

Sovereignty in Theory and Practice

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I. INTRODUCTION

This Article deals with the theory and practice of sovereignty from the perspective of a trend in theoretical perspectives as well as the relevant

trend in practice. The Article provides a survey of the leading thinkers' and philosophers' views on the nature and importance of sovereignty. The concept of sovereignty is exceedingly complex.¹ Unpacking its meanings and uses over time is challenging. An aspect of this challenge is that the discourse about sovereignty is vibrant among diverse policy, academic, and political constituencies.² At times, its narratives are relatively discrete and at other times, the narratives overlap with the discourses from other professional orientations. In this Article, we seek to enhance clarification about the sovereignty discourses and narratives used in theory and practice. For example, the Article begins with the work of Bodin and Hobbes. Both of these theorists make a case for the exercise of political power in hierarchical terms.³ It is unclear whether they are describing political power as it is, or recognizing the hierarchical aspect of sovereignty, as it ought to be. Both Bodin and Hobbes were scholars, although Bodin was also a prominent politician. They were both attracted to the idea of hierarchical sovereign power because they recognized its importance in the maintenance of public order, which they saw threatened by religious sectarian violence. In this sense, they would appear to have a normative preference for the concentration and centralization of power to retain minimum order.⁴ This would implicate a minimum normativity creeping into their analysis. Additionally, they were both aware the concentration of power could lead to its abuse. They denied sovereign absolutism in somewhat modest terms. In short, they were concerned about social chaos and in a limited way, sovereign abuse.⁵

Our study moves into the sovereignty idea in the context of international law with reference to the work of Grotius, the Dutch international lawyer of the early 17th century. Grotius took the sovereignty discourse to another level by considering the problem of

1. See generally EDGAR GRANDE & LOUIS W. PAULY, *COMPLEX SOVEREIGNTY: RECONSTITUTING POLITICAL AUTHORITY IN THE TWENTY-FIRST CENTURY* (Univ. of Toronto Press (2005)); see also Kanishka Jayasuriya, *Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?*, 8 *CONSTELLATIONS*, 442–60 (2001); see also Jacques Maritain, *The Concept of Sovereignty*, 44 *AM. POL. SCI. REV.* 343–57 (June 1950).

2. *Id.*

3. See generally Preston T. King, *THE IDEOLOGY OF ORDER: A COMPARATIVE ANALYSIS OF JEAN BODIN AND THOMAS HOBBS*, Psychology Press (1999); see generally Preston T. King, *THE IDEOLOGY OF ORDER: A COMPARATIVE ANALYSIS OF JEAN BODIN AND THOMAS HOBBS* (Psychology Press 1999).

4. *Id.*

5. *Id.*

sovereignty in an environment of multiple sovereigns.⁶ This was an environment, which required law and legal skills and therefore provided a framework within which reasoned legal elaboration would provide a mechanism to coordinate sovereign relations and thereby provide international restraints on sovereign absolutism.⁷ The Article then considers a significant 17th century juridical event in the practice of international law. We refer to the Treaty of Westphalia (1648) and its relevance to the development of sovereignty in practice. The importance of the Treaty is that it juridicalized the idea of an international society based on sovereign nation States. It is a framework that has had incredible traction over time, and was reflected in the most powerful theories of international law founded on the nation-state participants.⁸ The Article then reviews the work of other international scholars and philosophers from Pufendorf to Austin. These early international lawyers grapple with the idea of sovereignty and the subordination of sovereignty to the idea of international obligation. Their work begins to show the influence of positivism and the development of international law based on empirical sources such as treaty and custom. These developments are then confronted with a new and rigorous jurisprudential theory of sovereignty developed by the English legal philosopher, John Austin.⁹ Austin developed the theory of sovereignty of considerable power and durability and modified versions of his idea of sovereignty continue to be important in international law and international relations today.¹⁰

It is important to note that Austin's view of sovereignty was an explicit indication of the use of a positivistic, scientific view of law.¹¹ Technically, the logic of Austin's system was to deny the legal character of international law. Since there was no global super-sovereign, there

6. See generally EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* (Cambridge Uni. Press 2002); see also Edward Keene, *The Dualistic Grotian Conception of International Society* presentation at the BISA Annual Conference (2000); see also Samuel K. Murumba, *Grappling with a Grotian Moment: Sovereignty and the Quest for a Normative World Order*, 19 *BROOK. J. INT'L L.* 829 (1993); see also A. Claire Cutler, *The Grotian Tradition in International Law*, 23 *BRIT. Y.B. INT'L L.* 1 (1946).

7. *Id.*

8. Istyan Hont, *The Permanent Crisis of a Divided Mankind: 'Contemporary Crisis of the Nation State' in Historical Perspective*, 42 *POL. STUD. Supp.* 166-231 (1994); see also Myres S. McDougal, *Peace and War: Factual Continuum with Multiple Legal Consequences*, 49 *AM. J. INT'L L.* 63-68 (1955).

9. See generally WILLIAM LOUTIT MORISON, *JOHN AUSTIN* (Stanford Univ. Press (1982)); see generally JOHN AUSTIN & ROBERT CAMPBELL, *LECTURES ON JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW* (John Murray 1880).

10. *Id.*; see also John Dewey, *Austin's Theory of Sovereignty*, 9 *POL. SCI. Q.* 31-52 (1894).

11. *Id.*

could be no global super-law that subordinated sovereign competence.¹² In his view, international law was a form of positive morality.¹³ Austin did not demolish international law completely, but his thick version of sovereignty had a dramatic influence on the development of international law into the 20th century.¹⁴ Austin's approach to law suggested that all law was rooted in the orders of the sovereign and this reshaped legal thinking globally.¹⁵ It also implicated two different versions of science: the first logical and analytical, the second empirical.¹⁶ Each version had a distinctive approach to the identification of the sovereign, who was the source of all law. The analytical approach was considerably refined in the 20th century by such leading theorists as H.L.A. Hart.¹⁷ Hart and his influence have been significant in the scholarship of British international law and the discourse generated on the concept of sovereignty.¹⁸ Several important British jurists are considered in this Article. The Article also shifts its focus to the 20th century examining the changing character of sovereignty in the aftermath of the First and the Second World Wars and the implications of the U.N. Charter for rethinking the boundaries of sovereignty. The Article then focuses on the practice of international law and its influence on the boundaries of sovereignty in terms of international agreements regulating global spaces and resources, including the oceans and Polar Regions. Part IV examines the significant contributions made by scholars from the United Kingdom to the theory and understanding of sovereignty. This includes the work of H.L.A. Hart, Brownlie, and other more contemporary U.K. scholars.

Part V shifts the focus to the scholars who had significantly influenced the ideas of sovereignty in U.S. practice and theory. Here, Austin's

12. *Id.*

13. David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415–35 (1977); see also Mark R. MacGuigan, *Law, Morals, and Positivism*, 14 U. TORONTO L.J., 1–28 (1961); see also H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957).

14. *Id.*; see also Wilfrid E. Rumble, *Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986 (1981).

15. *Id.*

16. *Id.*

17. See generally NEIL MACCORMICK, H.L.A. HART (Stanford Univ. Press 2008); see generally H.L.A. HART, LAW, LIBERTY, AND MORALITY (Stanford Univ. Press 1963).

18. H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); see also H.L.A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U. L. REV. 433 (1957).

influence has been less analytical and conceptual, and more empirical.¹⁹ In part, this is a reflection of the complexities of the form of constitutional governance as well as the influence of the revolt against formalism in U.S. and its influence on legal theory.²⁰ The Article traces the influence of positivism in its empirical sense on such theorists as Holmes, Gray, and Thayer. In the social sciences, the influence of the empirical approach was also beginning to find traction.²¹ The Political theorist, Harold Dwight Lasswell, was a leader in the behavioral movement in the U.S.²² In the 1930's he published two books, which had a significant effect on providing an empirical orientation to the ideas of sovereignty and the nation State. In his book, *World Politics and Personal Insecurity*, he explored the importance of understanding the global environment in terms of the individual's perspectives of identity, demand, expectation, insecurity, and anxiety.²³ He also wrote *Psychopathology and Politics*, where he reconceptualized the State as a "manifold of events" and insisted that the State was not a super individual phenomenon, but empirically, a many individual phenomenon.²⁴ In fact, Lasswell was virtually recasting international relations in international law with a focus on sovereign personalities, to the idea of world politics in which the give and take of actual human beings shapes the conditions of world order from the local to the global and vice versa.²⁵ These ideas

19. Brian C. Schmidt, *Anarchy, World Politics and the Birth of a Discipline: American International Relations, Pluralist Theory and the Myth of Interwar Idealism*, 16 INTERNATIONAL RELATIONS 9, 9–31 (Apr. 2002); see also Richard Little, *Historiography and International Relations*, 25 REV. OF INT'L STUDIES 291, 291–99 (1999); see also Nicholas Greenwood Onuf, *Sovereignty: Outline of a Conceptual History*, 16 ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 425, 425–46 (1991); see also M. H. Hoeflich, *John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer*, 29 AM. J. LEGAL HIST. 36 (1985).

20. *Id.*; see also Susan Haack, *Legal Pragmatism: Where Does 'The Path of the Law' Lead Us?*, 50 AM. J. OF JURISPRUDENCE, 71–105 (2005); see also Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493–517 (1996).

21. See generally EILEEN MUNRO, *UNDERSTANDING SOCIAL WORK: AN EMPIRICAL APPROACH* (Athlone Press 1998).

22. Myres S. McDougal & W. Michael Reisman, *Harold Dwight Lasswell (1902–1978)*, 73 AM. J. INT'L L. 655–60 (1979).

23. HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (Free Press 1965).

24. HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* (Univ. Chi. Press 1986).

25. MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY*, (Yale Univ. Press 1980); see also Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237–69 (1969); see also Myres S. McDougal, Harold D. Lasswell, & W. Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence* (Faculty Scholarship Series, Paper 673 (1968)).

were later to emerge in an approach to sovereignty that involved more refined theories and methods of a contextually understanding, and the rooting of the sovereignty idea in global social, power, and constitutive processes.²⁶ This is discussed in the last part of the Article. In the meanwhile, there were more intermediate developments in legal and political theory in the U.S. We explore the works of Hart and Sacks, Carl Schmitt and Hannah Arendt, and in contemporary terms, the contributions of Judge Samuel Alito and the scholars Professor Ackerman (Yale), Yoo (Berkeley), and Tribe (Harvard). The Article concludes by reference to the implications for sovereignty of international practice indicated in the Nuremberg Proceedings and then refers to the developments of Lasswell and McDougal in the New Haven School and the ideas and methods of contextual mapping for the empirical specification of the sovereignty idea.

