individual rights over the right to democracy? In a sense, this is the normal state of affairs for the relations of democracy and human rights. Democratic processes in most states are primarily political ones, and human rights are primarily legal matters. But notice that in the present context we are talking about a right to democratic governance. In this case the choice to subordinate such a right greatly limits, or even negates, its status as a right. Also, democracy as politics is not always subject to human rights checks and can override such checks when necessary for a free and democratic society. Sometimes the needs of a society must be prioritised over those of the individual. Democracy as a subordinated right loses this ability. As a result, in choosing to subordinate democracy as a right we challenge one of the central components of democratic theory as a political process, namely the idea of rule by (simple) majority. In other words, because democracy as a human right is equal to ordinary human rights, and is even accorded less weight than other rights in this variation, it loses the ability to present an alternative vision of human relationships. Democracy becomes no different from human rights, and in fact is subservient to them. In this way democracy-as-right destroys the subtle dialectics of politics and rights and submerges the democratic process into the muddle of competing legal rights.


China represents a well publicised, non-democratic example of such a choice.

Technically, it would be very difficult for this possibility to arise, because most constitutional democracies have mechanisms allowing challenges to legislation that violates fundamental human rights. Thus in the US and Canada, for example, the respective supreme courts have the power to strike down unconstitutional legislation. But if we elevate democratic processes to the level of human rights we disturb this balance, since striking down a democratic choice would then violate another human right.

Crawford takes this approach, as he considers rights to democracy to be subservient to other basic human rights. Thus, if the majority of a population purports to exercise a right to democratic governance in such a way that it hinders the human rights of a minority or an individual, then according to Crawford, the democratic right must give way. Crawford, Democracy, pp. 5-6, and n. 20 (the latter listing examples of cases where the European Court has overturned democratic preferences when they violate basic human rights).

For arguments about the superiority of simple majority decision-making systems, see the section dealing with "Simple Versus Supra-Majority Systems," in Chapter 3, above.
3. Democratic Politics and Democratic Rights

This brings us to a related difficulty raised by changing democracy into a simple human right. It disturbs one of democracy's essential components, namely, the need for compromise. Rights conflicts do not generally admit of compromise. One side must win. Democracy, on the other hand, requires compromise as part of the give and take of democratic debate. Elshtain defends the value of a compromise position with vigour, arguing that compromise is not a mediocre way to do politics; it is an adventure, the *only* way to do democratic politics. It lacks the seduction of revolutionary violence, whether rhetorical or enacted. It does not stir the blood in the way a 'nonnegotiable demand' does. It is not *Me* demanding primacy for *Myself*. But it presages a livable future. Elshtain rejects the absolutist and utopian visions of perfection by revolution. She reminds us of Isaiah Berlin's warnings about the (im)perfectibility of human nature and argues that until we become perfect our political systems must be able to deal with imperfections. Democratic debate, with compromise as an essential component, is less likely to lead to error than a system vindicating only one, potentially extreme, position.

This brings us back to human rights, which protect individuals against governmental excesses—both of the democratic and non-democratic variety. Almost all of the above arguments in support of simple majority decision-making processes *presume an underlying check by human rights*. This is necessitated by the need to protect individuals and entrenched minorities who might otherwise be discriminated against. If we remove this human rights check by making rights themselves subject to simple majority—in other words, by merging rights into democratic politics—then we remove the underpinnings, the preconditions that make democracy possible. Yet if we turn this around and make democracy a right—thereby exposing it to the potential extremes of rights conflicts—then we suffer all of the problems associated with those conflicts. We fall into the 'all-or-nothing' trap that can emerge in human rights discourse, with one right being made to contradict the other, with no room for compromise. By converting democracy into a human right we may exacerbate the

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70 See, e.g., the statement to this effect in *Re Reference by the Governor in Council Concerning Certain Questions Related to the Secession of Quebec from Canada* (1998) 161 D.L.R. (4th) 385 (S.C.C.), at p. 417 (para. 68) [reproduced in the footnotes in Chapter 4, above (in the section dealing with the ability of the democratic process to produce tolerance, adaptability, knowledge and truth)].


72 Ibid., pp. 59-63. See also, *ibid.*, pp. 118-23 (comparing the French revolutionaries with their American counterparts, and favouring the latter for their more pragmatic acceptance of compromise rather than extremes that attempt perfection).
difficulties experienced in rights conflicts because we lose the political sphere. In most modern systems we avoid such problems precisely by separating the two spheres into the distinct discourses of democratic politics and human rights, with each checking and balancing the other in subtle and interesting ways. By throwing the two together as potentially competing human rights we remove much of the flexibility of politics as well as the sanctity of individual rights. As a result, better protections would seem to be available in systems where democracy and human rights remain distinct. Retaining this partial division between law and politics allows the continuance of an underlying check by human rights, but also maintains the flexibility of simple majority decision-making. This obviously places a grave limitation upon the idea of a right to democratic governance as being useful when conceived of as a kind of human right. I will suggest below that for such reasons it may be better to frame a right to democratic governance in a looser, less concrete and more aspirational manner, similar to the way in which the right to self-determination appears to be framed today.

C. JUDICIAL ENFORCEABILITY

The third, more practical difficulty facing a right to democratic governance, particularly when framed as a legal “right,” is one of enforceability. Aside from small efforts by a couple of regional bodies (the OSCE and OAS), no major international tribunal or

73 Saward, in The Terms of Democracy, makes the requirement for human rights checks upon democracy explicit.

74 Democracy itself requires certain human rights to be protected because they are pre-conditions for democratic government (e.g., the right to vote, freedom of speech, freedom of association). See Dahl, Democracy and Its Critics, pp. 169-73, and Nino, The Constitution of Deliberative Democracy, pp. 196-99 (certain rights as preconditions). But the relationship is more complex, as carefully illustrated by Nino. A robust theory of human rights—one that sees human rights as being both negative (protection from the state) and positive (requiring provision of certain pre-conditions for participation, such as food and education)—will inevitably result in such a large body of human rights that there will be little, or no, remaining sphere for democratic decision. In this sense a delicate balance must be established between protecting necessary, a priori rights, and leaving room for democratic decision. Nino’s position pushes this argument further since he sees democracy as having epistemological value for discovering moral truths or making moral choices, and thus argues that democracy must be given the widest scope because it can be the best mechanism for determining which rights should be protected (or in other words, which spheres should be excluded from democratic determination). In Nino’s opinion, in ibid., at p. 140, “democracy’s value consists in its reliability for discovering those rights.” See also, ibid., 63-66 (expansion of rights will restrict scope for democratic choice), and 136-41 (a priori rights required for democracy, but giving too many rights an a priori status will restrict the areas for democratic decision). Nino’s ‘bright line’ for determining when a priori rights should be upheld over democratic decisions is when the democratic decision-making process is inferior to other forms of decision-making, such as autonomous reflection. He explains at p. 140:

If the failure to satisfy an a priori right makes the democratic process so epistemically weak that it is inferior to our own individual reflection, we must proceed, if possible, to do what is necessary to fulfill that a priori right even by non-democratic means. But if the deterioration of the value of democracy due to the nonfulfillment of some a priori right is not so egregious that it is inferior to our own reflection, we should defer to the result of that process and trust that the process will provide for the fulfillment of the right in question.

75 E.g., Marks, The Riddle of All Constitutions, pp. 41-2.
organisation has been keen to enforce democratic commitments. The International Court of Justice has not been particularly helpful in this regard. In the Nicaragua case, for example, when the United States raised in its defence the issue of Nicaragua’s breach of democratic obligations, the Court was unable to find a binding and enforceable democratic commitment undertaken by Nicaragua. It was unable to do so even though the Nicaragua was a party to a

76 E.g., Roth, Governmental Illegitimacy, pp. 417-19 (discussing the dearth of action taken against non-democratic transitions by the international community).

77 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits, 1986 I.C.J. Rep. 14, pp. 130-35. In this case the US was found to have unlawfully used force against, and violated the principle of non-intervention with respect to, Nicaragua, both directly, and through the US support for, and training of, the contras. In analysing arguments in defence of the US, the Court looked at the strength of Nicaragua’s human rights commitments under the Inter-American system and whether these commitments would justify the US actions taken against Nicaragua. The Court concluded that they did not. This conclusion was arrived at despite Nicaragua’s being a party to the American Convention on Human Rights, which strongly supports democratic government—see its Preamble, and articles 15 (right of assembly), 16 (freedom of association), 29 (restrictions regarding interpretation), 32 (relationship between duties and rights). As seen in the following passages from the judgement, ibid., at pp. 134-35, the Court was extremely reluctant to substitute its own view about the nature of such commitments over those of the relevant Inter-American bodies:

267. The Court also notes that Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a “legal commitment” by Nicaragua towards the Organization of American States to respect these rights; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua [to govern the country democratically—see p. 131 (para. 260)] was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser.L/V/11.53) following visits by the Commission to Nicaragua at the Government’s invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.

268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

The above passages must be read together. Their combination makes it impossible to determine whether the Court’s several findings are independent—e.g., with the Inter-American system’s jurisdiction ‘overriding’ scrutiny by either the Court or the USA—or mutually supportive—with paragraph 268 tipping the balance, so that even if Nicaragua did violate these human rights, the US’s ‘corrective’ actions were unlawful and defeated US defence arguments on this point. Either position, however, is difficult to maintain. There is no hierarchy of tribunals internationally and no claim to exclusive competence by human rights tribunals, so the IJC had equal authority to determine breaches of human rights treaties, if it wished to do so. Also, if there had been a violation of human rights commitments on the part of Nicaragua, the Court could easily have determined that two breaches of international law existed in the case, one on the part of the US (force) and one on the part of Nicaragua (human rights). Finally, the Court’s reasoning is puzzling in light of the precise commitments undertaken by Nicaragua under Art. 29 of the American Convention on Human Rights (1969), which provides:

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
A number of treaties that required respect for democracy-related rights and practices, and even though Nicaragua had made promises to both the Organization of American States and its own people that it would hold democratic elections, it was clear that Nicaragua had breached its obligations with respect to democracy and human rights on a number of grounds, including: (1) that matters of domestic policy fall within a state's exclusive jurisdiction (pp. 130-31, para. 258), (2) that the democratic commitments in the OAS Charter did not per se create a binding obligation (since Art. 3, which requires representative democracy, is balanced against Arts. 12 and 16, allowing states to determine their own political organisation) (p. 131, para. 259), (3) that the Nicaraguan democratic undertaking had been political in nature, not legal (pp. 131-32, paras. 260-61), (4) that even if it had some legal character, such a democratic undertaking would have been towards the OAS, not the US, which could not stand in the place of the former (pp. 132-33, para. 262), (5) that even if the US could fulfil the OAS's role in enforcing such a commitment, it could not use "methods which the Organization could not use itself; in particular, it could not be authorized to use force in that event" (pp. 133, para. 262); (6) that the human rights commitments undertaken by Nicaragua in the Inter-American context were adequately enforceable under that system, not by the International Court of Justice (cf. p. 134, para. 267), and (7) that, regardless, the US's use of force as a countermeasure in such circumstances was illegal (pp. 134-35, para. 268). The Court, in *ibid.*, at p. 131 (para. 260), described the Nicaraguan democratic undertaking, as contained in a letter of 12 July 1979 from the Junta to the Secretary-General of the OAS, as follows:

> The letter contained *inter alia* a list of the objectives of the Nicaraguan Junta and stated in particular its intention of installing the new régime by a peaceful, orderly transition and of respecting human rights under the supervision of the Inter-American Commission on Human Rights, which the Junta invited to visit Nicaragua "as soon as we are installed". In this way, before its installation in Managua, the new régime soothed apprehensions as desired and expressed its intention of governing the country democratically.

Such an undertaking was held to be political in nature, with the treaties of the Organization of American States not changing its political character. This is explained by the Court, in *ibid.*, at p. 132 (para. 261):

> [T]he Court is unable to find anything in these documents, whether the resolution of the communication accompanied by the "Plan to secure peace", from which it can be inferred that any legal undertaking was intended to exist. [...] Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta of National Reconstruction planned the holding of free elections as part of its political programme of government, following the recommendation of the XVIIth Meeting of Consultation of Foreign Ministers of the Organization of American States. This was essentially a political pledge, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. *But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the methods of holding elections. The Organization of American States Charter has already been mentioned, with its respect for the political independence of the member States; in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members "agree to dedicate every effort," including:"

> "The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system." (Art. 42(f).)