II. THE HISTORICAL CONTEXT

The era of world politics in our time recognizes that the most important, territorially organized body politic in global political culture is the State.²⁷ The most basic characteristic of a State is that it needs a degree of control over the body politic, and control must invariably be accompanied by the component of authority in the exercise of the governing competences.²⁸ The complex combination of authority and control in the governance of a State is generally described in terms of the idea of sovereignty.²⁹ The conventional meaning of a State that is sovereign is that it is (1) a territorially organized body politic; (2) which has indications of a person or institution (3) vested with supreme control

26. *Id.*

27. Winston P. Nagan, FRSA & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141 (2004–2005) explores conceptual basis of sovereignty in terms of theory and international legal practice. It seeks to understand sovereignty in the changing context of international relations, globalization and the developments in international law that have constitutional characteristics under the U.N. Charter and practice. It also seeks to root contemporary ideas of sovereignty in the authority of the people's perspectives themselves, idea that is given formal expression in the preamble of the U.N. Charter itself.

28. Nandasiri Jasentuliyana, *Perspectives on international law*, KLUWER LAW INT'L 20 (1995) (stating that “[s]o far as States are concerned, the traditional definitions provided for in the Montevideo Convention remain generally accepted”).

29. *Supra* note 1.

and authority for that entity.³⁰ The two qualities that are indispensable to the idea of sovereignty are the elements of control and authority, which accompanies the sovereign's supreme governing competences.³¹ Since the term supreme qualifies the term sovereign, there is some ambiguity between the idea of supreme and the quantum of power necessary to assure supreme power. The clarification of this issue is empirical. It would require a greater understanding of the production and distribution of effective power within the body politic as well as the projection of sovereign power externally. To reduce sovereignty to the idea of control or supreme control seems to be incomplete. The general expectation is the sovereign requires something more than raw power or control in the exercise of effective governing competence.³² It is generally thought that sovereign competence is accompanied by the idea of authority.³³ The inquirer therefore needs some clarification about whether the authority aspects of sovereignty are purely matters of conceptual and normative discourse or whether some aspects of authority are matters that ought to be empirically defined and therefore have a scientific component to them.³⁴ This Article seeks to integrate a historical, a jurisprudential, and a world politics perspective. In the context of jurisprudence, it breaks new ground by bringing in the work of Harvard professors that do not directly unpack sovereignty but in fact their theories advance understanding with their notions of institutional competence. The perspective of world politics, as reflected in the New Haven School, is also meant to bring newer insights into sovereignty by understanding it as an outcome of important global processes, which inform world politics and world public order.

Most theorists would agree that the term sovereignty includes references to supreme power and authority relating to a body politic that is territorially

30. *Id.*; see also MALCOLM NATHAN SHAW, INTERNATIONAL LAW 178 (Cambridge Univ. Press (2003) (stating that "Article 1 of the Montevideo Convention on Rights and Duties of States, 1933 lays down the most widely accepted formulation of the criteria of statehood in international law. It note that the state as an international person 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'").

31. See Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The world process of effective power: The global war system*, in POWER AND POLICY IN QUEST OF LAW, ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW 353, 353 (Myres S. McDougal & W. Michael Reisman eds., 1985); Literature that empirically explores power; As Rosalyn Higgins does, see Higgins 1977 (discussing the meanings of power and authority under New Haven jurisprudence).

32. See generally *supra* note 30.

33. *Id.*; see also David Garland, *The Limits of the Sovereign State; Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445-71 (1996).

34. *Id.*

determined or determinable.³⁵ However, giving concrete meaning to ideas like “supreme,” “power,” “authority,” “body politic,” and “territoriality” are complex matters and their meanings appear still to be intellectually and scholastically unfolding. In addition, there are other levels of complexity. Sovereignty, as understood in terms of governing competence, is tied to the prescription, application, and enforcement of law.³⁶ This really requires clarification from a very different branch of inquiry: law. The work of Herman Dooyeweerd introduces the idea of how sovereignty has a special meaning in the context of jurisprudence and how in territorial terms it exists and coordinates with sovereigns organized in these terms.³⁷ Jenks and Larson seek to clarify this level of complexity by suggesting that sovereignty has an internal and an external dimension.³⁸ Rosalyn Higgins concluded in her work that it is the complexity of the external dimension of sovereignty that must also be considered.³⁹ Sovereignty has meanings and applications in such fields as international relations, world politics, international law, and diplomacy.⁴⁰

It may be that the sovereignty of internal domestic imperium and sovereignty in the context of international relations and world affairs represent very different conceptual worlds. Harold Lasswell and

35. See Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT'L & COMP. L. REV. 279 (2001-2002); see also Robert Latham, *Social Sovereignty*, 17 THEORY, CULTURE & SOCIETY 1-18 (2000).

36. Nagan and Hammer, *supra* note 27.

37. See generally HERMAN DOOYEWEERD, *THE CONTEST ABOUT THE CONCEPT OF SOVEREIGNTY IN MODERN JURISPRUDENCE AND POLITICAL SCIENCE* (Free Univ. Q. 1951) (Tracing the historical development of Sovereignty in legal and social thought).

38. ARTHUR LARSON, C. WILFRED JENKS & OTHERS, *SOVEREIGNTY WITHIN THE LAW* (Oceana Publications 1965) (consisting of a collection of essays by leading thinkers addressing the problem of limiting sovereignty under the rule of law).

39. Rosalyn Higgins, *Integrations of Authority and Control: Trends in the Literature of International Law and International Relations*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY, ESSAYS IN HONOR OF MYRES S. MCDUGAL* 79, 80-81 (W. Michael Reisman & Bums H. Weston eds., 1976) (leading academic commentator on the issues of control and authority in the structure and process of International Legal Order discusses the meanings of power and authority under New Haven jurisprudence and indicates that authority constitutes expectations of appropriateness in regard to the phases of effective decision processes maintaining that authority has to be seen as interlocking with supporting control, or power).

40. See generally *supra* note 35; see also Janice E. Thomson, *State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research*, 39 INT'L STUDIES Q. 213-33 (1995).

Abraham Kaplan explained in their work how external sovereignty must accommodate a world of alternate sovereigns through the mechanisms of diplomacy and a wide variety of methods of formal and informal communications strategies.⁴¹ The central issue here is the reach of sovereign competence across State and sovereign lines. Reisman and Weisman enhance awareness of complexities, which represent a major intellectual challenge in unpacking sovereignty for the conditions of the new millennium.⁴² Sovereignty is not static but instead is a changing phenomenon; changes take place when the very concept itself means different things to different professions, disciplines, and political and legal cultures.⁴³ Additionally, the nature of world politics and international relations has been deeply impacted by processes encapsulated in the term globalization.⁴⁴ The simplest explanation of the globalization phenomenon is in terms of its effects on sovereignty.⁴⁵ The phenomenon of globalization works on the insight that sovereign borders have in fact become porous in the face of the global flow of goods, services, people, and communications.⁴⁶

A. Jean Bodin and Sovereignty Theories in Context

The modern concept of sovereignty owes a great intellectual debt to the French political theorist Jean Bodin. Bodin's work is credited with giving the sovereignty concept coherence, content, and currency.⁴⁷ The

41. HAROLD D. LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY, A FRAMEWORK FOR POLITICAL INQUIRY 159, 188 (1950). See generally Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807, 807 (1988) (exposing the markers, tools and methods of social theory that are relevant this exploration).

42. See generally W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007) (overviewing of the approach of the constitutive foundations of sovereignty in the International System).

43. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967) (This is an overview on the constitutive foundations of sovereignty in the International System. It explains how a complete denial of the principles of humanitarian law, especially when grave breaches of that law are involved, also represents a rejection of fundamental human rights precepts and may point to an alternative normative order that essentially disparages the precept of human dignity.).

44. See generally David Held & Anthony G. McGrew, *Governing Globalization: Power, Authority and Global Governance*, POLITY (2002); see also Stephen M. Walt, *International Relations: One World, Many Theories*, 110 FOREIGN POLICY 29–32, 34–46 (special ed.: Frontiers of Knowledge 1998).

45. *Id.*; *supra* note 1.

46. *Id.*

47. Jean Bodin, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (substantive revision 2010), <http://plato.stanford.edu/entries/bodin>; see also JEAN BODIN, ON SOVEREIGNTY, FOUR CHAPTERS FROM *THE SIX BOOKS OF THE COMMONWEALTH* 1 (Julian H. Franklin ed., 1992) (stating that it should be examined considering its perspective from a scholarly

simplistic sense of Bodin's contribution is that it was committed to the concentration of power in the monarchy and therefore laid the foundations of sovereign absolutism.⁴⁸ While it is possible to impose such a gloss on his work, there is ample evidence contradicting this in the work of J.H.M. Salmon,⁴⁹ in his work on sovereignty, as well as evidence of his public life. Bodin was by no means committed to sovereign absolutism.⁵⁰ It would be better to see Bodin's work on sovereignty in the context of the political turmoil of his time. The public order of Europe, based on the Holy Roman Empire and the idea of Christian universality, was in fact crumbling under the influence of the Reformation.⁵¹ The demise of the Holy Roman Empire diminished the sense of Christian Universalism in Europe which produced a legacy of religious wars which appeared interminable and generated social dislocation and anarchy—matters that universalism could not remedy.⁵² Bodin's theory explains how public order tasks fell to local elites who controlled territory and population and how the local prince was seen as representing the idea of *majestas*.⁵³ Bodin had a number of experiences—

outlook of his experience as a protector of the people and a limiter of royal power; its external aspect covers war and international relations. Sovereignty is defined in terms of a Roman Law idea—*maiestas*; "Sovereignty is the absolute and perpetual power of a commonwealth, which the Latins call *maiestas*.").

48. See generally *supra* note 3.

49. These books represent Bodin's work on sovereignty. It is possible that Bodin's theory could be seen as justifying royal sovereign powers. Bodin also saw this property as belonging to the people and not the crown. Julian H. Franklin, *Jean Bodin, in 1 EUROPE 1450 TO 1789*, ENCYCLOPEDIA OF THE EARLY MODERN WORLD 270–72 (Jonathan Dewald ed., 2004); J.H.M. Salmon, *Theory of Sovereignty, in 5 EUROPE 1450 TO 1789*, ENCYCLOPEDIA OF THE EARLY MODERN WORLD 447–50 (Jonathan Dewald ed., 2004).

50. See J.H.M. Salmon, *The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism?*, 17 HISTORY OF POLITICAL THOUGHT 500, 500–22, 523 (1996).

51. See generally Edward R. Norman, *The Roman Catholic Church: an illustrated history* (Univ. of California Press 2007); see generally PETER HAMISH WILSON, *THE HOLY ROMAN EMPIRE, 1495–1806* (Palgrave Macmillan 1999); see generally VISCOUNT JAMES BRYCE BRYCE, *THE HOLY ROMAN EMPIRE* (Macmillan and Co. 1920).

52. See generally Moshe Reiss, *The Clash of Civilizations or Religions*, http://www.moshereiss.org/west/02_clash/02_clash.htm (last visited Feb. 6, 2012) (analyzing the impact of religion and or culture on the secular nation State in world order. It gives an explanation of how the conflicts of religion that were generated during this period were a major public policy problem).

53. J.H.M. Salmon, *supra* note 50; see generally ALAN JAMES, *SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY IX* (Taylor & Francis 1986) (stating "[m]ajestas est summa in cives ac subditos legibusque solute potestas" (Sovereignty is supreme power over citizens and subjugated peoples and is bound by no other law)).

political, scholastic, and religious—making his view of sovereignty more complex.⁵⁴ Bodin’s experience seems to indicate that what was needed locally was order that could be best sustained by hierarchy.⁵⁵ The prince or the king seemed to be an ideal fit for the public order and safety needs of the body politic. Bodin was a scholarly eminence in matters of governance.⁵⁶ He was consulted by the king on technical matters of governance, held elected office, and was elected a deputy of Vermandois and to the Estate’s General of Blois.⁵⁷ He received the presidency of the deputy of the Third Estate.⁵⁸ In this role, he was a tenacious defender of the interests of “the people.”⁵⁹ This could be seen as promoting a weakening of the monarchy in the interests of the Third Estate. Bodin had a record of challenging royal power over economic issues. The religious man in him resisted royal policies that he saw as provocative of religious conflict rather than tolerance.⁶⁰

Bodin grapples with the problem of the sovereign’s relation to tyrannicide, suggesting that there are circumstances in which despotism is justified and that tyranny is absolutely forbidden.⁶¹ Bodin acknowledges that sovereignty has an internal aspect that covers full political power, and that there are different forms of State and forms of governance. He suggests that the notion of sovereignty in the form of an absolutist monarch is only one form of governance.⁶² Bodin’s focus on monarchical sovereignty draws an awkward distinction between a despotic monarchy and a tyrannical one.⁶³ A despotic monarchy is still sovereign if it has defeated its enemies in a “just” war and then treats them as a despot.⁶⁴

54. P.L. Rose, *SELECTED WRITINGS ON PHILOSOPHY, RELIGION AND POLITICS*, GENEVE: DROZ (1980); A compendium of Jean Bodin’s most important pieces. The author uses them to provide an orientation to Bodin’s work and to attract the reader to the context of Bodin’s work which implicated religious conflict. Contains “Épître à son nouveau” 1586; “Consilium de institutione principis” 1603; “Sapientiae moralis epitome” 1586; “Paradoxon” 1596; “Le Paradoxe de J. Bodin” 1598; “Lettre à Jean Bautre de Matras” 1568–69; “Lettre de M. Bodin” 1590.

55. Julian H. Franklin & Robert M. Isherwood, *Jean Bodin and the Rise of Absolutist Theory*, 1 *HISTORY: REVIEWS OF NEW BOOKS* (2010); see also J.U. Lewis, *Jean Bodin’s ‘Logic of Sovereignty’*, 16 *POL. STUD.* 206, 206–22 (1968).

56. *Id.*; see generally *supra* note 53.

57. See generally *supra* note 47; see also Summerfield Baldwin, *Jean Bodin and the League*, 23 *CATH. HIST. REV.* 160–84 (1937); see also Owen Ulph, *Jean Bodin and the Estates-General of 1576*, 19 *J. MODERN HIST.* 289, 289–96 (1947).

58. *Id.*

59. *Id.*

60. *Id.*

61. See Nagan and Hammer, *supra* note 27

62. *Id.*; see generally *supra* notes 3 & 53.

63. *Id.*

64. See Matthew S. Weinert, *Bridging the human rights—Sovereignty divide: Theoretical foundations of a democratic sovereignty*, 8 *HUM. RTS. REV.* 5–32 (2007); *id.* at 8–9. “Bodin clarifies By royal or legitimate monarchy, he means that form of

The war is valid under the law of nations, and therefore this form of despotism is valid. If the sovereign conquers in an “unjust” war, then his conduct in expropriating the rights of the conquered is the one of a tyrant.⁶⁵ In Bodin’s view, despotism may be appropriate and sometimes legal but tyranny is never legitimate; it is contrary to divine and natural law.⁶⁶ Bodin has tied sovereignty to certain limiting factors. In the definition of sovereignty, Bodin uses the term *absolute*, an adjective drawn from Roman Law experience where is linked to the idea of sovereign prerogatives (*legibus solutus*).⁶⁷ Bodin’s sovereign is not subject to civil or positive law. However, the sovereign is bound by natural and divine law.⁶⁸ In short, the concepts of “supreme” or “absolute” are unequivocally limited by natural law, divine law and, to some extent, international law.⁶⁹ This suggests that Bodin’s use of the term *absolute* is meant to be qualified, and suggests restraints on sovereignty within the domain of natural and international law.⁷⁰ Bodin’s sovereignty was trying to reconcile the need for some level of hierarchical authority for public order with his belief in the legitimacy of the people and in divine and natural law.⁷¹ The element of explicit elucidation lacking in Bodin is the conjoining of authority with sovereignty or *majestas*.⁷² It is clear that when distinguishing different forms of State and governance, it is

government “in which the subject obeys the laws of the prince, the prince in turn obeys the laws of God, and natural liberty and the natural right to property is secured to all (II. ii. 56).” By despotic monarchy he means “one in which the prince is lord and master of both the possessions and the persons of his subjects by right of conquest in a just war; he governs his subjects as absolutely as the head of a household governs his slaves.” Finally, by tyrannical monarchy he means that form of government “in which the laws of nature are set naught, free subjects oppressed as if they were slaves, and their property treated as if it belonged to the tyrant” (56f).

65. *Id.*

66. *Id.*

67. See generally Richard Bonney, *Absolutism: What’s in a name?*, 1 FRENCH HIST. 93–117 (1987); see also Gilbert Bagnani, *Divine Right and Roman Law*, 3 PHOENIX 51–59 (1949); see also Max Adams Shepard, *Sovereignty at the Crossroads: A Study of Bodin*, 45 POL. SCI. Q. 580–603 (1930).

68. *Id.*

69. *Id.*; see generally ALESSANDRO PASSERIN D’ENTRÈVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY (Transaction Publishers 1951).

70. See KLUWER LAW INT’L, PERSPECTIVES ON INTERNATIONAL LAW 20 (Nandasiri Jasentuliyana ed., 1995) (giving an explanation of how the traditional definitions provided for in the Montevideo Convention remain a generally accepted concern within States in the International community).

71. See generally *supra* notes 47, 53, 64, and 67.

72. *Id.*

not at all clear that sovereignty draws its authority from the body politic.⁷³ Bodin's distinctions between despotism and tyrannicide seem to diminish the salience of divine and natural law as sources of sovereign authority. In other words, it is not that Bodin is devoted to unqualified absolutism; it is more that his concern with the practical problem of public order and stability in a time of conflict and social dislocation. Hence, Bodin may be read as stressing the control element of the idea of sovereignty.

B. *The Work and Contributions of Thomas Hobbes*

Thomas Hobbes believed that the motivation for the covenant creating sovereignty is the notion of insecurity and fear.⁷⁴ Hobbes expressed this idea as a fear of an outside conqueror or fear of one's fellow citizens.⁷⁵ This kind of social contract or covenant involves the renunciation of rights or the transfer of rights and the authorization of sovereign competence.⁷⁶ The central issue of the authority of the sovereign is not the covenant or contract but whether if the sovereign can effectively discharge the obligation to protect those who have consented to obedience.⁷⁷ In order to discharge the obligation to protect, the sovereign needs effective government.⁷⁸ To have effective government, its authority must be absolute.⁷⁹ It is essential for sovereignty to have certain rights that cannot be tested. These rights confer powers that must be reliably and effectively used in governance.⁸⁰ In this sense, Hobbes

73. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 178 (5th ed.) (2003) (exploring of the most widely accepted formulation of the criteria of statehood in international law provided in Article 1 of the Montevideo Convention on Rights and Duties of States, 1933 which lays down that the State as an international person should possess the a permanent population, a defined territory, a government and capacity to enter into relations with other states).

74. S.A. Lloyd, *Hobbes's Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (substantive revision 2008), <http://plato.stanford.edu/entries/hobbes-moral/> (stating that Hobbes is widely regarded as one of the great political philosophers in history; his great work the "*The Leviathan*" is compared to the great works of the classical philosophers such as Plato, Aristotle, Locke, Rousseau, Kant, and Rawls).

75. *Id.*; see also King *supra* note 3.

76. *Id.*; see generally GEORGE SHELTON, *MORALITY AND SOVEREIGNTY IN THE PHILOSOPHY OF HOBBS* (St. Martin's Press 1992).

77. *Id.*; see also David Dyzenhaus, *Hobbes and the Legitimacy of Law*, 20 *Law and Philosophy*, no. 5, 461–98 (2001); see also Quentin Skinner, *Hobbes on Sovereignty: An Unknown Discussion*, 13 *POL. STUD.* 213–18 (1965).

78. *Id.*; see also W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT'L L.* 866, 866–76 (Oct. 1990).

79. *Id.*

80. *Id.*; see also BARRY HINDESS, *DISCOURSES OF POWER: FROM HOBBS TO FOUCAULT*, (Blackwell Publishers 1996).

provides a cleaner and more precise concept of sovereignty than Bodin in terms of effective power or control.⁸¹ Indeed, Hobbes believes that limiting authority generates difficult disputes about what the precise limits are of authority itself. Moreover, if the individual citizen may unilaterally determine whether the government should be obeyed or not, then the result may be civil war or paralyzed government.⁸² According to Hobbes, there can be no authority above the authority of the sovereign for defining the question of authority itself.⁸³ In effect, Hobbes works on a dismal view of the human capacity for cooperation and a greatly enhanced view of the ubiquity of social conflict.

Notwithstanding Hobbes' limited exceptions to sovereignty, his work takes us far along the road of a sovereignty that is essentially unlimited. In his work, Hobbes seems to be collapsing sovereignty into naked power; and his sense of obligation is so limited and arid that Hobbes does not account for the possibility that sovereign power needs authority and authority that is more than a hypothetical covenant. In this sense, Hobbes may have influenced the versions of sovereignty of the 19th and early 20th centuries, which tended to claim a form of sovereign state absolutism. Hobbes wrote several versions of his political philosophy and there are many fine overviews of his normative philosophy.⁸⁴ *Homo*

81. King, *supra* note 3.

82. *Id.*

83. TOM SORELL & LUC FOISNEAU, *LEVIATHAN AFTER 350 YEARS* (Oxford Univ. Press 2004) (giving an elegant appraisal of the legacy of *The Leviathan*).