It is evident that provisions of this kind are far from being a commitment as to the use of particular political mechanisms. [Emphasis added.]
Of course this reluctance on the part of the Court may have had more to do with the particularly reprehensible methods by which the United States sought to enforce Nicaragua's democratic obligations. The US had mined Nicaragua's ports, destroyed its oil installations, and trained, armed and equipped the revolutionary contras. Nevertheless, the Court could conceivably have found breaches of international law on the part of both the parties in the case, or at least not dismissed the possibility of Nicaragua having any legal obligations with respect to democracy and human rights. As a result, the Case Concerning Military and Paramilitary Activities in and against Nicaragua raises concerns about the possibility of judicial enforceability of a right to democratic governance. Such concerns are deepened by the fact that strong democratic rights pose more than the usual difficulties associated with international legal enforcement. Not only does a right to democratic governance require some form of state consent for its creation, but it also depends upon the active assistance of current governments for its enforcement. Without such assistance, enforcement would be impossible. Ironically, however, such assistance may be equally impossible to obtain. This is because an international legal right to democratic governance will entail not merely the suspension a particular law, or the change of a discrete government policy. Rather, it may ultimately require changing the entire system of government. New elections may be

The Court's judgement is puzzling here. Nicaragua was a party to the International Covenant on Civil and Political Rights (1966) and to the American Convention on Human Rights (1969), both of which have a number of provisions supporting electoral democracy. Both of these treaties were mentioned above as being bases for a future right to democratic governance. Additionally, because the Court was not being asked to enforce a bilateral treaty obligation, it was irrelevant whether the US was a party to these human rights treaties. Further, if the Court had held against Nicaragua regarding a violation of these multilateral treaties, this finding would not have been caught by the US reservation against such treaties being interpreted with respect to itself. [For more on the US reservation, see the earlier decision, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. Rep. 392.] Such an incongruous holding on the part of the Court has caused James Crawford, for example, in Democracy, at p. 13, to comment wryly about the case that "the Court professed itself 'unable to find' such commitments: one can only say that it did not look very hard." In sum, the Nicaragua case offers little hope for the Court being able to find enforceable rights to democracy in either of these treaties.

79 Ibid., pp. 134-5 (para. 268)

80 Simpson, in "Imagined Consent," at p. 120, criticises Franck's theory for re-asserting the traditional dominance of the state when discussing rights of democratic governance:

In essence, Franck merges the two ideas of consent [individual and state consent] and imagines a world in which States themselves consent to a new norm of international law that demands the consent of the citizens for State legitimacy. ... Democratic entitlement becomes foundational not because individuals are central actors (TeSón) but because States deem them to be so (Franck). It appears that there would be no individual consent without prior State consent.

81 Note that this shows one clear way that a right to democratic governance under international law may be much more powerful than democracy in domestic systems. In the latter there is no ability to transform the system itself, as pointed out by Massimo La Torre, Democracy and Tensions: Representation, Majority Principle, Fundamental Rights, No. 95/5, EUI Working Paper LAW (Florence: European University Institute, 1994), at pp. 36-7:

Not only is the democratic method a method of organizing political power; it may be so also for this power, the power in place, since it may not call into discussion the overall structure of the State and the general running of the system, of which it is a mechanism. Only the identity of the elites may be shaken

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required, new legal systems may need to be set in place, new organs of government may have
to be created, and old parties may have to be removed from power. Thus, a right to
democratic governance under international law may effectively question the legitimacy of the
ruling apparatus of the entire state.\textsuperscript{82} This is an exciting possibility, but also a rather anarchic
one. For this reason the difficulties raised in practically enforcing the right urge caution in
our framing it in this manner.

D. IMPLEMENTATION BY THIRD STATES OR INTERNATIONAL
ORGANISATIONS

The fourth potential difficulty with a right to democratic governance, related to the
previous one, is that external actors may attempt to implement it through either forceful or
non-forceful means.

1. Mechanisms for Forcible Implementation

Forcible implementation of a right to democratic governance could be achieved
unilaterally, collectively, or on the basis of a reciprocal treaty-created arrangement. Each
possibility raises practical and theoretical concerns. As discussed below, forcible
implementation also undercuts democratic legitimacy and has negative universalistic and
imperialistic tendencies.

a. Unilateral

Unilateral military enforcement not only would breach the current international rules
regarding use of force.\textsuperscript{83} It is also unlikely to attract much, if any, support in international

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\textsuperscript{82} Fox, in “Political Participation,” at p. 252, summarises:

[I]et me say a word about enforcing the right to political participation. Most of the human rights
generally believed to have entered customary law require governments to alter specific policies. For
example, to comply with the norm prohibiting torture a government would order its police to cease using
excessive force in interrogations. In all other respects, the government continues on much as before.
Compliance with the right to political participation, however, in states where it was previously denied,
requires a change, not in policy but in the system of government. Once such a change occurs, the old
leaders will likely be replaced. Unlike other human rights, participatory rights question the legitimacy of
entire regimes. This is true because the entitlement of those leaders to govern cannot plausibly be
separated from advocacy of the right to political participation.

\textsuperscript{83} Vast scholarship exists on the law regarding use of force. As a matter of both customary and treaty law
(Art. 2(4) of the Charter of the United Nations (1945)), the threat or use of force is prohibited except in limited and
exceptional circumstances, such as for individual self-defence, collective self-defence, and more controversially,
for humanitarian intervention or rescue of nationals. For judicial discussion of the subject see, e.g., Corfu Channel
Case (U.K. v. Albania), Merits, 1949 I.C.J. Rep. 4, Case Concerning Military and Paramilitary Activities in and
More generally, see e.g., Shaw, International Law, 4th ed., ch. 19, Geoffrey Best, War and Law Since 1945
circles. The latter can be seen in the reactions of states and the International Court of Justice to actions taken by the United States in Nicaragua, Grenada and Panama.\textsuperscript{84} Even the arguably humanitarian intervention by NATO in Kosovo attracted deep criticism from some quarters.\textsuperscript{85} In addition, as history reveals, a right of pro-democratic intervention could threaten more than simple dictatorships. It could be used by powerful states to challenge any ‘unacceptable’ form of governance, thereby allowing external control of a state’s political system.\textsuperscript{86}

\textbf{b. Collective}

The alternative—collective enforcement—is also problematic. It is not as worrisome as unilateral enforcement because collective enforcement, if pursued through international and regional organisations, is less likely to be dominated by narrow, ideological interests. Multilateral combinations of legal and political decision-making regarding a right of democratic governance are also preferable to appointing a single third party (either a foreign state or judge).\textsuperscript{87} As a result, some have argued in favour of only allowing multilateral enforcement of such a right—either through regional organisations or by invoking the UN Security Council’s enforcement powers.\textsuperscript{88} There are drawbacks to each of these solutions, however. Regional arrangements are limited by Article 53 of the \textit{Charter of the United Nations}, which requires prior Security Council authorisation. Additionally, before the Security Council can use its Chapter VII powers it must establish the existence of a threat to

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\textsuperscript{86} This is the fear of many Latin American countries, who witnessed the effects of the Reagan doctrine upon regimes that did not meet with US approval. For more on the ‘Reagan doctrine’ and other justifications of the use of force in other states, see generally, Halberstam, “\textit{Copenhagen Document}.” See also Michael Doyle’s criticisms of the subjectivity of regime characterisation, in “Michael Doyle on the Democratic Peace—Again,” in \textit{Debating the Democratic Peace}, ed. M.E. Brown, S.M. Lynn-Jones and S.E. Miller, 364-73 (Cambridge, Mass.: MIT Press, 1996), p. 368 (the relevant passage is reproduced in the footnotes of Chapter 4, in the section entitled “A Justification for Pluralism.”


international peace and security.\textsuperscript{89} Any Security Council involvement, of course, will also be subject to the possibility of a veto.\textsuperscript{90}

c. \textit{Reciprocal, Treaty-Based}

Qualms regarding unilateral and multilateral enforcement options have led some to argue that states should enter into bilateral (or more preferably regional) pacts authorising them to forcefully intervene in one another's affairs to protect democracy. Such interventions could be authorised, for example, after an unconstitutional seizure of power in any state party for the purpose of re-establishing the ousted, democratically-elected government.\textsuperscript{91} A reciprocal, treaty-based approach arguably avoids the limitations raised above because such arrangements are premised upon the previously expressed \textit{consent} of the state concerned, and thereby free states and regional organisations from seeking Security Council authorisation (no unlawful use of force or intervention, \textit{per se}, occurring).\textsuperscript{92} The possibility of such treaty-based intervention is foreshadowed by Articles 9 of the \textit{Charter of the Organization of American States} (as amended by the 1992 \textit{Protocol of Washington}), which allows the suspension of a Member State "whose democratically constituted government has been overthrown" from participating in various OAS organs, conferences and commissions.\textsuperscript{93}

\textsuperscript{89} Art. 53(1) of the \textit{Charter of the United Nations} (1945) states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council," and Art. 39 requires the determination of the existence of a threat to the peace before enforcement measures can be taken under Arts. 41 or 42.

\textsuperscript{90} Art. 27(2) of the Charter provides that for any non-procedural matters, "3. Decisions of the Security Council ... shall be made by an affirmative vote of nine members including the concurring votes of the permanent members...." The need for its concurring vote gives each permanent member a veto.

\textsuperscript{91} E.g., Pierce, "The Haitian Crisis," at pp. 495-6, suggests such an option.

\textsuperscript{92} \textit{Ibid.}, pp. 495-6.

\textsuperscript{93} Art. 9 of the \textit{Charter of the Organization of American States} (1948), as amended by the \textit{Protocol of Washington}, adopted Dec. 14, 1992, states:

A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.

a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful;

b) The decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States;

c) The suspension shall take effect immediately following its approval by the General Assembly;

d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State;

e) The Member which has been subject to suspension shall continue to fulfill its obligations to the Organization;
Articles 19-22 of the Inter-American Democratic Charter further substantiate this OAS position.\textsuperscript{94} The new Constitutive Act of the African Union could push such developments further, as it contains articles that both promote democracy and allow intervention in specific circumstances.\textsuperscript{95}

\begin{itemize}
  \item f) The General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of the Member States;
  \item g) The powers referred to in this article shall be exercised in accordance with this Charter.
\end{itemize}

\textsuperscript{94} Arts. 19-22 of the Inter-American Democratic Charter provide:

\textit{Article 19}

Based on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.

\textit{Article 20}

In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, any member state or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.

The Permanent Council, depending on the situation, may undertake the necessary diplomatic initiatives, including good offices, to foster the restoration of democracy.

If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter.

The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process.

\textit{Article 21}

When the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states in accordance with the Charter of the OAS. The suspension shall take effect immediately.

The suspended member state shall continue to fulfill its obligations to the Organization, in particular its human rights obligations.

Notwithstanding the suspension of the member state, the Organization will maintain diplomatic initiatives to restore democracy in that state.

\textit{Article 22}

Once the situation that led to suspension has been resolved, any member state or the Secretary General may propose to the General Assembly that suspension be lifted. This decision shall require the vote of two thirds of the member states in accordance with the OAS Charter.

\textsuperscript{95} Art. 3(g) of the Constitutive Act of the African Union (2000) makes the promotion of "democratic principles and institutions, popular participation and good governance" one of the objectives of the Union. Art. 4 provides that the Union shall function in accordance with certain principles, including the following:

(i) prohibition of the use of force or threat to use force among Member States of the Union;

(g) non-interference by any Member State in the internal affairs of another;
Nevertheless, such arrangements pose their own dilemmas. Questions will arise as to whether a state’s consent to the regional arrangement was freely given, and in fact whether such consent even could be given—since it purports to bind future sovereigns to a particular, democratic form of political system. Additionally, if a dispute about democratic legitimacy arises under such a system, there is the difficult issue of deciding who or what will be authorised to adjudicate the constitutionality of changes in a state’s government. Such problems, of course, are not insurmountable. As a result, those in favour of energetic promotion of democracy will likely continue to consider reciprocal, treaty-based forms of enforcement as the best solution to the problems of enforcing a right to democratic governance.

2. Legitimacy Questions

We must therefore move to the more fundamental difficulty posed by any form of external, forcible imposition of democracy, namely, its affect upon legitimacy. The bona fides of intervention by a foreign state always will be open to question, and the actions of multilateral institutions always will remain subject to criticism. These latter institutions also may suffer from extreme democratic deficits (as evident in the veto powers of the Permanent Members of the UN Security Council), and thus may be questioned about their ability to impartially judge democratic credentials. Most importantly, external, forcible intervention is particularly problematic when used to promote democracy. It involves lethal use of force, which is a dubious mechanism with which to promote human rights. Also, the ‘will of the

(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;

(j) the right of Member States to request intervention from the Union in order to restore peace and security;

(m) respect for democratic principles, human rights, the rule of law and good governance;

(p) condemnation and rejection of unconstitutional changes of governments.