84. Hobbes wrote several versions of his political philosophy, including *The Elements of Law, Natural and Politic* (also under the titles *Human Nature* and *De Corpore Politico*) published in 1650, *De Cive* in 1642 published in English as *Philosophical Rudiments Concerning Government and Society* in 1651, the English *Leviathan* published in 1651, and its Latin revision in 1668. Others of his works are also important in understanding his political philosophy, especially his history of the English Civil War, *Behemoth* published in 1679, *De Corpore* in 1655, *De Homine* in 1658, *Dialogue Between a Philosopher and a Student of the Common Laws of England* in 1681, and *The Questions Concerning Liberty, Necessity, and Chance* in 1656. All of Hobbes's major writings are collected in *The English Works of Thomas Hobbes*, edited by Sir William Molesworth (11 volumes, London 1839-1845), and *Thomae Hobbes Opera Philosophica Quae Latina Scripsit Omnia*, also edited by Molesworth (5 volumes, London, 1839-45). Oxford University Press has undertaken a projected 26 volume collection of the *Clarendon Edition of the Works of Thomas Hobbes*. So far 3 volumes are available: *De Cive* edited by Howard Warrender, *The Correspondence of Thomas Hobbes* edited by Noel Malcolm, and *Writings on Common Law and Hereditary Right* edited by Alan Cromartie and Quentin Skinner. Readers new to Hobbes should begin with *Leviathan*, especially Parts Three and Four, as well as the more familiar and often excerpted Parts One and Two.

homini lupus a Popular Roman proverb by Plautus (dead 184 B. C.), in his *Asinaria* is later used by Thomas Hobbes in his *De cive, Epistola dedicatoria*. Hobbes taught that “man is a wolf to other men” because he believed that people, by nature, were selfish, and acted only to serve their own interests.⁸⁵ Hobbes believed that governments existed to protect people from their own evil nature.⁸⁶ He further taught that the only way to achieve lasting peace was for people to subjugate themselves to a supreme, sovereign monarch.⁸⁷ Although Hobbes makes a strong case for sovereign absolutism, his writings also suggest that there are some limits to State absolutism. The citizen may disobey the government because the citizen obtains a right of self-defense against sovereign power.⁸⁸ Hobbes also provides for resistance rights when family issues and honor values are at stake.⁸⁹ In his view, the fundamental obligation on the sovereign is the obligation to protect the citizen. If the sovereign fails to do so, this obligation no longer holds.⁹⁰ These limits on state absolutism seems to suggest that limits on the currency and coherence of Hobbes’ concern for unfettered sovereign power.

C. *The Work and Contributions of Hugo Grotius*

Austin’s later theory sought to be logically rigorous concluding both, international law and constitutional law, which purported to limit the law making competence of the sovereign, were not really law but simply forms of positive morality.⁹¹ This view challenged centuries of international law, which had been largely sustained by the ideas of the *ius gentium* and later developments in natural law.⁹² It would be appropriate to briefly retrace the footprints of sovereignty’s influence on international law prior to Austin. The most important contribution to natural law emerged from the Dutch Jurist, Hugo Grotius.⁹³ Grotius came from a nation State that had been immediately involved in a war of

85. S.A. Lloyd, *Special Issue on Recent Work on the Moral and Political Philosophy of Thomas Hobbes*, 82 PAC. PHIL. Q. 3, 3–4 (2001) (affirming the current salience and durability of Hobbes’ ideas).

86. *Id.*; see generally *supra* notes 76, 77, and 80.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See generally *supra* note 14.

92. See generally *supra* note 69.

93. See generally EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* (Cambridge Univ. Press 2002); see also A. Claire Cutler, *The ‘Grotian Tradition’ in International Relations*, 17 REV. INT’L STUD. 41, 41–65 (1991); see also Knud Haakonssen, *Hugo Grotius and the History of Political Thought*, 13 POL. THEORY 239, 239–65 (1985).

independence against Spanish colonialism.⁹⁴ The states that comprised the Netherlands were vigorous claimants of the right to self-determination and independence of the nation state.⁹⁵ Grotius' masterful integration of the independence and autonomy of the sovereign state, and the challenges of developing orderly relations between states in periods of war and peace, shows how a great deal of international law effectually evolved with a working through of the imperatives of sovereign power and authority and the constraints suggested by reason and expressed in the form of international law.⁹⁶ A good indication of Grotius' approach is found in the following quotation:

Fully convinced . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon the subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.⁹⁷

One of the most important contributions that Grotius made to the understanding of sovereignty in a climate of multiple sovereigns was his introduction of the idea that legal thought and legal reasoning, which implicated rationality, could be deployed in a way that brought reason to the conduct of sovereigns among themselves.⁹⁸ Grotius did much to establish the idea of just war. He maintained that there were discoverable natural justice principles which would justify war as just cause principles of self-defense, reparation for injury, and punishment.⁹⁹ The concept of just war is not really a license to make war, it is meant to be a constraint

94. *Id.*

95. *Id.*

96. HUGONIS GROTIUS, *DE JURE BELLI AC PACIS* [THE LAW OF WAR AND PEACE] (1625); This piece is a masterly integration of the independence and autonomy of the sovereign state and the challenges of developing orderly relations between states in periods of war and peace. It provided sufficient deference to the reality of the state and provided the validation of reason as a foundation for the law of nations between states.

97. HUGO GROTIUS, *ON THE LAND OF WAR AND PEACE (DE IURE BELLI AC PACIS)*, Prologue sec. 28, (Carnegie ed. 1925).

98. *Id.*; see also Bacchus, James, *Groping Toward Grotius: The WTO and the International Rule of Law*, 44 HARV. INT'L L.J. 533 (2003); see also Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 665-68 (1939).

99. *Id.*; see generally PAUL RAMSEY, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* (Rowman & Littlefield 2002).

on recourse to war. His work also established the legal foundations of restraint found in the *ius in bello*.¹⁰⁰ Grotius is justly regarded as the father of modern international law.

D. The Treaty of Westphalia

The theories of Bodin and Hobbes should also be measured against the practical world of international diplomacy of the 17th century. The most significant diplomatic and juridical event for the idea of sovereignty emerged from the Peace of Westphalia of 1648.¹⁰¹ This was essentially a peace treaty seeking to establish a response to religious conflict in Europe.¹⁰² Notably, Bodin had sought to constrain the impulse of this conflict in France.¹⁰³ It is possible that Hobbes, too, may have been influenced by the problems of conflict and the importance of strong central authority to constrain it.¹⁰⁴ The Treaty of Westphalia, in effect, recognized that a European body politic would be a decentralized sovereignty-dominated body politic.¹⁰⁵ This meant that the local elites (i.e., dukes, princes, kings) would now exercise secular sovereign authority over the lands and territories over which they could claim authority and control.¹⁰⁶ It is commonly understood that the Peace of Westphalia was the decisive political and juridical event for establishing a European system of authority based on the sovereignty of the nation state.¹⁰⁷ Moreover, the nation State would define its internal obligations

100. *Id.*; see also Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391–413 (1993).

101. *Treaty of Westphalia*, The Avalon Project: Documents in Law, History and Diplomacy, Yale Law School; Lillian Goldman Law Library (accessed on Mar. 29, 2012); see generally MAJOR PEACE TREATIES OF MODERN HISTORY 1648–1967 (Fred L. Israel ed., 1967) (stating that the centrality of the Treaty is that it was generated by interest groups seeking to end interminable religious conflicts in Europe. It essentially diminishes the political importance of the idea of Christian Universalism under Papal authority and effectually decentralizes control and authority in terms of aggregates of a population, territory and the localized structures of hierarchical authority).

102. *Id.*; see generally DANIEL H. NEXON, *THE STRUGGLE FOR POWER IN EARLY MODERN EUROPE: RELIGIOUS CONFLICT, DYNASTIC EMPIRES, AND INTERNATIONAL CHANGE* (Princeton Univ. Press 2009); see also Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20–41 (1948).

103. *Id.*; see generally *supra* notes 3, 47, 53, 64, and 67.

104. See generally *supra* notes 3 & 80.

105. Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HIST. REV. (2010); see also Eric Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269 (1977-1978).

106. *Id.*

107. *Id.*; see Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969, 982–87, 1013, 1020 (1975). Contemporary salience of Westphalia for the sovereignty/State paradigm of world order. Draws attention to forces emerging in the global environment that essentially transcend to state, including the importance of the emergent global civil society and the work of the New

according to the citizenship of its subjects rather than its religious or confessional outlook.¹⁰⁸ The important point here is that the rooting of sovereign authority in secular terms would also imply that the limitations (that, for example, Bodin supported on sovereign authority based on natural law and divine law) would no longer be relevant to a form of sovereignty that was meant to separate itself from religion. It is this development of the sovereignty idea and its political expression and development in the Treaty of Westphalia that provides us with the prototype of the modern State system.¹⁰⁹ This system is a sovereignty-dominated paradigm of the global, legal, and political process, significantly dominated by the nation state.¹¹⁰ It would appear that the drafters of the Westphalian Treaty were not only motivated by the enduring religious conflicts, but also by the influence of Bodin and Hobbes. What is distinctive in Westphalia is that these theoretical and philosophical views are given a strong institutional expression in the form of a multilateral treaty. Modern commentators have suggested that from the perspective of international relations and international law, the Treaty of Westphalia was a decisive juridical event.¹¹¹ In this sense, theory and philosophy gravitate to law and jurisprudence.¹¹²

E. The Work and Contributions of Pufendorf and Vattel

Baron Samuel von Pufendorf was a German scholar with a wide range of powerful interdisciplinary skills.¹¹³ As a jurist, he did his most creative work on international law at Lund University.¹¹⁴ Pufendorf shows how

Haven School and the procedures and methods which anticipate the possibility of other social forces and foundations of modern international law.

108. *Id.*; see also Bjorn Hettne, *The Fate of Citizenship in Post-Westphalia*, 4 *CITIZENSHIP STUDIES*, 1 (2010); see also Charles Tilly, *Citizenship, Identity and Social History*, 40 *INT'L REV. SOC. HIST.* 1, 1–17 (1995).

109. *Id.*; see also RICHARD FALK, *THE DECLINE OF CITIZENSHIP IN AN ERA OF GLOBALIZATION, IN PEOPLE OUT OF PLACE: GLOBALIZATION, HUMAN RIGHTS, AND THE CITIZENSHIP GAP* (Alison Brysk & Gershon Shafir eds., Psychology Press 2004); see also RICHARD FALK, *THE DECLINE OF CITIZENSHIP IN AN ERA OF GLOBALIZATION*, 4 *CITIZENSHIP STUDIES*, 1 (2010).