Art. 30, ibid., requires suspension of unconstitutionally established governments: “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.” These various provisions may be combined as follows: (1) democracy is Objective and Principle of the Union, (2)(a) unconstitutional changes of government, (b) threat or use of force by other Member States, and (c) intervention by other Member States, are contrary to the Principles of the Union, (3) the Union may intervene in a Member State to deal with “grave circumstances,” and (4) the Union also may intervene at the request of a “Member State” to restore “peace and security.” If a non-democratic coup is viewed as a “grave circumstance” (unlikely, given the other examples), or if an ousted democratic regime may be considered a “Member State” and restoring that regime could fall under restoration of “peace and security,” then these Constitutive Act provisions could allow forceful intervention by the African Union to restore democracy.


people’ concerned will not necessarily be consulted by those intervening.\(^9\) Even if an attempt is made to ascertain the ‘popular will,’ the results may be far from clear in any particular crisis.\(^9\)

Further, difficulties may arise if a government of questionable democratic intent is elected by means of an otherwise free and fair democratic process.\(^10\) For example, the December 1998 election of Lt-Col Hugo Chávez Frías as President of Venezuela raised significant concerns about the continued viability of Venezuelan democracy. Chávez had attempted to seize power by \textit{coup} in 1992 and his exact intentions in 1998 were not clear.\(^11\) After his election, for example, Chávez engaged in a radical constitutional overhaul of the Venezuelan state. He dissolved the legislature, abolished the Supreme Court, and ruled with the aid of a constituent assembly until a new constitution could be approved in December 1999.\(^12\) The new constitution provided greater powers to the Venezuelan President as well as

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- External military intervention, even against the most odious dictators, is a dangerous way to produce a ‘democratic world order.’ Sometimes, with a cautious cost-benefit analysis and with the certainty of substantial and legitimate internal support, it may be worthwhile—that is, under conditions when rapid military success is possible and the will of the people at issue is clear. Even so, any time an outside power supplants any existing government the problem of legitimacy is paramount. The very democratic norms to be instilled may be compromised.

\(^9\) An example of a non-democratic \textit{coup} that was arguably welcomed by a substantial proportion of the populace was the bloodless 1979 \textit{coup} of Maurice Bishop in Grenada. For more on the \textit{coup} and its aftermath, see, e.g., William C. Gilmore, \textit{The Grenada Intervention: Analysis and Documentation} (London: Mansell Publishing, 1984).


\(^11\) Lt-Col Hugo Chávez Frías was elected President of Venezuela on 6 December 1998. \textit{Keegan’s Record of World Events Online} (1960-Present), 1998, Vol. 44, December 1998, VENEZUELA, summarises events surrounding the attempted \textit{coup} and subsequent election:

- Chávez, a former paratroop commander who had tried to storm the presidential palace in a failed \textit{coup} attempt in February 1992, had spent two years in prison before being released in 1994 by President Rafael Caldera Rodríguez. During the election campaign he had frightened the business establishment with his promises of radical economic and political change in Venezuela. His programme included the dissolution of the legislature, the suspension of foreign debt payments, and the revision of recent privatisation contracts. [Cross-references omitted.]

\(^12\) Following his election Chávez carried out significant constitutional reforms, plunging Venezuela into crisis when the Constituent Assembly, empowered by Chávez to re-draft the constitution, in August 1999 granted itself the power to intervene in the judiciary and then declared a “legislative emergency,” suspending all sessions of Congress. \textit{Ibid.}, 1999, Vol. 45, August 1999, VENEZUELA. Chávez also re-opened the border dispute with
allowed a second six-year Presidential term (which Chávez subsequently used). Although there is little doubt about the strong popular support enjoyed by Chávez—support which got him elected twice—his earlier attempt at gaining power through a coup d’état, and his later unorthodox approach towards constitutional politics, both squarely raise the kinds of difficulties that may occur in the context of ascertaining the ‘will of the people’ for the purposes of implementing a right of democratic intervention. Either Chávez’s election, or his later actions in overhauling the constitution, easily could have been used by external powers as justifications for forcible intervention to protect “democracy.”

3. Avoiding the Threat of Uniformity

Another significant problem arises regarding forcible, interventionist visions of a right to democratic governance under international law. This is the problem I have characterised as the threat of ‘democratic uniformity’ and which I mentioned earlier in the context of discussing the imperializing potential of democratic discourses. The potential for this threat was first discussed above in relation to the ‘democratic peace thesis,’ which revealed that democracy is the only political system that yields peace dividends at the international level. This benign conclusion, however, has been used to support further arguments in favour of extending democracy to all nations. These arguments rest on the


A new constitution was approved with 71.21 percent of the vote in a referendum held on Dec. 15. The low turnout rate of only 46 percent was largely blamed on torrential rain in much of the country. The 350-article constitution, drafted by a Constituent Assembly composed mainly of supporters of President Hugo Chávez Frías, was promulgated on Dec. 20. It was the centrepiece of Chávez’s radical reform plan, which aimed to pull the country out of economic and political crisis. Chávez said that the new basic law, which altered the country’s name to the Bolivarian Republic of Venezuela, would strengthen democracy, introduce essential civil and human rights, and eliminate widespread corruption, especially in the judiciary. However, critics denounced the document, claiming that it concentrated too much power in the hands of the presidency.

The new constitution permitted the president to be elected for two consecutive six-year terms, and increased the executive branch’s control over the central bank, the military and the legislature. It also replaced Congress (the bicameral legislature) with a unicameral National Assembly, eliminating the Senate (the upper house) and with it the position of lifetime senator, a post traditionally granted to former heads of state. The members of this assembly would be elected in general elections due by March 2000. [Cross-references omitted.]

Following the referendum Venezuela was “ruled by a President enjoying extraordinary powers and with no elected legislature, a situation which was set to last until elections in May.” The National Constituent Assembly (ANC) took over as interim legislative body until the new unicameral legislature could be elected, dissolving the bicameral National Congress and abolishing the Supreme Court of Justice and replacing it by an ANC hand-picked Supreme Tribunal of Justice. Just before taking on its new role as interim legislature, the ANC had passed legislation allowing reinstatement of those members of the military that had taken part in the 1992 coup attempts. ibid., 2000, Vol. 46, January 2000, VENEZUELA. Chávez was elected for a second, six-year presidential term under the new constitution by 59.7 percent of the vote on 30 July 2000: ibid., 2000, Vol. 46, July 2000, VENEZUELA.

104 See the section on the relations of democracy and statehood in Chapter 7, above.

105 See the section dealing with the instrumental justification of “Peace” in Chapter 4, above.
assumptions that world-wide democracy would increase global peace dividends as well as reduce transaction costs between states (social, political, economic costs). Both of these assumptions may prove correct in the future, but raise difficulties at present. Worse, an especially problematic variant of these arguments, relying upon universalization to reduce transaction costs, pushes for the simultaneous and universal promotion of capitalism and democracy. I will come back to this kind of argument below. Notice at this point that even the more limited push towards democratic uniformity raises concerns, especially in light of the potential for an interventionist version of the right to democratic governance. The two main difficulties raised by democratic uniformity are (1) that it may hamper our global ‘political imagination,’ and (2) that it may bring an increased potential for heteronomy. The latter potential arises because the terms “democratic governance” and “right to democratic governance” cannot be (and I have argued should not be) defined with scientific precision at present. Their underdetermined nature, although in many ways beneficial, nevertheless could allow various extrinsic values and ideologies to be imported into practical attempts to implement the right to democratic governance.\textsuperscript{106} Let us look briefly at these two concerns regarding uniformity.

\textit{a. Weakened Political Imagination}

Firstly, any attempt to press for a uniform version of democracy may hinder our political imagination.\textsuperscript{107} This is especially problematic because at present our understanding of democracy is incomplete and we must continue to support the kinds of ‘experiments in democracy’ that can generate new and better democratic practices and conceptions of democracy. We must resist settling for an emaciated version of democratic governance. This possibility is all too real. Limited and inadequate conceptions of democratic governance have been accepted at the international level for some time. Governments and the international community have frequently been more concerned with ‘formal’ rather than ‘substantive’ conceptions of democracy.\textsuperscript{108} Such emaciated visions of democracy do not include

\textsuperscript{106}Definitions of these terms that are too focused would limit our opportunities for experimenting with new forms of democracy, which could prove to be better than existing models. For an analysis of the ideological impact of democracy see Susan Marks’ recent work, \textit{The Riddle of All Constitutions}. Marks uses a nuanced understanding of ideology, particularly through the technique of ‘ideology critique,’ to ‘analyse international legal processes through which asymmetrical power relations are legitimated, obscured, denied, reified, naturalized, or otherwise supported.’ \textit{Ibid.}, p. 29. She is specifically concerned to ‘investigate how moves to promote democracy through international law may serve, on the one hand, to stabilize systematic asymmetries of power and, on the other, to suggest ways of transforming those asymmetries.’ \textit{Ibid.}

\textsuperscript{107} Cf. Marks, \textit{ibid.}, p. 53 (cautioning us against promoting constrained and limited versions of democracy).

\textsuperscript{108} E.g., in Otto, “Challenging the ‘New World Order,’” at p. 379, argues that democratic conceptions in human rights law reveal “an overriding emphasis on policing formal electoral and voting processes rather than on promoting more flexible and participatory forms of democracy.” Grossman, in “Remarks,” at p. 261, argues about the Americas:
participatory elements and they would substantially diminish the value of democracy and democratic processes. By pushing for democratic uniformity at an early stage, when a full-fledged right to democratic governance is still being developed, we may end up settling for an impoverished version of democracy. Rather than accept uniform but deficient democracies, or become resigned to the idea that democracy may not be achievable in some areas of the world (a kind of sceptical democratic relativism), I believe that we should continue to promote and develop diverse forms of democratic governance. We should continue to search for forms of democracy that could be stronger, participatory and globally acceptable.

b. Democratic Determinacy, Ideology, Heteronomy and Capitalism

The second problem with promoting a uniform vision of democracy is that it may enable ideological heteronomy. In light of the present underdetermined nature of democracy, the drive towards uniformity may encourage powerful actors to impose their particular visions

Democracy, to many in the hemisphere, is equivalent to free elections, and “free elections” means no more than one candidate with votes properly counted and the winner becoming president. This narrow vision of democracy can result in severe problems, such as the possible exclusion of certain sectors of the society, and problems involving institutional or de facto arrangements that severely restrict the power of elected officials, for example, to control the security establishment.

See also Marks, _The Riddle of All Constitutions_, p. 40 [election-focused, limited conception of democracy used by proponents of norm of democratic governance], Simpson, “Imagined Consent,” p. 124. Some feminist theorists would take Grossman’s comments even further, arguing that the simplistic way in which we assess democratic content is really just a more obvious example of how simplistic our thinking is about liberal democracy as a whole. Instead of being a neutral mechanism for freedom and equality, liberal representative democracy is itself argued to produce gross inequalities in our society and reinforce patriarchal values: Otto, ibid. Other feminists have challenged this view, arguing that liberal democracy permits more variety than assumed in these critiques, and that the real issue is not so much one of seeking ‘alternatives’ to liberal democracy, but rather making it more participatory, more substantial: Anne Phillips, “Must Feminists Give Up On Liberal Democracy?” in _Prospects for Democracy: North, South, East, West_, ed. D. Held, 93-111 (Cambridge: Polity Press, 1993).

109 Carothers, in “Empirical Perspectives,” at p. 264, makes a similar point in criticising our exclusive focus on elections rather than a variety of indicators of democracy: “elections are underdeterminative of democracy ... [being] a necessary but not sufficient condition.” See also, Roth, _Governmental Illegitimacy_, pp. 421-22; Marks, _The Riddle of All Constitutions_, ch. 3 [discussing the drawbacks of ‘low intensity’ visions of democracy]. Carothers argues that a number of democratic preconditions will not be satisfied by simple elections, and thus democracy must be viewed more broadly. He argues, in ibid., at p. 264, that elections _per se_ will not solve certain problems: (1) human rights abuses (there is “no simple threshold level of human rights abuses signifying a nondenomocratic situation”); (2) constraint of elected governments (i.e., by the military); (3) government corruption; (4) government dominance by a particular class of society; and (5), the existence of informal barriers to democratic participation (i.e., ones that “shut out or marginalize certain sectors of society”).

110 Carothers takes this kind of ‘relativist’ position. Throughout his article Carothers argues that democracy is not a universally accepted norm and that there are in fact different levels of democratic progress in two major areas of the world: the Western and non-Western parts of the world (with Latin America and Eastern Europe being considered part of the former, and Arabic states, Africa and Asia being part of the latter). _Ibid._, pp. 262-3. He therefore argues, in ibid., at p. 265, that democracy must be seen on something like a continuum, with different levels of democratic participation being achievable in different societies. In other words, we may need to recognise that many societies both do not, and _will not_, meet western liberal models of democracy. His sobering conclusion, at p. 266, is that “[t]he current advocacy of a democracy norm is important in international law, but it is based on a superficial empirical account of world events.” _Cf._, Simpson, “Imagined Consent,” p. 124 (not enough empirical evidence of the “ascendancy of the democratic impulse”).

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of democracy upon weaker entities, by means of force, trade, aid or ideology. An indirect example of this problem is revealed in the recent literature that associates democracy with the need for western-style liberal markets. Such literature tends to connect political and economic movements in an unquestioning manner. Not only is this linkage theoretically inconsistent (since democracy and capitalism are in some ways incompatible), but it is also deeply problematic at the practical level. For example, the linking of democracy and capitalism has led developed countries and international financial institutions to require predetermined 'packages' of democratic and 'free market' changes from developing countries before they will disburse aid funds or provide other assistance. In many cases the result has been negative for both democracy and capitalism, with each undercutting the other. This practice also has been strongly resisted by developing states, who recognise it as being merely another form of Western neo-colonialism—a kind of liberal democratic free market colonisation.