110. *Id.*; see also Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 *STANFORD L. REV.* 959–86 (2000).

111. *Id.*

112. *Id.*

113. *Id.*

114. See generally Hugh Chisholm, *Pufendorf, Samuel*, *ENCYCLOPÆDIA BRITANNICA* (11th ed., Cambridge Univ. Press ed. 1911).

he struggled with Hobbes' philosophy and rejected the destructive implications of Hobbes' views of human nature.¹¹⁵ Pufendorf was also influenced by Grotius, and therefore by Grotius' ideas of international obligation and the reality of the state; namely, how Grotius considered that the state represented the aggregate will of individuals in it, an idea that seemed to anticipate the rooting of sovereignty in the authority of the people.¹¹⁶ In regard to international law, he argued that natural law does not extend beyond the limits of this life and that it confines itself to regulating external acts.¹¹⁷ In this sense, Pufendorf was seeking to secularize natural law and bring the idea closer to what later would be considered empirical science. In particular, the externalization of natural law effects may be seen as an effort to make it objective. Pufendorf also tried to strengthen the authority foundations of the sovereign state by suggesting that the state (*civitas gentium*) was a moral person (*persona moralis*).¹¹⁸ This notion would strengthen the idea of sovereignty of the nation state. Further, the introduction of the moral element meant that all nations, whether Christians or not, were a part of humanity expressed through the state as a moral person. Therefore international law recognizes states with a certain moral persona subject to obligations as moral persona in their interactions with each other.¹¹⁹ The international law of the 16th century was also influenced by the work of the international law scholar, Swiss philosopher and jurist, Emerich de Vattel.¹²⁰ Vattel shows how he accepted the sovereignty of the nation state but also stressed the

115. *Id.*; see also Fiammetta Palladini, *Pufendorf disciple of Hobbes: The nature of man and the state of nature: The doctrine of socialitas*, 34 *History of European Ideas*, (2012); see generally SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* (Basil Kennett, trans., 1729) (providing a comprehensive system of society, law, and government based on a theory of human nature founding natural law on the need for sociability). Pufendorf paid great respect to Grotius as the founder of a modern, enlightened natural law, but criticized his remaining "scholasticism." Similarly, he learned from Hobbes but rejected the reduction of natural law to individual self-interest.

116. *Id.*; see also John Finnis, *On the Incoherence of Legal Positivism*, 75 *NOTRE DAME L. REV.* 1597 (1999–2000).

117. *Id.*; see generally Samuel von Pufendorf, *De officio hominis et civis juxta legem naturalem libri duo* (Oxford Univ. Press 1927); see also Samuel Pufendorf (Freiherr von), CRAIG L. CARR, *THE POLITICAL WRITINGS OF SAMUEL PUFENDORF* (Oxford Univ. Press 1994).

118. *Id.*; see also Hans Aufricht, *Personality in International Law*, 37 *Am. Pol. Sci. Rev.* 217, 217–43 (1943); see generally CHARLES EDWARD MERRIAM, *HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU* (Columbia Univ. Press 1900).

119. *Id.*; see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2599–2659 (June 1997) (Symposium: Group Conflict and the Constitution: Race, Sexuality, and Religion).

120. *Id.*

importance of the nation state for advancing the common good.¹²¹ He expressed his fundamental idea as follows:

All nations are therefore under a strict obligation to cultivate justice towards each other, to observe it scrupulously, and carefully to abstain from everything that may violate it. Each ought to render to the others what belongs to them, to respect their rights, and to leave them in the peaceable enjoyment of them.¹²²

F. *The Work and Contributions of Moser and Martens*

The work of Johann Jakob Moser and Georg Friedrich von Martens is particularly important for changing and justifying the endurance of a “strong” or “thick”¹²³ sovereignty in international law.¹²⁴ Both of these writers were influenced by the positivist approach to international law,¹²⁵ which meant a sharp break with the ideas of international obligation as founded in terms of morality or natural law.¹²⁶ What was important was what sovereigns did and how they acted. In the international context, sovereigns overwhelmingly communicated with each other in terms of agreements.¹²⁷ Moser shows that this method of communication meant a

121. See generally EMMERICH DE Vattel, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (Joseph Chitty, trans.) (1834) (explaining Vattel’s political philosophy views of politics and international relations). His book influenced recognized people of history and it modernized the entire theory and practice of international law. It has been translated to several languages and distributed all around the world.

122. Emerich de Vattel, *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758), *LAW OF NATIONS OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (1759 First English Edition, Book II, Chapter V).

123. Cynthia Weber, *Reconsidering statehood: examining the sovereignty/intervention boundary*. *Review of International Studies*, 18, pp 199-216, (1992).

124. Martti Koskenniemi, *Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law*, 15 *CONSTELLATIONS* NO 2 190, 201 (2008). This article is an analysis of the legacy of the “positivism” of Georg Friedrich von Martens. It describes it as a positivism of fear or a conservative disposition and shows how Martens explained that natural law does not entitle Christian princesses to take territory occupied by savages creating a revolution in the enthusiasm for human freedom and enlightenment.; see also Peter P. Remec, *The Position of the Individual in International Law According to Grotius and Vattel*, 44 *REVUE INTERNATIONALE DE LA CROIX-ROUGE* 314, 314–15 (1962).

125. *Id.*

126. *Id.*; see also Hans Wehberg, *Pacta Sunt Servanda*, 53 *AM. J. INT’L L.* 775–86 (1959).

127. *Id.*; see generally MICHAEL FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* (Penn State Press 1995).

positive source of international law found in the agreements made by the sovereigns.¹²⁸ According to Martens it was possible to establish this method because one could empirically determine what the sovereigns consented to in their agreements by collecting all possible treaties and organizing them.¹²⁹ Such agreements represent the consent of the sovereign to be bound and therefore such consent is reconcilable with the sovereign powers of the state. A second component of international law was reflected in the recognition of the custom that the sovereigns had generated in their operations with each other.¹³⁰ In a technical sense, custom is a non-consensual source of international law, and since it could be seen as non-consensual, it might be inconsistent with the sovereign autonomy of the other state. The test evolves in such a way as to suggest that custom carries the implicit consent of the State to be legally bound. Essentially, custom was qualified by the principle *opinio juris sive necessitatis*.¹³¹ Custom and treaty, therefore, became the primary sources of international law and these sources could be reconciled with the sovereignty of the nation state without recourse to the vagaries of the natural law tradition.¹³² Powerful as these theories were, they could not quite destroy the Grotian tradition, which sought to make international law subject to a principle of reasonable prescription and application. Additionally, the Moser-Martens approach still had to confront the power of Austin's theory and its challenge to the reality of international

128. *Id.*; see generally JOHANN JAKOB MOSER, VERSUCH DES NEUESTEN EUROPÄISCHEN VÖLKERRECHT IN FREIDENS- UND KRIEGSZEITEN (10 vols., 1777-1780); BEITRÄGE ZU DEM NEUESTED EUROPÄISCHEN VÖLKERRECHT IN FRIEDENSZEITEN (5 vols., 1778-1780); BEITRÄGE ZU DEM NEUESTED EURPÄISCHEN VÖLKERRECHT IN KRIEGZEITEN (3 vols., 1779-1780) (1732 to 1780) (explaining that International law was above all professional practice and was the first to discuss in an adequate form the subject of European international law in times of peace and war being the first legal scholar to bring out a complete presentation of German constitutional law). His entire work shows his influence in the process of making public law an academic science.

129. *Id.*; see generally GEORG FRIEDRICH MARTENS, SUMMARY OF THE LAW OF NATIONS: FOUNDED ON THE TREATIES AND CUSTOMS OF MODERN NATIONS OF EUROPE (William Cobbett, trans., 1986) (providing a list of the principal treatises from 1748 to the time of its creation that have great practical utility even when it might be seen as a very partial view of the systems of Europe of that time) The book had gone through 13 editions and in 1894 Holland won the Swiney Prize of £100 and a silver cup.

130. *Id.*

131. See generally, SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS (McGill-Queen's Press (MQUP) 2002); see also Stern, Brigitte, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89 (2001); see also Chodosh, Hiram E., *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991); see also Slama, Jo Lynn, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603 (1990); see also G. I. Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419, 419-30 (1961).

132. *Id.*

law that it was merely positive morality.¹³³ The leading English international lawyer of the 19th and early 20th century, Holland, lamented that international law reflected the vanishing point of legal theory.¹³⁴ Moreover, other leading international lawyers appear to agree with this idea.¹³⁵

G. John Austin and the Theory of Sovereignty

The political and philosophical writings of Bodin and Hobbes,¹³⁶ and the practical expression of some of these themes in the European State system in the aftermath of the Westphalian peace,¹³⁷ received a significant and strengthened intellectual presence through developments in legal theory and legal culture.¹³⁸ In his early works, Austin developed his imperative theory of law that used the emerging tools of positivism to provide, for a linguistically sensitive effort, a definition and redefinition of the nature of law.¹³⁹ The central idea was that law was the command of a sovereign imposed by a sanction.¹⁴⁰ The command was directed at

133. See generally THOMAS ERSKINE HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* (13th ed. 1924) (explaining positive law, its source, object and the importance of the laws of rules of human action in the determination of rights of public or private character providing a guide on how to analyze them and their leading classification, which is based on the persons with whom it is connected; public persons being the state or its delegates).

134. See generally CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (Haymarket Books 2006).

135. *Id.*; see generally HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (Oxford Univ. Press 2011); see also W. Michael Reisman, *International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture* (Proceedings of the Annual Meeting), 75 AM. SOC'Y INT'L L. 101, 101–20 (1981) (Proceedings of the 75th Anniversary Convocation. Order, Freedom, Justice, Power: The Challenges for International Law); see also Onuf, Nicholas Greenwood, *International Legal Order as an Idea*, 73 AM. J. INT'L L. 244 (1979); see also H. Lauterpacht, *The Nature of International Law and General Jurisprudence*, 37 *ECONOMICA* 301, 301–20 (1932).

136. See generally *supra* notes 3, 47, 53, 64, 67, and 80.

137. See generally *supra* notes 101, 102, and 105.

138. *Supra* note 1.

139. See generally *supra* note 9; see also John Austin, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (John Murray 1832). Austin was the leading legal positivist of his time and his approach to sovereignty is an effort to bring the objectivity of science to the description and analyses of law based on sovereign authority. His model is essentially a hierarchical concept of law with the sovereign in a superior position issuing orders and commands to the community, which is in the habit of obedience.