Arguments explicitly linking democracy and capitalism have arisen precisely because the meaning of "democratic governance" in practice remains undetermined. Despite the clear and detailed phrasing produced by the Organization for Security and Co-operation in Europe in the Copenhagen Document, for example, the right to democratic governance remains too loosely defined, too imprecise, to inform any predictable practice. As

111 E.g., Simpson, in ibid., at pp. 120-23, warns about the "pattern of conformity" that may be imposed by simplistic desires to export democracy. Discussing the work of Ferdinand Teson, Simpson argues, at p. 121, that "[e]xporting democracy too, has a habit of proving counter-productive or, worse, can be a disguise for action in pursuit of suspect ideological ends. Teson's idea of an exclusive company of democratic states finds expression in the term 'rogue State' which has been used to justify interventions in Nicaragua, Panama, Grenada, Libya, Iran, Iraq and Chile."


113 See, e.g., the discussion of Weberian modernity, the democratic state and capitalism in Chapter 7, above.

114 See discussion in footnote 134, below, and the surrounding text.


116 See, e.g., Roth, Governmental Illegitimacy, p. 420-26 (engaging in a careful critique of the ability of democratic norms to yield a predictable practice). This is also illustrated by the fact that in 1990-91 the UN General Assembly passed three Resolutions, two strongly supporting democracy and election monitoring, but one reserving each state's right to determine the methods and institutions of the electoral processes: Franck, "Democratic Governance," pp. 64-5 and 82, and footnotes 82-6 and 195-7 (citing: GA Res. 45/150 (Dec. 18, 1990); GA Res. 46/137 (Dec. 17, 1991); and GA Res. 45/151 (Dec. 18, 1990), respectively). Accord: Crawford, Democracy, p. 17 and n. 62. The General Assembly repeated this ambiguous practice in 1998 with two further Resolutions: Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in Their Electoral Processes, UNGA Res. 52/119, UN Doc. A/RES/52/119 (23 Feb. 1998), and Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and
mentioned earlier, this can be a good thing in light of the need for further development of, and experimentation with, democracy. But in the present context the underdetermined nature of democracy may be negative because it could be invoked to support a variety of imperialist and ideologically-motivated actions by powerful states—actions which may be only loosely connected with, or even unconnected to, democracy. This concern has been raised by scholars familiar with democratic regimes in Central and Southern America, where in the not-too-distant past many of the regimes labelled ‘democratic’ by the West seemed to be as far from any standard version of representative government as their communist rivals. In recent works both Brad Roth and Susan Marks make explicit this troubling connection between democracy, ideology and pro-democratic interference. Roth, for example, states:

Democratic entitlement proponents seek, to one extent or another, to license ‘pro-democratic’ interferences in the internal processes of sovereign states. Invocations of democratic principles in specific political controversies, however, are by nature ideologically skewed, if not altogether manipulative. In the typical case, all sides of a political struggle claim the democratic high ground, and the multifaceted nature of the concept allows each side to make a facially plausible case. As a result, the outside observer tends to identify as ‘democratic’ whichever side engages his sympathies. Worse, the outsider is tempted to equate democracy with freedom and power for those members of foreign societies with whom he personally identifies. Mischief frequently results. If partisan judgments of this type can be passed off as an application of an international legal standard that licenses intervention, the potential for mischief is greatly compounded.

Because of the lack of a precise meaning for “democracy,” states could use the term to disguise ideologically-driven interventions as ‘democratic.’

Susan Marks approaches the same problem from a slightly different perspective. Rather than being underdetermined, she argues that a very narrow, minimalist, ‘low intensity’ definition of democracy has been accepted by international law. Importantly, Marks argues that this form of democracy has taken on an ideological character. This explains why

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117 See, e.g., Carothers, “Empirical Perspectives,” and Roth, Governmental Illegitimacy.

118 Roth, Governmental Illegitimacy; Marks, The Riddle of All Constitutions. For an earlier, shorter version of Marks’ argument in the specific context of liberalism, see Susan Marks, “The End of History? Reflections on Some International Legal Theses” (1997) 8 E.J.I.L. 449-77.

119 Roth, Governmental Illegitimacy, p. 420 (citations omitted).

120 Notice, however, as suggested by Roth, that such a connection need not be completely nefarious or Machiavellian. Any broad political standard like ‘democratic/non-democratic’ requires a great deal of interpretation in its application. Since both sides to a dispute will be able to claim a democratic basis, an external interner will tend to favour the claim of the party that most closely matches her own interpretation of ‘democracy’ or democracy-related practices.

121 See generally, Marks, The Riddle of All Constitutions, chs. 2 and 3.
international lawyers and political theorists use ideological forms of argument to justify ‘low intensity democracy.’ They ‘rationalise’ its minimalist democratic standards as being the only ones possible, because such standards can be monitored by international observers and do not require any on-going and thorough implementation of democratic norms. Further, low intensity democracy is justified through a ‘narrative’ description of the development of democracy internationally, which is shown to progress from an earlier articulation of the principle of self-determination up to the present focus upon electoral politics and election monitoring. Low intensity democracy is seen as either a high point on a scale of continuing democratic progress, or as the outcome, the “highest stage of normative progress.” It is also ‘normalised’ as part of the standard version of democracy (even if the equation of the two is questionable), and plays a role in ‘masking’ the asymmetrical power relations present in low intensity democracy societies. Such minimalist visions of democracy also serve the ideological role of ‘unification’ by presenting the electoral process as a means (albeit imaginary) of resolving social and political antagonisms. They do this partly by using ‘universalising’ arguments that prioritise civil and political rights to the exclusion of other forms of human or group rights; they thereby expose social life to a process of reductive ‘simplification.’ Finally, Marks argues that low intensity democracy is ‘reified’—turned from a human idea into a pre-given object—in international discourse, thus further ‘naturalising’ it as the “sole notion of democracy that requires consideration.” In sum, as a result of such ideological justifications a particular, minimalist form of democracy is dominant, but also is removed from general political scrutiny. In such a way it becomes a-historical and pre-given (or at least a pre-requisite along the path of democracy generally). Broader understandings of democracy thereby move beyond our imagination.

The arguments of Roth and Marks approach the same challenge from different perspectives. They are both concerned about the way in which the international legal notion of democracy can be, and has been, manipulated for ulterior (or at least non-democratic) ends.

122 Ibid., p. 62. I have highlighted several terms in the following description of Marks’ argument with single quotation marks because she defines them more precisely in the first chapter of her work. See generally, ibid., ch. 1.

123 Ibid., pp. 62-3 (referring particularly to minimalist election-monitoring practices).

124 Ibid., p. 63 (referring especially to Thomas Franck’s writings).

125 Ibid., pp. 63-4. Marks, in ibid., at p. 64, notes that social and economic inequalities are presumed irrelevant in matters related to voting and elections, even though “social and economic inequalities translate into differential capacities to exercise and influence political power.” She also argues that low intensity visions of democracy tend to invert the true situation by making these “inequalities appear as equalities” (i.e., by excluding them from scrutiny under what it means to be a democracy). Ibid.

126 Ibid., p. 65.

127 Ibid., p. 66.
purposes. This problem of ideological manipulation is seen most clearly in the context of arguments in favour of rights of democratic intervention. At the simplest level such interventionist arguments often reveal external, non-democracy-specific motivations when judging which countries need democratic intervention and which countries or entities should be intervening. At a more involved level, those advocating a right to intervene in another state to establish a democratic government often imply that other political, economic and social changes should go along with setting up a democratic government. In many cases, restoration of democracy seems to be considered merely the first of a variety of changes a country will need to undergo, almost invariably including acceptance of Western-style free market reforms.

Such difficulties reveal the ‘Catch-22’ involved in envisaging the right to democratic governance as permitting intervention to support democracy. On the one hand, if the definition of “democracy” is too vague, intervention can be used to support broad ideological and imperialistic pursuits. But on the other hand, if its definition is significantly narrowed we will suffer under emaciated visions of democracy and possibly loose the potential to create better and more meaningful forms. Moreover, narrowing our vision of democracy to focus solely on criteria related to the democratic electoral processes proves equally problematic.

Such processes are themselves under-determinative of democracy, since free and fair elections can produce non-democratic governments. Interventionist forms of the right to

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128 Reisman, for example, in “Sovereignty and Human Rights,” on the one hand relies upon popular will as support for the US intervention in Panama (p. 873), but on the other, dismisses popular will in the case of Soviet intervention in Afghanistan (p. 875).

129 Pierce, in “The Haitian Crisis,” at p. 487, makes this connection explicit:

Predictably, the same goal continues to be announced by foreign policy leaders in the United States who emphasize not only the value of democracy itself but also its necessary corollary—the free market. In September 1993, National Security Advisor Anthony Lake asserted that the fundamental U.S. mission in the world was the ‘enlargement of the world’s free community of market democracies.’ [Emphasis added and citations omitted].

130 Such difficulties lead Roth, in Governmental Illegitimacy, at p. 424, to reject the right to democratic governance:

To assert an international right to governance, then, is to assert not a right to governance conducted according to a given set of procedures, but a right to such procedures as are calculated in any given instance to further the establishment of a truly democratic society. Such a ‘right’ either is indeterminate or entails the imposition of a specific liberal-democratic worldview that has yet to find general acceptance.

131 Examples of democratic elections producing non-democratic results include, according to Hoffman, in Beyond the State, at p. 200, the German elections of 1933 and the ‘disallowed’ election of the Islamic Liberation Front of Algeria in 1991. See generally, ibid., pp. 200-202 (refuting the ‘tyranny thesis,’ i.e., that democratic choice necessarily leads to tyranny of the majority). Carothers, in “Empirical Perspectives,” at p. 265, points out that the Latin American experience showing that “democracy is not always the people’s choice”:

What we must realize—and this may be hard to accept—is that in at least some of those future cases, the departure of an elected civilian government and its replacement by some nondemocratic form of government will be supported at least initially by a majority of the population of that country. […]

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democratic governance face particular challenges in such a situation. If a non-democratic government is produced by a democratic electoral process (a result only likely for new democracies, or under particularly weak conceptions of democracy), then the democratic intervener is faced with a difficult decision. The intervener can either respect the results of the democratic process or reject them and in the short term act anti-democratically (using intervention) in hopes that such action will ultimately encourage long-term democratic goals. Either way, narrow and weak visions of democracy fail to uphold the concept’s central values.

Let me illustrate these difficulties in a more concrete manner by briefly examining some of the arguments that link democracy and capitalism. These arguments reveal how an interventionist right to democratic governance easily may be turned to ideological purposes by the strong against the weak. This may seem counterintuitive to some, as bringing in free market economies alongside democratic rights may appear to simultaneously combine two goods. But there are four reasons to resist implementing capitalism alongside democratic governance in one, pre-determined package. Firstly, their direct combination, as opposed to a gradual phasing in of one at a time, may cause much higher levels of suffering for the population of a country undergoing the transition. This was recently illustrated in Eastern Europe, where the combination of restraint upon governments, tighter economic controls, and dismantling of affirmative action programs (in both employment and electoral positions), dramatically worsened standards of living and affected other aspects of the new societies.

I am not saying that popular rejection of elected governments happens often, nor that it is good, nor that it lasts. My point is only that such situations have occurred in the past and will occur in the future, and that they are very problematic for adherents to the idea that only a democratic government has the consent of the people.

For the debate about both the legality and democratic soundness of external interventions to re-establish democracy in cases in which democratic elections have brought non-democratic or even anti-democratic governments into power see the sources listed in footnote 100, above. See also the commentary on the election of Venezuelan President Chávez in the subsequent footnotes following and surrounding text, above.

Wood, in Democracy Against Capitalism, at p. 235, argues that the current tendency to identify democracy with the free market, although tilting the balance too far, “is not completely inconsistent with the fundamental principles of liberal democracy,” which separate the economic and political spheres.


E.g., Otto, ibid. See also, Paul Lewis, “Road to Capitalism Taking Toll On Men in the Former Soviet Bloc,” New York Times, International (1 August 1999), p. 3. Lewis summarises a UN report that reveals that the ratio of men to women is falling in many of the post-Communist countries of the former Soviet Union and in parts of Eastern Europe. According to the report, these countries are paying “a high social and human cost for their transition to a market economy.” Factors leading to this divergence include “rising suicide rates, declining life expectancy, poor health care and an increase in self-destructive behavior – including drug and alcohol abuse and crime.” Life expectancy has fallen by four years for men in Russia and lower living standards have resulted in declining birth rates and higher mortality rates. There has been a related increase in suicides, including a 60
This result in part may have been caused by the minimalist version of democracy promoted in these countries. But it was also caused by the simultaneous imposition of harsh economic and political reforms. Secondly, the combination of democracy and capitalism, in a manner similar to imposing limited conceptions of democracy (as discussed earlier), may yield limited and impoverished visions of the former. Thirdly, capitalism has its own preferences, ones that may not be compatible with democratic choice—such as its lack of neutrality regarding decisions about the scope of the market. As a result, some of the tendencies of capitalism may work against the full implementation of democracy. Fourthly, the urge to combine capitalism and democracy may be based upon incorrect assumptions about their compatibility. Their incompatibility may arise at the level of theory—as illustrated by Marxist scholars, and in a more interesting manner, by Max Weber. As seen

percent rise in Russia, 95 percent in Latvia and 80 percent in Lithuania. The result, according to the report, if one uses the standard of comparison of the ratio of 96 men to every 100 women found in the UK and Japan, is "that there are 9.6 million 'missing men' in the countries of the region."

135 See, e.g., Marks, The Riddle of All Constitutions, pp. 57-8 (discussing the harsh consequences of weak, or 'low intensity' versions of democracy, including instability, economic hardship, and repression). In ibid., at pp. 67-9, Marks also discusses David Kennedy's argument that a two-track approach to political, legal and economic development is at play, with ex-communist Eastern European states suffering under outdated political and economic models imposed by the West: "Eastern policymakers and Western advisers alike are advocating for the East an approach to economic and political life which Western societies no longer adopt, and probably never did."

136 Hoffman, for example, in Beyond the State, at p. 198, criticises several recent models of democracy as being "models of 'capitalist democracy',' which thus "uncritically [reflect] the way in which democracy has been 'redefined' in the twentieth century so as to rob it of its egalitarian and anti-statist characteristics." See also Wood, Democracy Against Capitalism [generally arguing that capitalism restricts our potential for realising a more democratic society, with Marxist thought still offering a stronger alternative—i.e., through her suggested 'democratic modes of production' of the final chapter]. In ibid., ch. 7, Wood makes the narrower argument that capitalism broadened, and at the same time diluted the meaning of citizenship from ancient times to the present. By devaluing the political quality of citizenship and emphasising its economic characteristics, capitalism has weakened the concept for modern democracies. This leads a strong statement by Wood at p. 211: "The devaluation of citizenship entailed by capitalist social relations is an essential attribute of modern democracy."

137 Nino, in The Constitution of Deliberative Democracy, at p. 163, points out that "the market is not often neutral concerning preferences that are incompatible with the expansion of the market itself."


Increasingly, the crucial interrelationship between market reforms and democratic political reforms is coming to be widely accepted by policymakers. Rather than dwelling on the inconclusive debate as to whether democratic change leads to economic reform or whether the loosening of the economic system is a precondition for a political opening, it is far more important to understand that both processes mutually reinforce one another and fundamental progress in one sphere appears to be a precondition of progress in the other. This, at any rate, is the conclusion of this survey..."

Section 18 of the Prague Document on the Further Development of CSCE Institutions and Structures (1992) also explicitly endorses such a connection: "The Ministers agreed on the need to continue their efforts to strengthen the focus of the CSCE on the transition to and development of free-market economies as an essential contribution to the building of democracy."

139 Several authors have suggested that capitalism and democracy are not easily, or possibly never, compatible. For a general argument about the anti-democratic nature of capitalism (from a distinctly Marxist perspective), see Wood, Democracy Against Capitalism. Max Weber identified more subtle disharmonies between capitalism and democracy, but suggested that the two might work together in a state of balanced tension—each
earlier in Chapter 7, Weber viewed capitalism and democracy as competing with each other in a kind of antinomical relation. But they were also capable of working together in a dialectical fashion, each balancing the negative tendencies of the of the other, as well as those present in bureaucracy (the necessary ‘third pillar’). At the simpler, practical level the combination of capitalism and democracy may be equally problematic. Owen Fiss, for example, argues that capitalism may tend more naturally towards authoritarian regimes. Anti-democratic tendencies of capitalist systems include such things as the concentration of (economic) power without political accountability for its use, the ability of powerful economic actors to influence the political process (e.g., campaign contributions, media coverage), and the market itself not encouraging the media to enlighten the populace about political issues (low profitability). Capitalism’s hierarchies do not encourage activism or independent political participation, and the economic inequalities produced by capitalism influence voting patterns, the choice of electoral candidates, and citizen contentment (i.e., encouraging resentment and illegal industries, such as narcotics trade). Additionally, Western-style capitalism strongly delimits the role of democracy to the public or political forum and does not encourage democratic organising in the workplace. This is especially striking because it thereby excludes vast areas of our lives from democratic decision-making. Although Fiss does not

checking the more problematic aspects of the other. See generally, Kronman, Max Weber, chs. 6 and 8, Mommsen, The Political and Social Theory of Max Weber, chs. 4 and 11. But cf. Wood, supra, at pp. 146-78, where she argues that Marx’s critique of capitalism is more powerful than Weber’s, since the latter, in her opinion, assumes rather than explains capitalism’s origins. Mommsen, in ch. 4 of his work, supra, argues that such a focus is misplaced and simplistic, since Weber’s goal was not to offer an holistic explanation of the origins of capitalism. Such an holistic explanation would be pointless and ‘dishonest’ because of all the variables at play. E.g., Mommsen, explains in ibid., at pp. 56 and 57, respectively:

[U]nlike Marx, Weber emphasized that one could grasp only segments of social reality, never its totality. Weber thought it impossible, indeed dishonest, to go beyond the construction of ideal types: models that are used for describing particular historical sequences and for analysing their social effects and human consequences. In other words, from Weber’s methodological perspective, claims about the objectivity of the historical process were fictitious. […]

[Weber] never claimed that his ‘Protestant ethic’ thesis completely answered the question of how and why industrial capitalism arose. He pointed out repeatedly that he uncovered only one group of factors among others that had contributed to the rise of capitalism. [Citations omitted.]

See also the section of Chapter 7, above, entitled “Weberian Modernity, the Democratic State and Capitalism.”

140 Fiss, “Capitalism and Democracy,” p. 919.


142 Fiss, in ibid., states at p. 914: “In capitalist societies most employers are non-governmental, and while this may enhance the freedom of citizens to criticize the government, their new dependency impairs their freedom to criticize their firm, their boss, or the governmental policies that sustain or support that firm. They face discharge if they speak out.” [Citation omitted].

143 See e.g., Wood, Democracy Against Capitalism, ch. 7 (especially pp. 233-37). At p. 234 Wood points out that modern capitalist liberal democracy excludes decisions on many of the crucial factors affecting our lives:

[Liberal democracy] leaves untouched vast areas of our daily lives—in the workplace, in the distribution of labour and resources—which are not subject to democratic accountability but are governed by the powers of property and the ‘laws’ of the market, the imperatives of profit maximization.

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argue that capitalism should be rejected—the battle no longer being one “between capitalism and socialism, but rather a battle within capitalism”—nevertheless the tensions between capitalism and democracy should caution us against complacency regarding the strength of the latter to overcome the excesses of the former.144

Again, both these practical and theoretical difficulties are caused when we attempt to join interventionist forms of the right to democratic governance with capitalism. They arise because if we do not have specific, limited criteria about what that right entails, any intervening power may be free to impose its own values upon another state. There is no supranational body currently capable of making such impartial democratic determinations, and our history of colonialism bears witness to the general problems of this kind of paternalistic imposition.145 The most basic problem involved in imposing democracies upon people is that the undertaking will likely defeat the values it seeks to engender. As surmised by Crawford, “a rule of legality for pro-democratic invasions would deny the people concerned—the alleged beneficiaries of the rule—any opportunity to state their own views on the events.”146

4. Non-Forcible Implementation

As a result of the significant difficulties involved in forcible implementation of a right to democratic governance some have argued in favour of using more indirect, non-forcible arrangements to implement the right. Such arrangements would be less likely to be susceptible to abuse, and even if they were, would not involve as dramatic forms of coercion. One non-forcible option, for example, would be for states and the international community to withhold financial and other support from both non-democratic regimes and any rogue states that attempt to deal with them. Another option would be to employ direct economic sanctions or embargoes to enforce the right to democratic governance. These sanctions would express symbolic disapproval of the regime as well as physically and economically cripple it.147

Yet even these non-forcible options have some disadvantages. Firstly, in terms of effectiveness, certain states will be more likely to be influenced by economic sanctions than others. Also, unless the sanctions or embargoes are respected by a vast majority of states they

144 Fiss, “Capitalism and Democracy,” p. 919 (emphasis added). To help encourage democratic values Fiss urges a variety of protective and supportive measures to check the negative aspects of capitalism: ibid. But see the references to Max Weber’s work in footnote 139, above, which suggest that capitalism and democracy may be combined in a dialectical relationship in order to balance each other’s negative potential.

145 E.g., Simpson, “Imagined Consent,” p. 121 (no body capable of making such determinations); Franck, “Democratic Governance,” p. 78 (warning us that imposition of standards by the international community “long ago justified ‘enlightened’ colonialism”).

146 Crawford, Democracy, p. 20.

will likely prove ineffective. There is some evidence, for example, that the embargoes enforced against Haiti by the Organization of American States and the United Nations Security Council did not significantly damage the position of the coup leaders.\textsuperscript{148} Secondly, with any form of economic sanction there are usually serious consequences for the population of the targeted state, the very people whom the sanctions are meant to help.\textsuperscript{149} Such consequences perhaps could be ameliorated or avoided in certain situations. Also, good ‘tests’ and evaluative frameworks have been formulated to help establish when sanctions should or should not be implemented.\textsuperscript{150} Nevertheless, a third disadvantage with non-forcible implementation of a right to democratic governance is simply that it may not be speedy. Examples of recalcitrant regimes (such as that formerly existing in South Africa) suggest that these kinds of procedures might take a very long time to produce results. Fourthly, non-forcible arrangements may connect implementation of democratic governance with other ideological goals, such as encouragement of capitalism.

A particularly interesting example of this latter difficulty is found in the most recent manifestation of the embargo imposed by the US since the early 1960s upon trade with Cuba, namely, the Helms-Burton Act.\textsuperscript{151} This piece of legislation was enacted at least partly to

\textsuperscript{148} Pierce, in \textit{ibid.}, at pp. 498-502, discusses some of the reasons why the sanctions against the Haitian regime failed, including the non-binding quality of the OAS sanctions, the widespread international disobedience of the embargo, the weakening effect of the US exemptions to the embargo, and the fact that Haiti may simply have had too basic an economy and too weak a political culture to be affected by them (i.e., having a low degree of international integration).

\textsuperscript{149} \textit{Ibid.}, pp. 503.

\textsuperscript{150} Pierce, in \textit{ibid.}, at pp. 504-6, provides a good summary of the variety of factors that could be assessed in determining whether or not to use sanctions in a given case.

\textsuperscript{151} The US embargo on trade to Cuba came into place shortly after Fidel Castro’s seizure of power in January 1959. E.g., the “Bay of Pigs Invasion,” in \textit{Encyclopedia Britannica Online}, as available at http://search.eb.com/bol/topic?eq=140222&src=1 (accessed 27 July 2001), summarises:

Within six months of Castro’s overthrow of Fulgencio Batista’s dictatorship in Cuba (January 1959), relations between Castro’s government and the United States began to deteriorate. The new Cuban government confiscated private property (much of it owned by North American interests), sent agents to initiate revolutions in several Latin-American countries, and established diplomatic and economic ties with leading socialist powers. Castro himself often and vociferously accused the United States of trying to undermine his government. Several U.S. congressmen and senators, from early 1960, denounced Castro; and by June the Congress had passed legislation enabling President Dwight D. Eisenhower to take retaliatory steps: the United States cut off sugar purchases from Cuba and soon thereafter placed an embargo on all exports to Cuba except food and medicine. In January 1961, Eisenhower, in one of the final acts of his administration, broke diplomatic ties with Cuba.
promote a democratic transformation in Cuba. Unfortunately, it attempts to do so by isolating Cuban citizens from global trade by imposing severe penalties on companies of any nationality that deal with assets of US citizens that were ‘confiscated’ by the Cuban regime of Fidel Castro. The Helms-Burton Act has been widely criticised for its potentially extraterritorial nature and cruel effects. The present concern is simply that it is unfit for its ostensible purpose of encouraging a democratic transition in Cuba. The Act therefore shows how even a non-forcible means of implementing democracy may go awry. The Helms-Burton Act will fail to promote democratic reform in Cuba for three reasons. Firstly, it resorts to a heavy-handed, ‘all-or-nothing’ approach to democratic change—one that discourages any political reforms short of ousting the Castro brothers. Such inflexibility drastically curtails the ability of the US administration to send out the kinds of subtle signals of approval or disapproval that might encourage Cuba to engage in democratic reform. Secondly, the Helms-Burton Act is unlikely to engender democratic reforms because of the excessively strict political and economic standards it sets for Cuba. In fact, the Act even prevents assistance so long as Fidel Castro or his brother Raul stay in power. The ability of such provisions to encourage democracy is questionable and their effect upon any transitional

152 The Act permits no exceptions and ties the Executive’s hands until certain criteria are fulfilled (i.e., the creation of a transitional government), or it is superseded by another statute: Lowenfeld, “Congress and Cuba,” p. 422. This rigid stance must be seen in the context of the earlier, more flexible policies of the US government. The Helms-Burton Act replaces various at least potentially sensitive regimes that were in place since 1962. Between the early 1960s and the late 1980s, the various levels of restrictions upon US, and US subsidiary, dealings with Cuba allowed the government to exercise significant diplomatic or political flexibility in its efforts to persuade it to become a democracy. Ibid., pp. 420-22. Thus Lowenfeld explains, in ibid., at p. 421, that the previous “embargo and its fine tuning ... [were] tools of foreign policy.” Earlier regimes allowed US subsidiaries operating out of foreign countries to apply for a general licence to allow them to follow local, not US law, with respect to trading with Cuba, and in later years these general licenses were replaced by specific licence requirements (in 1975). Thus, the US was able to express its disapproval of Cuban authorities to a greater or lesser extent depending upon the motivations of the administration in power. This kind of ‘soft’ approach is being used at present by Canada and the European Union, as well as more recently, the states of the Caribbean. Cuba is a full member of the Association of Caribbean States and has recently entered into reciprocal taxation agreements with Barbados. See, e.g., CARICOM Secretariat, “The Association of Caribbean States (ACS)” (CARICOM Secretariat) [undated pamphlet].