140. *Id.*; see generally JOHN AUSTIN, ROBERT CAMPBELL, *LECTURES ON JURISPRUDENCE: OR, THE PHILOSOPHY OF POSITIVE LAW* (John Murray 1880); see also Kenneth Mann,

members of the community, who were in the habit of obedience regarding the sovereign's commands.¹⁴¹ Since the State in Europe had evolved with higher degrees of centralization and administration, the idea of the State as sovereign, and as the source of all law, had an intuitive commonsense appeal.¹⁴² This was a relatively easy model to understand because it was straightforwardly hierarchical with the genius of having some of the most essential characteristics of law, which it could account for.¹⁴³ The problem with Austin's theory is that it had a close affinity with power or control.¹⁴⁴ The element of authority in his model was lacking.¹⁴⁵ This meant that the model, which reduced law to superior power, looked no different from a gunman who enters a bank with a gun and demands that the cash be handed over to him. In short, the gunman exercises a power to force someone (or oblige someone) to do or refrain from doing something. But the question of whether there is an obligation, which is founded on authority and which requires compliance, is ignored. The Austinian model gravitated to the status of the conventional view of law and solidified the place of sovereignty not only in municipal law but also in international law.¹⁴⁶ It is possible to view this development as a critical formalization of the thoughts of Bodin, Hobbes, and the outcomes of the Westphalian peace. Nineteenth century State practice solidified a Eurocentric conception of sovereignty and state.¹⁴⁷ These developments were consolidated by the Congress of Vienna and later by the process known as the Concert of Europe.¹⁴⁸ The developments of European colonial expansion, which were accelerated in the 19th century, used sovereignty ideas imposed on the complex colonial societies that they had conquered to generate a degree of order among colonial competitors.

Punitive Civil Sanctions: The Middleground between Criminal and Civil Law, 101 YALE L.J. 1795, 1795–1873 (1992) (Symposium: Punishment); see also George C. Christie, *The Model of Principles*, 1968 DUKE L.J. 649 (1968).

141. *Id.*

142. *Id.*; see also McCormick, N., *Beyond the Sovereign State*, 56 MOD. L. REV. 1–18 (1993).

143. *Id.*

144. Samuel Enoch Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 VAND. L. REV. 117 (1960-1961); see also John Dewey, *Austin's Theory of Sovereignty*, 9 POL. SCI. Q. 31, 31–52 (1894).

145. *Id.*

146. *Id.*

147. *Supra* note 1.

148. Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 789–90 (1994). Describes how positivism reached its height in the writings of the English philosopher John Austin. Explains how the developments of sovereignty were consolidated by the Congress of Vienna and later by the Concert of Europe; a process where the European states met and considered transnational matters of European policy and public order.

III. THE THEORY OF SOVEREIGNTY AND INTERNATIONAL LAW

A. *Sovereignty and International Obligation After the First World War*

A vast corpus of treaty law was generated between European colonizers and non-European potentates.¹⁴⁹ These potentates were deemed to be sovereign for the purpose of transferring their powers to their colonial conquerors.¹⁵⁰ However, in this process, in terms of control and authority, vast sectors of the planet experienced the loss of sovereignty.¹⁵¹ The 19th century development essentially made non-European states candidates for admission into the initially established European system of international law.¹⁵² Moreover, in the 20th century, as decolonization accelerated, and as shown by the *2006 United Nations Member States List*,¹⁵³ admissions to the international club of State sovereigns accelerated.¹⁵⁴ Today, according to the *2008 Non-member States and*

149. See generally *supra* notes 101, 102 and 105.

150. Nele Matz, *Civilization and the Mandate System under the League of Nations as Origin of Trusteeship*, 9 Max Planck Y.B. U.N. L. 47, 47–95 (2005); see also Anghie, Antony, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y. UNIV. J. INT'L L. & POL. 513 (2002).

151. *Id.*

152. See generally CHARLES HENRY ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (Clarendon Press 1967). (challenging the conventional wisdom that the roots of modern international law are purely Eurocentric). This pioneering study draws attention to the practice and customs of colonial expansion done through the currency of legal instruments with non-European sovereigns. It should be noted that the treaties and practices between European and non-European sovereigns were included as sources of Eurocentric International Law.

153. See Press Release, Department of Public Information, *United Nations Member States*, U.N. Department of Public Information Press Release: News and Media Division Press Release ORG/1469 (June 28, 2006) (documenting the expansion of sovereignty in the world community).

154. Lim, Kok-ui, *Taiwan's Case for United Nations Membership*; Chang, Parris, 1 UCLA J. INT'L L. & FOREIGN AFF. 393 (1996-1997); see also Carroll, Anthony J.; Rajagopal, B., *The Case for the Independent Statehood of Somaliland*, 8 AM. U. J. INT'L L. & POL'Y 653 (1992-1993); see also Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51 (1988-1989); see also Mazzawi, Musa, *Self-Determination in International Law—A Study of the Rhodesian Case*, 1 POLY L. REV. 15 (1975); David Lloyd, who suggests that only the first two criteria for statehood should be met: (1) having the traditional characteristics of a state; and, (2) expressing the willingness to abide by the Charter, explains that “under the Charter, when the United Nations refuses to recognize a state created in violation of international law, its members are prohibited from recognizing that state. He adds that, “the United Nations’ support of the right of all people to freely determine their political

Entities List, there are over 200 sovereign states.¹⁵⁵ The 20th century saw a greatly expanded idea of sovereignty, supported by the theoretical underpinnings of legal theory.¹⁵⁶ One of these results was the idea that a sovereign State had no clear limits to the exercise of its competence without having consented to those limits.¹⁵⁷ The failures of this somewhat anarchical system resulted in the great tragedy of the First World War.¹⁵⁸ Here actors acting under color of sovereign authority could mistakenly set in motion events that would culminate in a war of global proportions. The American President, Woodrow Wilson, promoted the idea of sovereign cooperation via a League of Nations—an idea that was concurrently supported by General Smuts of South Africa.¹⁵⁹ But as it is explained in Fenwick, the idea of a League of Nations would require some subordination of sovereignty to international law.¹⁶⁰ However, the sovereignty idea still dominated negotiations and the League emerged with a unanimity rule.¹⁶¹ If a single sovereign objected to a League determination on a matter within its competence, then the League would be unable to act. In this sense, the strong or thick version of sovereignty subverted the emerging and difficult idea of subjecting sovereignty to international obligation. The paralysis of the League is, in the judgment of some theorists, one of the reasons that may have contributed to the Second World War.

status and its failure to recognize a right of secession in general has been interpreted to mean that the U.N. supports self-determination only in the decolonization process, meaning that it the issue needs to be “integrally linked to the need to free peoples from colonial and ‘alien’ subjugation.” Lloyd proclaims the idea that “under international law, one state’s recognition of another state will not make the new state internationally accepted, nor will one state’s refusal to recognize another state keep the new state out of the international community.” See David O. Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U. J. INT’L L. & POL. 761, 793–94 (1994).

155. See *Permanent Missions to the United Nations*, U.N. ST/SG/SER.A/298 (2008) (These statistics demonstrated the vitality of the expansion of sovereign members of the world community.).

156. See generally *supra* note 1; see generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2008) (This study demonstrated the use of the Eurocentric idea of sovereignty in non-European contexts.).

157. See generally *id.*

158. *Id.*; see generally JAMES JOLL, *THE ORIGINS OF THE FIRST WORLD WAR* (Longman 1987).

159. See generally F.S. NORTHEGE, *THE LEAGUE OF NATIONS: ITS LIFE AND TIMES, 1920–1946* (New York: Holmes & Meier 1986) (stating it is a concise story about the creation of the League of Nations. Professor Northedge focuses on the reasons for the failure of the of the League as a system of collective security.).

160. CHARLES FENWICK, *INTERNATIONAL LAW* 619–24 (1965) (discussing a short introduction to international legal arrangements after the First World War).

161. See Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT’L L. 300 (1968) (explaining a refined and systematic study of the theory of international law obligations as a limiting source of authority on the conduct of sovereign states in the international environment).

*B. Sovereignty and International Obligation After the
Second World War*

The Second World War was conducted under the principle that a sovereign may determine whether (and if so, what limits) it would honor in the conduct of war. Hitler's Germany developed the idea that it was involved in what was described as "total war."¹⁶² Under the guise of sovereignty, there was the implicit claim that there were no rules from the law of war that could constrain the prerogatives of the sovereign.¹⁶³ Additionally, the Nazis were race-obsessed; and they viewed persons of Jewish ethnicity as candidates for physical extinction. They viewed the Slavic people as *untermenschen* (subhuman people) that could be treated with extreme cruelty and used in whatever terms the Nazis thought were in their own interest.¹⁶⁴ Nazi absolutism developed the death camps in which vast numbers of Jews and other ethnic "expendables" were exterminated.¹⁶⁵ It should be added that, outside of Nazi atrocities, the growth of the totalitarian state—especially in Europe—had generated monumental atrocities but often these were targeted at their own citizens.¹⁶⁶ Thus, it has been estimated that Russia has accounted for some 60 million murders by government.¹⁶⁷ A significant aspect of this

162. See generally ALAN JOHN PERCIVALE TAYLOR, *THE ORIGINS OF THE SECOND WORLD WAR* (Simon & Schuster 1996); see generally WINSTON CHURCHILL, *THE SECOND WORLD WAR* (Golden Press 1960).

163. *Id.*; see also Korovin, Eugene, *The Second World War and International Law*, 40 AM. J. INT'L L. 742 (1946); see YEHUDA BAUER, *RETHINKING THE HOLOCAUST* (2001) (reviewing an insightful overview and reconsideration of the Holocaust history and meaning). Bauer uses his historiography and analysis to insist on an understanding of the political foundations and decision within the State that generated and executed policies creating the Holocaust. In a sense, it draws attention to the abuse of sovereignty.

164. See generally Leonid Rein, *Untermenschen in SS Uniforms: 30th Waffen-Grenadier Division of Waffen SS*, 20 J. SLAVIC MIL.STUD. 2 (2007); see generally ROBERT S. WISTRICH, *HITLER AND THE HOLOCAUST* (Random House Digital, Inc. 2001).

165. *Id.*; see also Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal*, 65 YALE L.J. 449, 449–81 (1995).

166. See ROBERT LIFTON & ERIC MARKUSEN, *THE GENOCIDAL MENTALITY: NAZI HOLOCAUST AND NUCLEAR THREAT* (1990). This book brings the reality of the psychopathological personalities and their role in the Holocaust or possible role in a future nuclear Holocaust. In this sense, a realistic sense of sovereignty must account for the personalities that are prone to genocide and mass destruction of human beings.

167. See R. J. RUMMEL, *DEATH BY GOVERNMENT* (1994). These studies are an indication of the unlimited abuse of sovereignty as a world order problem. This study with the copious statistical data underlines the dangers of sovereignty in the modern era. In short, the sovereign State with its implications for killing and mass murder needs some

statistic is identified with Stalinistic totalitarianism.¹⁶⁸ At the end of WWII, considerable disquiet was generated about the notion of the abuse of State sovereignty and the scale of the horror that it generated. The most important effort that clearly establishes limits to what government can do is reflected in the work of the Nuremburg Tribunal.¹⁶⁹ In Nuremburg, the defense that the defendants were merely following the orders of the sovereign was rejected.¹⁷⁰ The court stressed that behind the veil of the sovereign are the finite human agents of decision-making.¹⁷¹ A court of law could therefore penetrate the veil of the State and sovereign and hold the decision makers accountable. In historic terms, Nuremburg established a critical repudiation of the principle of sovereign absolutism. It, in effect, repudiated legal theories of sovereignty that sought to shield defendants from responsibility for mass murder.¹⁷²

C. Threshold Empirical Ideas and Sovereignty

After the First World War, Harold Lasswell, a member of the Chicago School, sought to reshape the study of politics as an empirical science. He wrote two important books that were to reshape the thinking about sovereignty in an empirical direction. The first of these books was his pioneering study titled *Psychopathology and Politics*.¹⁷³ If the study of politics had been dominated by a historical/institutional focus of enquiry, Lasswell deliberately shifted that focus to the individual human participants in politics.¹⁷⁴ Some of those individuals, who were in leadership roles, whether covering themselves in the symbols of sovereign authority, could bring to the role of political leadership psychological deficits and

dimension of control and prevention to avoid the absolutism that may lead to mass murder and human destruction.

168. *Id.*; see generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (Houghton Mifflin Harcourt 1973).

169. See Winston P. Nagan, *Racism, Genocide, and Mass Murder: Toward a Legal Theory About Group Deprivation*, 17 NAT'L BLACK L.J. 133 (2004) (rethinking the boundaries of human rights, humanitarian law and the scope of intervention. Draws attention on the problem that states have indulged in unlimited atrocity justified as an exercise of sovereign absolutism seeking to generalize the major forms of human rights, humanitarian deprivation and the problems generated by a thick version of sovereignty developing a general social process of contextual foundations).

170. *Id.*; see also *supra* note 166; see also *Opinion and Judgment of the Nuremberg International Military Tribunal or the Trial of German Major War Criminals for War Crimes and Crimes Against Humanity*, Nuremberg, 30th September and 1st October, 1946.

171. *Id.*

172. *Id.*

173. HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 240 (Chi. Univ. Press 1930).

174. *Id.*

dysfunctions.¹⁷⁵ These deficits could be a result of psychopathological personality orientations.¹⁷⁶ If this were true, some political leaders, who were psychopathological in personality orientation, would constitute a danger to the State and to world order.¹⁷⁷ Therefore, there might be an urgent necessity for the development of a form of preventive politics. These insights penetrate the veil of sovereignty and anticipate the idea of leadership accountability as well as restrains on the conduct of leadership; in short, restraints on sovereignty.¹⁷⁸ In order to make the theory more credible there was a critical necessity to deconstruct the idea of the sovereign State, which was insulated in the symbolism of an impenetrable juridical curtain of non-transparency. Advancing this agenda required a radical empiricism for unpacking the nature of the State to clearly understand the nature of authority, control, and personality in the organization and functions of the State. Lasswell's reconceptualization of the State was that it was an empirically, observable manifold of events. However, the study of the State as a manifold of events, which involves individual participants, as well as participants in the aggregate, generated a lifelong quest for an adequate theory and method of enquiry to completely understand the interdependence and inter-determination of the individual and society or more generally the interrelationships between personality and culture.¹⁷⁹ Lasswell saw, within the idea of the State as a manifold of events, is the importance of the study of the individual personality "upon the meaning of the political process as a whole."¹⁸⁰ Such interactions between person and culture operate within what Lasswell termed an "event manifold."¹⁸¹ Within the event manifold, Lasswell understood the complexity of what he was suggesting:

[s]ince the psychopathological approach to the individual is the most elaborate procedure yet devised for the study of human personality, it would appear to

175. *Id.*

176. *Id.*; see generally HAROLD D. LASSWELL, *POWER AND PERSONALITY* (1948); see also HAROLD D. LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOR* 195 (1948). On the dynamics of personality see LASSWELL & MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY*, Vol. I, at 591–630 (1992); on the political personality see *id.* at 681–82; on the connection of personality to political culture see *id.* at 683–722.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

raise in the most acute form the thorny problem of the relation between research on the individual and research upon society.¹⁸²

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

[i]t may be asserted at the outset that our thinking is vitiated unless we dispose of the fictitious cleavage which is sometimes supposed to separate the study of the "individual" from the study of "society." There is no cleavage; there is but a gradual gradation of reference points. Some events have their locus in but a single individual, and are unsuitable for comparative investigation. Some events are widely distributed among individuals, like breathing, but have no special importance for interpersonal relations. Our starting-point as social scientists is the statement of a distinctive event which is widely spread among human beings who occupy a particular time-space manifold.¹⁸³

Having demolished the rationality of a familiar dualism between the individual and the group or the State, Lasswell in effect set his agenda on the next important intellectual challenge: the individual in the global environment. Lasswell sets out his thoughts in his now classic, *World Politics and Personal Insecurity*.¹⁸⁴ This piece was a study in the social sciences and established an important place for the individual in the arena of world politics. By implication, the sovereign State clearly did not monopolize this arena of action. The central idea was that the global environment was a generator of meaning and understanding in terms of symbols that penetrated sovereign lines.¹⁸⁵ Those symbols sometimes influenced individual behavior because they could be perceived symbolically as threats to security and thus productive of individual anxiety.¹⁸⁶ This work laid the foundations for a movement away from the monopoly of the sovereign State as the exclusive subject of international law, and the sovereign State as the monopolizer of international relations.¹⁸⁷ Clearly, the individual was also participating

182. *Id.*

183. *Id.*

184. See HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 5–8, 28–39, 64–66 (Free Press 1965).

185. *Id.*

186. *Id.*

187. *Id.*

in this universe and thus reflected an important human subjectivity in terms of the values implicated in the global system.¹⁸⁸ These ideas were not a direct attack on sovereignty, but a framework that later developed, into a sophisticated empirical approach to mapping the salient features of global processes critical to outcomes we describe as the sovereign nation State.¹⁸⁹

D. Sovereignty and the U.N. Charter

The Charter of the U.N. is an instrument by which members both assert and limit their sovereignty. The Charter is more than a formal constitution for the international community.¹⁹⁰ It is an outcome of the world, social, and power processes. It was a reaction to World War II—to the experience of total war and the Holocaust.¹⁹¹ As a preventative measure, the Charter placed limits on its members' sovereignty.¹⁹² Yet, paradoxically, membership in the U.N. was an important means of asserting sovereignty.¹⁹³ An examination of the history and text of the Charter reveals this tension.¹⁹⁴ The Charter was written for the sovereign nation-States of the world community.¹⁹⁵ Many of those sovereigns had been members of the U.N.'s predecessor, the League of Nations.¹⁹⁶ The Charter also inherited a sizable body of international law that preceded its entry into force.¹⁹⁷ Although the higher law aspirations of theorists

188. *Id.*

189. *Id.*

190. See United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at <http://www.unhcr.org/refworld/docid/3ae6b3930.html>; Fassbender, Bardo *The United Nations Charter As Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); see also Leland M. GOODRICH, ET AL., CHARTER OF THE UNITED NATIONS 290–309 (3d ed. 1969) (for a discussion of the history of the Charter of the United Nations and justifications as to why the Security Council is imbued with such power.).

191. *Id.*; see also Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227 (1996-1997); see also Henkin, Louis, *Human Rights and State Sovereignty*, 25 GA. J. INT'L & COMP. L. 31 (1995-1996).

192. *Id.*; see also Ira Leitel, *The United Nations Charter as a Restraint Upon a Nation's Right to Wage War*, 36 BROOK. L. REV. 212 (1969-1970); see also LELAND M. GOODRICH, FROM LEAGUE OF NATIONS TO UNITED NATIONS. INTERNATIONAL ORGANIZATION 1, 3–21 (1947).

193. *Id.*; see generally *supra* note 156.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

such as Grotius, Vattel, and Pufendorf continued to have traction, the tradition of Moser and Martens positivism was very much in evidence since the Charter represented a form of sovereign consensual obligation.¹⁹⁸ The influence of this latter perspective is well illustrated by the Permanent Court of International Justice in the *Lotus Case* from where international law inherited one of its very important principles.¹⁹⁹ The PCIJ stated that, “restrictions upon the sovereignty of States could not be presumed.”²⁰⁰ This suggested that some deference would have to be given to the expectation that there are no presumptive limitations to sovereignty in the international legal system.²⁰¹ It should also be noted that the failure of the League of Nations was rooted in the principle that any individual sovereign State could exercise a veto in the League.²⁰² The U.N. Charter, in effect, would have to respond to these and other problems in defining the scope of sovereignty and the force of international obligation. In this case, the Court articulated a powerful version of strong or thick sovereignty indicating in effect that a sovereign has to consent in order to be bound by an international obligation.²⁰³ The Court said that limits to the sovereignty of the State could not be presumed.²⁰⁴ Thus, recognizing a limited form of international obligation the Court stressed a presumption, which gave primacy of thick sovereignty to the nation State. Another important example of practice during this period emerged from the influential arbitral decision of the *Island of Palmas Case* where practice of international law strengthened the definition of sovereignty.²⁰⁵ In this arbitration, the arbitrator considered that mere discovery as a basis for title to the sovereign dominion and control of the territory was weak and could not defeat the assertion of sovereignty of the State that exercised continuous control and authority

198. *Id.*

199. *See S. S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 20–46, for judicial authority for the idea of thick sovereignty. Its central proposition was that there were no presumptive limits to sovereign authority in international law.

200. *Id.*; *see also* Nagan and Hammer *supra* note 27.

201. *Id.*; *see also* Stephan Hobe, *The Era of Globalisation as a Challenge to International Law*, 40 DUQ. L. REV. 655 (2001-2002).

202. *Supra* note 160; *see also* Stone, Julius, *The Rule of Unanimity: The Practice of the Council and Assembly of the League of Nations*, 14 Brit. Y.B. Int'l L. 18 (1933); *see also* Williams, John Fischer, *League of Nations and Unanimity*, 19 Am. J. Int'l L. 475 (1925).