153 The Act effectively prevents the US government from being able to provide aid to any transitional regime or regime proposing reforms because of the definitions it sets regarding what kinds of things can count as “transitional” or “democratic governments.” For example, one of the requirements for a “democratic government” under the Act, contained in Section 206(6) is that the new regime must have made “demonstrable progress in returning to United States citizens ... property taken by the Cuban government.” Lowenfeld, ibid., p. 423 (quoting from Section 206 (6) of the Act). The provision for “transition” governments repeats this requirement, except that in this case the regime merely must be “taking appropriate steps” rather than having to have achieved demonstrable progress in returning confiscated property to United States citizens. Ibid., pp. 424-5, n. 32 (reproducing Section 205, which sets out the requirements for a transition government, as well as “additional factors” including the one I have commented upon). Such provisions would bankrupt any new Cuban regime.

154 Section 205(a)(7) stipulates that a transitional government in Cuba for the purposes of the Act (meaning one eligible for assistance), is one that “does not include Fidel Castro or Raul Castro” [as reproduced in ibid., p. 424, in n. 32].
or newly emerging regime would be severe.\textsuperscript{155} Finally, the Helms-Burton Act cuts Cuba off from any non-US economic aid that might encourage democratic development.\textsuperscript{156} When this is combined with the provisions regarding payment of damages or other forms of compensation for confiscated US property, the Act’s goal of promoting democracy would seem to have been suppressed for the unrelated task of recovering assets of US nationals.\textsuperscript{157}

As a result of such grave weaknesses, the Helms-Burton Act should serve as a warning about the kinds of problems that can arise even if well-meaning politicians feel it is their duty to promote democracy in foreign countries.\textsuperscript{158} It definitely cautions us against using heavy-handed approaches.\textsuperscript{159} It has special relevance in light of the fact that recent experience in Eastern Europe reveals that newly-emerging democracies may be difficult to maintain in the face of severe economic hardship. Democratic systems are not ready-made and may not be self-sustaining in their early years. Further, democracy \textit{per se} will not solve a country’s economic and political problems.\textsuperscript{160} Heteronomous imposition of democratic and free market values may contradict some of the fundamental premises of democracy, including its respect for diversity and autonomy. These difficulties arise both for forcibly and non-

\textsuperscript{155} As Lowenfeld points out in \textit{ibid.}, at p. 424, these kinds of restrictions are “inconsistent with the goal of a democratically elected government, with its own agenda and priorities.” See also, \textit{ibid.}, p. 425.

\textsuperscript{156} The Act, and US diplomatic pressure, prevent Cuba from participating in the Organisation of American States as well as a number of international financial institutions (such as the World Bank, the International Monetary Fund, and the Inter-American Development Bank): \textit{ibid.}, p. 423. But see the recent Caribbean developments highlighted in footnote 152, above.

\textsuperscript{157} As a result, these economic requirements and prohibitions would drastically cripple any new government that emerges, regardless of the strength of its democratic values. Even Brice Clagett, who is a strong proponent of the Helms-Burton Act, makes this point clear in “Title III of the Helms-Burton Act is Consistent with International Law” (1996) 90 A.J.I.L. 434-440, at p. 435:

A post-Castro government will face staggering problems in attempting to do justice to the regime’s victims [as required under the Act] while reviving the economy from the wreckage in which Castro will have left it. (The claims of preconfiscation U.S. nationals alone as certified by the Foreign Claims Settlement Commission, including interest, now total more than $6 billion.) Any just solution will necessarily involve a large measure of restitution or substitution, since the payment of the full monetary compensation to all claimants will be far beyond Cuba’s resources.

\textsuperscript{158} Lowenfeld, “Congress and Cuba,” at pp. 433-4, implies that he is in favour of the goal of promoting democracy envisioned in the Act, but is doubtful about the methods by which the Act seeks to accomplish this goal:

The critique here expressed relates to the legislation. It hampers the discretion of the executive branch; it purports to micromanage a transition whose contours no one can predict; it places too much emphasis on property issues almost two generations old; it perverts our immigration and travel laws; and it seeks to impose American policy judgments on nationals of friendly foreign states in a manner that is both unlawful and unwise.

Perhaps all of this could be forgiven if the Helms-Burton Act could really bring about liberty and democracy in Cuba. I see no reason to believe that it will do so.

\textsuperscript{159} Interestingly, the European Union seems to have accepted the Helms-Burton Act even though it likely violates international trade laws, because of fears that any disputes over the Act might fatally harm the new WTO regime: Stefan Smis and Kim Van der Borght, “Current Developments: The EU-US Compromise on the Helms-Burton and D’Amato Acts” (1999) 93 A.J.I.L. 227-36, p. 236.

\textsuperscript{160} See, e.g., Franck, “Democratic Governance,” p. 73 (referring to Haiti).
forcibly implemented rights to democratic governance. Nevertheless, if a right to democratic governance under international law is to be formulated as a practical and enforceable human right, non-forcible regimes must be seen to be superior to any of the previous forcible mechanisms.

V. ITS POTENTIAL BENEFITS

Let me conclude by highlighting some of the more hopeful aspects of the right to democratic governance under international law. This may seem puzzling in light of the fact that over half of the present Chapter has been spent both criticising certain forms of the right and generally warning about the likely difficulties involved in its implementation. There are two overall reasons for the criticisms. Firstly, to put this cautiously, much of the literature about a right to democratic governance seems to be entirely outward looking. Writers from democratic countries write about a new right that is to be applicable in foreign, non-democratic countries. I suspect that this is why there is so little commentary on possible conflicts between democratic and other rights. Dictatorships, after all, allow few if any human rights to exist, and therefore fewer rights would be available to challenge that of democratic governance. This may also account for the preference of so many writers for interventionist forms of the right. It is easier to approve of benign intervention by one's own country in another to help foreign, repressed peoples. Such outward looking visions of a right to democratic governance are troubling to say the least. They also are hypocritical. If the right really is a universal, customary one then it must be applicable everywhere—whether the democratic difficulty occurs in Canada (Quebec), the United Kingdom (Northern Ireland), or the United States of America (Florida). If advocating forcible intervention, one must be able to accept the possibility that foreign troops may someday occupy one's own state. Secondly, much of the literature seems to be overly optimistic about the ability of states and the international community to apply the right fairly and impartially. This is puzzling because not too long ago harsh and brutal regimes declared themselves to be democratic and were welcomed as such by other democratic states. The sharp ideological tensions of the Cold War produced support for Pinochet's dictatorship in Chile, for example, from some long-standing democracies. Many other examples could be produced from the Americas and other regions of the globe. For such reasons, this Chapter has continually highlighted the way in which the term "democracy" is underdetermined and thus may be subject to ideological manipulation.

161 If, in contrast, the European Union had offered to militarily occupy Florida during the 2000 US Presidential elections in order to "restore democracy" perhaps the tone of this scholarship would change.
But the same two reasons underlying my criticisms of the right to democratic governance also should encourage cautious optimism about the right. Precisely because a right to democratic governance would be applicable globally can it offer such great promise. All countries, no matter how weak or how powerful, would be subject to the right. Additionally, the underdetermined nature of democracy is beneficial at this stage of human development. We have not perfected the concept. Further experiments in democracy are needed.

For these reasons, if the right to democratic governance is to be conceived of in a manner similar to a human right, it should be implemented cautiously and sensitively. Perhaps it could be implemented with processes similar to those used by international human rights bodies. The international community itself, or a specially created body, could investigate and shame states and other entities that violate democratic norms and practices, and encourage and assist democratic ones. Such non-forceful suasion offers the greatest hope for the gradual but consistent growth and deepening of democracy around the globe. Additionally, if a right to democratic governance as a human right is implemented only in a non-forceful manner, then dialogues about democracy could be continued even after the right comes into being. States with alternative views about democracy could present their visions of democracy to the international community in order to produce a kind of dialectic of criticism and justification. As long as the alternative visions are in some manner democratic, then both the international community and the divergent states could continue to dialogue until their differences are resolved. Either the states with alternative visions of democracy would become more mainstream as a result of international pressures, or the international community would change and develop in order to embrace new democratic visions. Clearly there will be cases in which the political system possessed by a state or other entity may not be democratic in any sense of the word. In such cases democracy may have to be more insistently encouraged. In some very extreme cases, extreme solutions may even be necessary. Multilateral or reciprocal treaty-based forcible solutions might be attempted, and may even be successful in the short term for more straightforward tasks as expelling a despotic clique that has seized power, or enforcing a cease-fire between warring factions in order to hold an election or referendum. But even in these cases the short term forcible ‘solution’ may simply postpone the difficulties or create new ones. Short of a lengthy and

162 A largely disenfranchised populace, for example, could request outside assistance to overcome a small military elite in order to hold elections. Note, however, that even here we must be cautious. As Brad Roth reminds us, in *Governmental Illegitimacy*, at pp. 414-15, sometimes the fact that a populace has not rebelled against such oppressors may indicate that the situation is not so clear cut. At p. 415 of the same work, Roth puts one version of this scenario bluntly: “Albeit paradoxical, it is far from ridiculous that the right of self-
absolute occupation, external coercion is unlikely to be able to inculcate the kinds of institutions, values and political beliefs necessary for a functioning democracy. In order to encourage the kind of pluralism and respect required for democratic debate, long-term solutions must come from the population itself. This does mean that international law must apologise for dictators or that a form of democratic relativism must be embraced. Rather, I would simply reiterate that in the case of promotion of democracy, the means are particularly crucial to the end. Striking the balance between effectively ‘encouraging’ and ‘enforcing’ democracy may be difficult in some cases. But the negative consequences of the latter should be clear. In forcing democratic governance we go against the very principles that justify it. In doing so we may stunt, or even destroy the fragile growth of democracy across the globe.

The greatest potential for a right to democratic governance thus may be to conceive of it as a softer, more aspirational form of right. It should be stronger than some of the more ephemeral rights recently suggested (such as the rights to a clean environment or to peace), but weaker than a directly enforceable human right. Perhaps the right to democratic governance could be framed along the lines of the right of self-determination under international law, at least as conceived of earlier (as it is hedged in by so many legal restrictions at present). If conceived of in this manner, a right to democratic governance could be applicable at the international level in a variety of non-coercive ways. Democracy-promotion, for example, could be encouraged through international technical assistance, international election monitoring, and educational programs by international or non-governmental organisations. Each possibility could help to instil the values essential to democracy without crushing the fundamental role that must be played by the people themselves. Finally, regardless of the precise form advocated for the right to democratic governance, such advocacy is itself valuable. The mere potential of the creation of such a right inspires further debates and deeper and more active thinking about the shape of democracy. By constantly drawing our attention to democracy—even bringing it to the centre

determination may amount, as a matter of practical application, to the right to be ruled by domestic thugs rather than by foreigners announcing benevolent intentions."  

163 Complete occupation occurred in Germany and Japan after the end of WWII, both of which are now successful democracies. However, this solution is clearly problematic if generalised for the future. Not only is such occupation likely to raise fears associated with colonialism and neo-colonialism, but it is also patently illegal—as a violation of the laws against use of force, of the laws regarding non-intervention in the domestic affairs of states and the most fundamental principles underlying sovereignty and equality of states. Moreover, both Germany and Japan had earlier forms of constitutional government to draw upon in rebuilding their societies. I would like to thank Stephen Brown and Robert Darst for suggesting this counterfactual, and Thomas Grant for his help in responding to it. Interestingly, Edward D. Mansfield and Jack Snyder, in “Democratization and the Danger of War,” in Debating the Democratic Peace, ed. M.E. Brown, S.M. Lynn-Jones and S.E. Miller, 301-34 (Cambridge, Mass.: MIT Press, 1996), at p. 332, are sceptical about the ability of external powers, even superpowers, to start a state on the road towards democracy. They point out that “in most cases the initial steps on the road to democratization will not be produced by the conscious policy of the United States, no matter what that policy may be.”

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stage of international legal and political discourse—the mere possibility of a right to
democratic governance can be beneficial.
CONCLUSION S

Let us draw together some of the various strands of the present work, beginning with a brief overview of its main points and then examining one remaining challenge to a democratic conception of sovereignty, namely, its relation to non-democratic systems of governance. In the first Chapter we examined basic definitions of democracy, statehood and sovereignty and saw that all three terms have been subject to lengthy processes of historical development. It was suggested that although the three concepts may be compatible, they are not necessarily so. The next seven Chapters fleshed out the meanings of these three concepts and critically examined their potential for compatibility.

Chapter 2 developed our understanding of statehood, revealing that in addition to possessing a permanent population, defined territory, government and the capacity to enter into international relations, the state is characterised by its claim to a continuous monopoly of legitimate force within a territorial area. Statehood can be distinguished from government because it depends upon force; government may exist in non-forceful forms. Both statehood and government share a requirement for legitimisation, however, and this allows us to link them to democracy. Democracy, with its wide variety of legitimating features, is compatible with, and useful to, both. Further, the role of the state is changing and evolving as a result of the processes of globalisation. No longer can any state exert complete control over economic forces, either within its borders or externally. Nor can a state protect or develop its culture in isolation. Environmental issues affect regions, continents and the entire globe. States are no longer able to protect their citizens from external or internal threats as a result of changes in weapons technology and the forms of warfare. The state is not the sole subject of international relations, now being rivalled by international organisations, non-governmental organisations, trans-governmental contacts, transnational criminal forces and 'transovereigns.' Despite all of these changes to the state’s functions in the national and international spheres, its role as the dominant and preferred institutional mechanism for international relations remains unchanged. The state remains the primary, but not exclusive actor at the international level. However statehood per se, it should be noted, neither is, nor necessarily will become, democratic.

In Chapters 3 and 4 we turned to examine the meaning of democracy, looking at its implications for statehood as well as the various justifications for its promotion and further consolidation in both the national and international spheres. In clarifying its components we answered four questions regarding the natures of the democratic ‘people,’ demos, polis and
polity. The group subject to democratic processes, or ‘people,’ may be of nearly any size. Democratic theory per se is unable to determine such matters, since it presupposes the existence of a population for democratic processes. Nevertheless, the values underlying democracy are of some help here, as they suggest that in constituting the people strong regard must be had for the requirements of equality and non-discrimination. The demos, the subgroup of the people that is entitled to participate in democratic decision-making, should be nearly identical to the entire people—being made up of all adult members except transients and persons proved mentally defective. The size of the democratic unit, or polis, may vary dramatically, from small groups to large regional organisations. When establishing a polis as a discrete geographical entity, however, one capable of making decisions regarding most of the issues of importance that affect individuals today, its size should be similar to that of the state. Such a state-favouring conclusion must be put in context, as the size of currently existing states varies incredibly. The democratic polity, or acceptable form of democratic governance, is only partially restricted. Both representative and participatory forms of democracy are acceptable. The goods of each form of polity must be balanced. Representative forms of governance allow us to live within larger democratic units and give us freedom from constant decision-making, but suffer from a ‘democratic deficit’ in comparison to direct, participatory decision-making processes. As a result, the middle position advocated is that of accepting representative democratic governance as a ‘necessary evil’ of modern life—but at the same time recognising the need to constantly inject participatory, face-to-face deliberative elements into all forms of democracy and democratic governance. In Chapter 3 we also examined the minimum set of human rights required for democratic processes, as well as scrutinised a basic outline of the rights and electoral institutions needed for the modern democratic state.

Chapter 4 developed this understanding of democracy through its discussion of the many ways in which it is instrumentally and non-instrumentally justifiable. Democracy is a means to a whole variety of important and valuable ends. It can increase knowledge, tolerance of diversity, human autonomy, self-determination, and the development and entrenchment of human rights. It can produce greater social adaptability, enable a closer appreciation of the truth, best protect and express self-interest, and decrease transaction costs between democratic peoples. Democracy even has the potential to increase global peace and to produce efficient and legitimate forms of governance. It is also an end in itself, a form of human good; it is both procedurally and substantively valuable. Aside from engendering a deeper understanding of the meaning and profound value of democracy these two Chapters revealed its distinctiveness as a form of decision-making and governance. In fact, by being the only form of governance that shows a statistically significant tendency towards more
peaceful global relations, democracy fundamentally challenges a variety of assumptions about the international sphere. The democratic state is unique and requires different models of analysis. The relations of states can no longer be viewed through the 'billiard-ball' model; the democratic state, as it were, 'rolls' differently. Importantly, the 'democratic peace' thesis shows us that the internal political composition of a state affects its external behaviour. The internal/external divide cannot be absolute.

Precisely for such reasons it is important to relate democracy to sovereignty. One of the fundamental roles of sovereignty is to create and maintain this external/internal divide, to separate the national from the international. In order to further understand sovereignty, in Chapter 5 we examined its two dominant models, namely, the absolutist and contractarian versions of sovereignty. Absolutist views of sovereignty, although more commonly associated with the historical development of the concept than with its present incarnation, are examined in some detail precisely because the assumptions and values underlying these formulations remain compelling to many today. Absolutism conceives of a perfect form of authority, postulating a supreme and theoretically illimitable sovereign, one which maintains power through its ability to exert ultimate coercive force. Whether the source of such absolute authority is divine or human, the theoretical perfection of the absolutist model of power will remain attractive to societies in turmoil. Such great thinkers as Machiavelli, Bodin and Hobbes embraced absolutism for these reasons. Although absolutist visions of sovereignty may be strongly criticised for a number of reasons today (both theoretical and practical, as seen in Chapter 5), their lingering influences survive in a variety of areas of international law and politics. As a result such theories will present a continuing challenge to any attempt to establish a democratic conception of sovereignty—a challenge that can be overcome only through our awareness of both the imperfectibility of human nature and of the inherently corrosive and self-destructive nature of absolutism.

Contractarian views, as seen in Chapter 5, are troublesome only because they do not go far enough. They suffer from a variety of weaknesses derived from the contractual analogy they use, an analogy that is inflexible and inherently limiting. Also, the revolutionary potential of the social contract has tended to lead writers such as Locke to impose severe limitations upon the populace’s ability to check the sovereign, on the one hand, and to increase the powers of the sovereign on the other. The result is similar to that in Hobbes’ Leviathan—sovereignty is effectively removed from the sphere of public and popular accountability. In such a way delegation of authority too easily becomes transfer of authority, and the requirement of consent becomes discrete rather than continuous. Nevertheless, contractarian theories are superior to absolutist ones simply because they recognise that the source of sovereignty lies in the people.
Chapter 6 carries on with questions related to the source, locus, scope and attributes of sovereignty. Traditional conceptions of sovereignty’s source and locus tend to locate the former in the divine, the ruler, or the people, and the latter squarely in the hands of the ruler. As a result, one of the clear challenges facing a democratic conception of sovereignty is that of making the source and the locus identical. By returning decision-making powers to the people, participatory democracy has the potential to allow the demos to be both the source and locus of sovereign authority. The scope of sovereignty traditionally is viewed as being coterminous with the state. But since the democratic *polis* may exist in a variety of shapes and sizes, a democratic conception of sovereignty has the potential to alter this scope. The attributes of the sovereign are both flexible and changeable, and in fact have varied enormously over time. This best can be appreciated by viewing sovereignty as a form of status, as recommended in the present work. Another important role identified for sovereignty is that of delimiting the national and international spheres. Sovereignty sits astride, or even constitutes the border between the national and the international. It also has aspirational qualities, being one of the most common goals of oppressed peoples who wish to gain autonomy or independence. Finally, sovereignty plays a normative role, both in the Kelsenian sense of being part of a larger inter-connected normative order (at national and international levels), and in the more subjective sense of lending weight and formality (even moral purpose) to claims made on behalf of a sovereign entity. By being normative sovereignty also expresses an acceptance of legitimate authority, thereby taking on a volitional quality.

From this more detailed and nuanced understanding of sovereignty we compared the term with statehood and democracy in Chapter 7. Sovereignty and democracy may represent different visions of authority, the former tending towards a descending view (commands passed from superiors to inferiors), and the latter revealing an ascending view (decisions being made by ordinary persons and merely being executed by agents of the people). Democracy and statehood, on the other hand, can easily be seen as compatible, since the former can exist simply as a procedural mechanism for decision-making. However, democracy can clash with statehood because it also embodies deep and substantive values. Democracy’s a-territorial nature easily allows it to be used as an imperializing force at the international level. We have learned to be cautious here, since democracy’s high value (being both instrumentally and non-instrumentally desirable), makes it easy for advocates to slide from a position of ‘democracy-promotion’ to that of ‘democratic universalization.’ This latter course must be resisted, especially because the dangerous temptation of democratic heteronomy remains significant for some states. Rather than seek to impose sub-standard democratic uniformity we must recognise that current conceptions of democracy are imperfect and require further development.
Sovereignty also can be distinguished from statehood. This is more difficult today because of the overwhelming dominance of the sovereign state in the international sphere. But attempts to equate sovereignty with statehood, or to define sovereignty as an aggregate of state claims, yield impoverished and inaccurate visions of sovereignty, ones that do not express the many roles that can be played by the concept. Nor is sovereignty identical to any particular attribute of statehood, as suggested by those who claim it to be merely a synonym for “independence.” In fact, as seen in Chapter 7, several examples can be provided of non-sovereign states.

To these examples of non-sovereign states are added examples of non-state sovereigns, divided sovereignties and coexisting forms of sovereignty in Chapter 8. This Chapter sets out the democratic conception of sovereignty in some detail. This conception encompasses new and interesting visions of the democratic polis and polity, each of which can be expanded beyond traditional statal forms. Several mechanisms are suggested for increasing democracy at the international level, through various combinations of democratic processes and institutions. The democratic conception allows us to identify both the source and locus of sovereignty as being the demos. The scope of sovereignty—as suggested by the various examples of non-state sovereignty, non-sovereign states, divided and coexisting sovereignties—also may be dramatically re-conceived. By linking sovereignty with the people rather than the state more flexible vessels for the expression of sovereign status are possible. The attributes of sovereignty will necessarily be limited by the particular form of democratic sovereignty chosen (city-states, for example, possessing fewer attributes than larger states). Also, sovereign attributes may be tailored to the needs of the people themselves. The democratic conception of sovereignty thereby has the potential to greatly expand the possible forms of human interaction, both at the national and international levels.

Having thus explored the possibilities of statehood, democracy and sovereignty we turned to examine several alternative mechanisms through which democracy could be implemented at the international level, namely, through self-determination, the recognition of states, and the proposed right to democratic governance. Chapters 9, 10 and 11 all suggest that although each respective development has the potential to increase democracy at the international level, that nevertheless none possesses the same kind of transformative potential that arises through linking democracy directly to sovereignty. Chapter 9, for example, when examining the right to self-determination under international law, suggests that although the right had enormous influence during the decolonisation period, in its current incarnation it is restricted and limited, mainly as a result of the difficulties involved in applying the right to independent states. As a result, at present the most viable form of self-determination remains the internal one.
Imposing conditions related to respect for human rights and democracy to state recognition, as examined in Chapter 10, reveals some potential for democracy-promotion, but is also problematic. By adding new conditions to recognition of states, for instance, the difficulties connected with politically and ideologically motivated recognition requirements re-emerge. In addition, the state practice in the area (as revealed in a detailed examination of the developments following the dissolution of Yugoslavia), is inadequate to support strong requirements of human rights and democracy. Chapter 11 examines the suggested right to democratic governance under international law, a right which would seem to bring the most hope for the robust promotion and protection of democracy at the international level. Because this right remains one de lege ferenda, Chapter 11 postulates several potential models for the right and examines their likely consequences. Various difficulties with such a right are scrutinised, including the potential for 'rights conflicts' when framing democracy as a human right. Judicial or third party enforcement of the right is also problematic. A strong concern related to the right to democratic governance, as with democracy generally, is that it must not be used to promote democratic uniformity or democratic forms of imperialism. Only by guarding against such pitfalls can a deep vision of democracy be encouraged at both national and international levels.

In sum, our analysis of the three concepts of statehood, democracy and sovereignty, and more particularly, of their relations with one another, allows us to envisage different forms of democratic and sovereign interaction. These new forms can enable meaningful and substantive visions of democracy, and at the same time preserve some of the protective aspects of sovereignty. By allowing sovereign units to exclude some forms of external interference we allow their peoples the potential to develop novel, even superior, visions of democracy and human interaction.

I. DEMOCRACY AND NON-DEMOCRATIC SYSTEMS

Let us briefly examine a final challenge to the democratic conception of sovereignty, namely, the challenge posed by peoples who simply do not wish to adhere to democratic systems of governance. This challenge of relating the democratic conception to expressly non-democratic forms of governance is most graphically raised by indigenous claims at both national and international levels.

This topic is a complex one. Claims on the part of indigenous peoples pose unique difficulties for international legal and political theory for a number of reasons.1 Historically,

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1 Extensive literature exists on this topic. See generally, James Tully, "Aboriginal Property and Western Theory: Recovering A Middle Ground," in Property Rights, ed. E.F. Paul, F.D. Miller, Jr., and J. Paul, 153-80
their claims literally divided international legal scholarship. Two doctrinal streams emerged in the 15th and 16th Centuries regarding how Europeans should relate to indigenous peoples. One school of thought, most closely associated with Spanish theologians such as Francisco de Vitoria and Bartolome de las Casas, accepted the fundamental equality of indigenous peoples and acknowledged their rights and international status. The other school of thought, which became dominant in subsequent centuries, treated indigenous people and their territory as a legal non-subject or nullity (as in the phrase terra nullius, used to describe their lands). I have argued elsewhere that such divisions continue to resonate in international law today. Some indigenous claims, for example, assert both pre-state and current indigenous sovereignty within the territory of modern liberal democratic states. Such assertions challenge the very underpinnings of state political legitimacy by implying that an indigenous form of sovereignty can continue and coexist with another form of sovereignty in the same territory (contradicting the exclusivity thesis), and that sovereignty generally speaking, is divisible (contradicting the unitary thesis). Their claims also have been disproportionately successful, statistically speaking. Despite small populations, limited resources, fledgling political organisation, high social differentiation, high levels of political and economic discrimination and disproportionate ecological stresses, indigenous peoples have convinced non-indigenous state

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2 E.g., Francisco de Vitoria, “De Potestate Civili” [Concerning Civil Power], in The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations, ed. J.B. Scott, Ixxi-xxii (Oxford: Clarendon Press, 1934), idem., “De Indis et de Jure Belli Relationes” [On the Indians and On the Law of War], in The Classics of International Law, ed. J.B. Scott, 101-87 (Washington, D.C.: Carnegie Institution of Washington, 1917). For more on Vitoria and the “Spanish School” generally see, e.g., David Kennedy, “Primitive Legal Scholarship” (1986) 27 Harvard Int’l L.J. 1-98. For more on their treatment of the topic of indigenous peoples see C.G. Marks, “Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas” (1992) 13 Australian Yrbk. Int’l L. 1-51. For a fascinating early exchange on the legal status of heathens and their property, one that supports the view of infidels as being part of the communias omnium gentium, see the “Conclusions of Paul Vladimiri on the Legal Status of Heathen” (1415), reproduced in Grewe, Fontes Historiae Iuris Gentium, Vol. 1, at pp. 357-62 [fifty-two conclusions offered by the rector of the Jagiellonian University of Cracow at the Council of Constance (1414-18), about the legal status of infidels in a debate between the King of Poland and the Lithuanians against the Teutonic Order]. Note, however, that the writings in the Spanish school were limited in other ways, since they allowed certain rights to be used against indigenous peoples (including rights of conquest and enslavement), if they refused Christian conversion.

3 Berry, “Legal Anomalies, Indigenous Peoples and the New World.”

4 See, e.g., Macklem, “Distributing Sovereignty,” Brian Slattery, “Aboriginal Sovereignty and Imperial Claims,” in Aboriginal Self-Determination, ed. F. Cassidy, 197-217 (Lantzville, B.C.: Oolichan Books, 1991), Werther, Self-Determination in Western Democracies [all three raising the possibility of indigenous sovereignty, the first two from a legal, and the latter from a political science, perspective]. See also Berry, ibid.

5 Of course the word “success” is employed in a relative sense, as indigenous populations still remain among the most disadvantaged on the earth. See, e.g., Ted Robert Gurr, Minorities at Risk: A Global View of Ethnopolitical Conflicts (Washington, D.C.: United States Institute of Peace Press, 1993).
authorities to delegate greater power and authority to themselves over their own lives. Such gains have been made in Norway, Sweden, Denmark, Canada, Australia, and the United States, and would not have been predictable using standard political theories about power dynamics in modern democratic states. Some groups have dramatically increased their levels of participation in both state governance and policy formation, even to the extent of participating directly in international fora. In addition, a large international movement has developed expressly for the purposes of promoting and protecting indigenous rights.

These indigenous claims challenge traditional theories of sovereignty and democracy. Traditional perceptions of sovereignty as unitary, exclusive, and state-based, simply cannot accept the possibility of a distinct indigenous form of sovereignty existing simultaneously alongside statal sovereignty in a modern independent state. A democratic conception of sovereignty, on the other hand, does not require unitary and exclusive sovereignty on the part of the state. It has the potential to recognise multiple and even overlapping sovereignties. It is therefore not threatened in the same way by indigenous claims. In fact it may be much more amenable to them than other theories of sovereignty.

A difficulty remains, however, with respect to the potentially non-democratic nature of some of these indigenous claims, which are not framed in the language of modern liberal

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6 See e.g., Berry, “Legal Anomalies, Indigenous Peoples and the New World” [making such arguments in greater depth], Werther, Self-Determination in Western Democracies [revealing how indigenous claims do not fit within normal political science models, achieving disproportionate gains], Gurr, ibid. [analysing minorities and ethno-political conflicts, showing that indigenous peoples are the most highly challenged, and yet surprisingly, are less likely to resort to violence to obtain their goals].

7 These countries are the ones studied in Werther’s work, ibid. See also ibid., p. xxi (discussing the ability of indigenous groups to press claims despite significant economic and political disadvantages).


9 Concrete results of this movement include Martinez’s “Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations.” The Organization of American States established a Working Group to consider its proposed Declaration on the Rights of Indigenous Populations: OAS General Assembly Resolution, “Proposed American Declaration on the Rights of Indigenous Populations,” adopted first plenary session, June 7, 1999, AG/RES.1610 (XXIX-0/99), as available at http://www.oas.org/assembly/eng/apr1610.htm. See also the OAS General Assembly Resolution “Proposed American Declaration on the Rights of Indigenous Populations,” adopted at the first plenary session, held on June 5, 2000 (pending review by the Style Committee), AG/RES. 1708 (XXX-O/00), as available at http://www.oas.org/assembly/docsAprovados/AprodEn/RES1708.htm. All of the above web sites were accessed on 21 August 2001.
democratic theory. Rather, some of these claims assert entitlement to a separate indigenous status, a status based upon group rights and rights vested in their communities as ‘peoples’ or ‘nations.’ By rejecting the adequacy of liberal theory, which places rights and responsibilities with the individual, and instead founding their claims upon traditional group-based, or nation-based grounds, indigenous peoples in effect step outside of the bounds of the liberal framework, a framework which simply cannot satisfy their demands. Some of these indigenous claimants, for example, assert the right to continue traditional, communitarian forms of governance and culture, forms that may be explicitly anti-liberal and non-democratic. In addition, most such claims are framed in terms of increased autonomy within the structures of modern liberal democratic states (rather than in terms of achieving independent statehood). Ironically, although this aspect of their claims lessens fears of secession, it actually heightens the theoretical tensions between indigenous traditional practices and the contrasting liberal democratic ones of the surrounding majority populations.

10 See generally, Werther, Self-Determination in Western Democracies. See also, Tully, Strange Multiplicity (explaining at length the differences between indigenous world views and liberal constitutionalism, and proposing a form of contemporary constitutionalism that can accept such diversity).

11 E.g., Werther, in ibid., at p. 23, explains the three problems that modern governments face as a result of this group-based nature of aboriginal claims:

It is difficult for First World democracies to accept demands for special political treatment of domestic ethnic minorities who claim to be “peoples.” In the first instance, liberal democratic theory places rights and responsibilities with the individual and generally regards group political and legal rights and responsibilities as illegitimate. Supporting ethnically distinctive public policies with different attendant political rights would seem to violate important, self-evident principles about citizen rights and equity embodied in the national law of most First World countries. These countries are consequently very reluctant to acknowledge group rights beyond those of cultural pluralism. Second, the way in which most Western European countries formed was based upon a denial of the continued political viability of prestate ethnic formations. States, especially democracies, are very reluctant to atomize in the face of demands issuing from prestate ethnic formations. Third, contractual notions of individual rights rely on the concept of the state as the sole repository of sovereignty. It is with the state alone that individuals contract to keep these rights secure. Thus, in the First World, in each of these areas, relying on liberal contractual theory provides no legal basis and a weak theoretical basis for challenging state sovereignty or for legitimating special group rights based upon ethnicity. This means that groups relying upon liberal theories of individual political rights as a theoretical grounding for their self-determination movements must not only overcome national law and policy, but must also contend with what is in fact hostile theory. [Emphasis added and citations omitted.]


12 The stark contrast between these two visions of society recently emerged in Canadian debates regarding implementation of aboriginal self-government. In these debates traditional aspects of indigenous self-government, which are potentially non-democratic and illiberal, were juxtaposed against claims for individual human rights protection by indigenous women. See, e.g., Native Women’s Association of Canada v. Canada (1992) 95 D.L.R. (4th) 106, [1992] 4 C.N.L.R. 71 (F.C.A.) [challenge by plaintiff association regarding its denial of funding for a constitutional amendment conference alleging, inter alia, that existing men’s groups would not prioritise or protect the human and constitutional rights of indigenous women in upcoming indigenous self-government negotiations]; David S. Berry, “Conflicts Between Minority Women and Traditional Structures: International Law, Rights and Culture” (1998) 7 Social & Legal Studies 55-75 [discussing the previous case and the broader legal-philosophical conflict it raises]. See also, Wendy Moss, “Indigenous Self-Government in Canada and Sexual Equality Under the Indian Act: Resolving Conflicts Between Collective and Individual Rights” (1990) 15 Queen’s L.J. 279-305.
Indigenous claims, to the extent that they fall within this pattern of conflict, therefore reveal an important limitation of the democratic conception of sovereignty. Since the latter conception is motivated by a desire to deepen and promote democracy at all levels some conflict with non-democratic practices simply cannot be avoided. Unless traditional aboriginal practices can be shown to be compatible with participatory and deliberative democratic values (unlikely), or at least to present the possibility of enriching our understandings of human relations in a manner which could enrich democracy (more likely), then a choice must be made between two incommensurable goods. The value of promoting and sustaining historical cultures and practices in order for indigenous peoples to govern themselves with dignity must be weighed against liberal democratic values and traditions. Such a task will not be easy. It is one of the ongoing challenges facing international law, especially international human rights law, which has been accused of being culturally specific. A democratic conception of sovereignty alone may not adequately address these challenges. Democracy developed in a European and North American context. Although it has spread all over the globe and may eventually become truly universal, at present it is still linked more closely to certain regions of the world. Nevertheless, simply by expanding the possibilities for self-governance through new and varied forms of sovereignty, a democratic conception of sovereignty may help to enable the kinds of cross-cultural discourses (or dialectics) that will bridge these divides. In fact, precisely by allowing strong, knowledge-creating dialogues democracy may be better suited for such a task than any other existing system.

In conclusion, the democratic conception of sovereignty set out in the present work has the potential to promote new and exciting forms of human association and deep and significant human autonomy. By emphasising active, participatory forms of democracy it can increase accountability and legitimacy at national and international levels. By retaining a role for sovereignty it encourages and preserves unique social and legal orders, thereby enabling the kinds of ‘experiments in living’ that may generate superior forms of democracy. A democratic conception of sovereignty can help us to live within an increasingly complex international system (with its wider variety of actors, reflecting the wider diversity of individuals), and has the potential to encourage new and unique forms of social and legal relations.
SELECT BIBLIOGRAPHY
(Listed by Source)

I. BOOKS AND ARTICLES


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II. CASES AND DECISIONS


*Austro-German Customs Union Case—see Customs Régime Between Germany and Austria (Protocol of March 19th, 1931)*.


*Case Concerning Right of Passage Over Indian Territory (Portugal v. India)*, Merits, 1960 I.C.J. Rep. 6.


Fletcher v. Peck, 6 Cranch 87, 2 Peters 308 (1810).


Mitchel v. United States, 9 Peters 711, 9 L. Ed. 283 (1835).

Nanni and Others v. Pace and the Sovereign Order of Malta (1935-37) 8 A.D. 2, 8 I.L.R. 2 (Italian Court of Cassation).


Report Presented to the Council of the League by the Commission of Rapporteurs (Beyens, Calonder, Elkus), L.N. Council Doc. B 7. 21/68/106 [VII] (16 April 1921) [regarding the Åland Islands].


Schooner Exchange v. McFaddon, The, 7 Cranch. 116 (1812).


Tinoco Arbitration (Great Britain v. Costa Rica), (1923) 1 R.I.A.A. 369, 2 I.L.R. 34.


III. LEGAL DOCUMENTS (INTERNATIONAL, REGIONAL AND DOMESTIC)

A. TREATIES


Treaty of Westphalia (1648)—see the Treaty of Peace Between France and the Empire (Münster, October 24, 1648), and Treaty of Peace Between Sweden and the Empire (Osnabrück, October 24, 1648), above.


B. DECLARATIONS, RESOLUTIONS AND DOMESTIC AGREEMENTS


Authorization to Form a Multinational Force Under Unified Command and Control to Restore the Legitimately Elected President and Authorities of the Government of Haiti and Extension of


Declaration of Santiago (1959), Fifth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States, Final Act, OEA/Ser. C/II.5, pp. 4-6.


Fourteen Points, 5 Whiteman Dig. Int'l L. (1965).


Proposed American Declaration on the Rights of Indigenous Populations, OAS General Assembly Resolution AG/RES. 1708 (XXX-O/00), adopted at the first plenary session, held on June 5, 2000 (pending review by the Style Committee), as available at http://www.oas.org/assembly/docsAprovados/AprodocEn/RES1708.htm (accessed 21 August 2001).


DECLARATION

I composed this thesis and it is my own work.

25 September 2001