203. *See generally id.*

204. *Id.*

205. *See Island of Palmas (Neth. v. U.S.)*, HAGUE CT. REP. (Scott) 83 (Perm. Ct. Arb. 1928) (establishing three important rules concerning island territorial disputes and becoming one of the most highly influential precedents dealing with island territorial conflicts).

over the land.²⁰⁶ In this sense, the arbitrator favored sovereignty as exercised by effective power versus sovereignty as a nominal legalistic assertion of titled by discovery.²⁰⁷

IV. MODERN INTERNATIONAL SOVEREIGNTY

The Charter does not define sovereignty. The first words in the Preamble of the Charter introduces the key terms: “We the Peoples of the United Nations determined . . .”²⁰⁸ The references to “Peoples” and “Nations,” when coupled with the term “determined,” suggest that the peoples of the world are the ultimate source of international authority. Moreover, the peoples have “determined,” or made an affirmative decision, to adopt the Charter of the U.N. because of certain problems and conditions of global salience.²⁰⁹ The member States of the U.N. are sovereign; the idea that sovereign legitimacy and authority under the Charter is derived from the “Peoples” ultimately assumes that in the international community, sovereign national authority is itself, in some degree, constrained by the authority of the people it seeks to symbolize or represent. In short, the tacit assumption of the authority of sovereignty is actually rooted in the perspectives of all peoples in the global community who are not objects of sovereignty but subjects of it. Roosevelt expressed, in 1941, that the demands of the “Peoples” are expressed in four fundamental principles on which the U.N. is premised: prevention of war, protection of human rights and dignity, respect for social progress according to the rule of law, and higher living standards and development for all.²¹⁰ The

206. *Id.*; see generally MICHAEL FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* (Penn State Press 1995).

207. *Id.*

208. See U.N. Charter, pmb. & art. 1–2, for an explanation of the scope of international concern and the limitations on sovereignty, given the purposes of the U.N. to maintain international peace and security and to develop friendly relations among nations based on respect for principles of equal rights and self-determination of peoples. States are subject to a good faith obligation and are required to settle disputes through peaceful methods.

209. See Thomas M. Franck & Faiza Patel, *U.N. Police Action in Lieu of War: “The Old Order Changeth”*, 85 A.J.I.L. 63, 66–67 (1991) (documenting the modifications and permutations of sovereignty under the U.N. Charter).

210. See 9 FRANKLIN DELANO ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: WAR—AND AID TO DEMOCRACIES* 663 (The McMillan Co., 1941) (commonly known as “Four Freedoms Speech;” proclaiming U.N. pledge to maintain international peace and security, and to ensure that armed force shall not be used. Proclaims UN’s goal of reaffirming “faith in fundamental human rights [and] the dignity

concepts of “United” and “Nations” are to be understood conjunctively.²¹¹ When read together, these terms seem to generate conflicts about the nature of sovereignty. One such conflict is evident: the key operative components of the U.N. are sovereign nations. Accordingly, the efficacy of the U.N. should be measurable by examining the sum of its parts. It is a body of coordinate sovereigns; its institutional authority cannot aspire to more authority than that reposing in the will of the sovereigns themselves. Yet, on some occasions, the U.N. has the authority to invoke an institutional capacity broader than the sum of its sovereign parts. In short, there is tension in the international constitutional system based on principles of international concern and obligation on the one hand and sovereign, territorial, and political independence on the other.

A. U.N. Charter’s Membership, Obligations, and Responsibilities

A further criterion that strengthens the principle that the U.N. Charter is a sovereignty-dominated instrument is found in the membership provisions of Chapter II.²¹² Article 3 states that the original members of the U.N. “shall be . . . states,”²¹³ and Article 4(1) states that membership in the United Nations is open to “all other peace-loving states which accept the obligations contained in the present Charter.”²¹⁴ Although membership in the U.N. is exclusively a matter of State sovereignty, an institutional set of limits is imposed: the State must be “peace-loving,” accept all Charter obligations, and accept the obligations of international law as developed under the Charter. Likewise, Article 6, though it may be exercised only in highly unusual or exceptional circumstances, stipulates that a State may be expelled from the U.N. if it is a persistent violator of the U.N. Charter.²¹⁵ The scope of prohibited activity that results in expulsion may be controverted. For example, expulsion can entail the loss of recognition. Perhaps it might also impose a duty not to

and worth of the human person,” and its pledge to “promote social progress,” respect, and the equal rights of men and women and of nations large and small).

211. I L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE—PEACE* 286 (H. Lauterpacht ed., 8th ed. 1955) (asserting phrase “sovereign nation” entails two kinds of sovereignty possessed by each State: *dominium*, or territorial sovereignty, which is supreme authority over all persons, items, and acts within that state’s territory, and *imperium*, or political sovereignty, which is supreme authority over all citizens of that State, be they at home or abroad).

212. U.N. Charter, Chapter II: Membership.

213. U.N. Charter art. 3 (stipulating that the original members of the U.N. shall be states that participated in the United Nations Conference and have signed and ratified the document).

214. U.N. Charter art. 4, para. 1.

215. U.N. Charter art. 6 (targeting a State that is a persistent violator of the Charter and which State may be expelled upon a recommendation of the Security Council).

recognize an expelled entity, or its acts, in the context of international relations and law. Whether such a procedure may be pushed to the limit of regime replacement may be hotly disputed, but at least in theory, the question of expulsion under Article 6 implicates the idea that the sovereign equality of States is conditioned by U.N. Charter obligations and that a persistent violation of these obligations erodes the authority of the State. In short, the Charter supports and seeks to protect and advance a particular form of good governance-oriented sovereignty. It also aims to discourage other forms of government that seek to position sovereignty above Charter obligations. There are, of course, other Charter based limits on sovereignty. For example, Chapter IV of the Charter outlines the composition and workings of the General Assembly and gives the Assembly the power to highlight any issue by making it a matter for international discussion and elaboration. Specifically, Article 10 states that “[t]he General Assembly may discuss any questions or any matters within the scope of the . . . Charter”.²¹⁶ In addition, and in accordance to Article 13, the Assembly has the power to initiate studies and make recommendations.²¹⁷ This “promotional” Assembly function may shape international expectations. For example the Advisory Opinion of the ICJ in 1962, was influenced by General Assembly recommendations.²¹⁸ Such recommendations may even create soft international law that might be binding on sovereign States in limited circumstances.

216. U.N. Charter art. 10 (giving the General Assembly the competence to “discuss any questions or matters within the scope of the . . . Charter”).

217. U.N. Charter art. 13. The General Assembly has the competence to “initiate studies and make recommendations for the purpose of . . . promoting international cooperation . . . and . . . the progressive development of international law.” This competence extends to cooperation “in the economic, social, . . . educational and health fields” as well as “human rights and fundamental freedoms.”

218. *Certain Expenses of the United Nations: Advisory Opinion*, 1963 DUKE L.J. 304, 304–306 & n.11 (1963). This case effectually upholds a constitutional innovation in the U.N. Charter—the so-called Uniting for Peace Resolution. The case validated expenses expended under the power of the Resolution.

B. Security Council

The U.N. Charter Chapter V, Articles 24,²¹⁹ and 27(3),²²⁰ and Chapter VII, Article 39,²²¹ confer to the Security Council special security-related competences upon certain member States. The five permanent members exercise what some scholars deem to be super sovereign powers.²²² These members have the special power of veto. Other elected members have extra powers by virtue of membership in the Council, but do not have unilateral veto power.²²³ The Security Council is given the primary global responsibility for peace and security and has the competence to enforce its decisions peacefully through Chapter VI, Articles 41,²²⁴ via military force under Article 42,²²⁵ or by the use of force Chapter VII, Article 51.²²⁶ It has the authority to make the determination as to whether there exists “any threat to the peace, breach of the peace, or act of aggression.”²²⁷ The powers of the Security Council are nevertheless subject to certain inherent powers of sovereign States. Article 51 of the Charter assures members “the inherent right of . . . self-defense . . . until the Security Council has taken the measures necessary to maintain

219. U.N. Charter art. 24, para. 1. The Article “confer[s] on the Security Council [the] primary responsibility for . . . maint[aining] . . . international peace and security.”

220. U.N. Charter art. 27, para. 3. The decisions of the Security Council are affirmed by majority vote with a concurrence of the five permanent members. See U.N. Charter art. 23, para. 1.

221. U.N. Charter art. 39. The Security Council has the competence to determine the existence of a threat or breach to international peace and security or of an act of aggression, and shall recommend actions consistent with Articles 41 and 42.

222. LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 290–309 (3d ed. 1969) (discussing the history of the Charter of the United Nations and offering justifications as to why the Security Council is imbued with such power).

223. BARDO FASSBENDER, U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE (Martinus Nijhoff Publishers 1998); see also Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the U.N.*, 28 CORNELL INT’L L.J. 29 (1995); see also Louis B. Sohn, *Voting Procedures in U.N. Conferences for the Codification of International Law*, 69 AM. J. INT’L LAW 310–53 (1975).

224. U.N. Charter art. 41 (dealing with measures to give effect to its decisions that do not involve the use of armed force).

225. U.N. Charter art. 42. If the Security Council considers that the measures on Article 41 are not effective it may take coercive action using air, sea, or land forces as unnecessary to restore and maintain international peace and security.

226. U.N. Charter art. 51. The International Court of Justice has not interpreted the terminology employed in Article 51 regarding a State’s right to self-defense, especially the term, inherent. Accordingly, it can be interpreted using one or more of the established four methods.

227. *Id.*

international peace and security.” The term “inherent” is ambiguous.²²⁸ It seems to make reference to the notion that Article 51 itself codifies this “inherent” right. “Inherent” may at the same time refer to rights, which are not clearly articulated in Article 51 but instead exist antecedent to the Charter. It is one of the most contested provisions in the entire Charter and possibly in all of international law.²²⁹ The Charter represents a continuing constitutional process of conflict and collaboration with respect to the basic architecture of international law and relations.²³⁰ The contestation sometimes reflects a strong version of sovereignty, as shown in the Lotus case, thus seeking to weaken the scope of international obligation.²³¹ At other times, it is the strength of the international obligation, supported by the critical powers within the U.N., which seems

228. GEORG SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 153–54 (4th ed. 1960). Literal approach is comprised of a “plain meaning”; contextual reading of ambiguous words regardless of the drafter’s intent. Systematic approach analyzes the “four corners” of the document and seeks to assign the document consistent phraseology. Intentional approach is comprised of a thorough analysis of the drafter’s intent at the time the document was signed. Functional or teleological approach considers the function and goals of the document throughout the passage of time.

229. See generally Alexander Orakhelashvili, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 11 J. CONFLICT & SEC. L. 119–39 (2006) (Request for advisory opinion); *Summary of the Advisory Opinion of 9 July 2004*—The ICJ writes in paragraph 139 of the opinion: “Under the terms of Article 51 of the Charter of the U.N.:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the U.N., until the Security Council has taken measures necessary to maintain international peace and security.

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. . . . Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

See also Sean D. Murphy, *Terrorism and the Concept of Armed Attack in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41 (2002); see also Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539 (2001-2002).

230. See Winston P. Nagan, *Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium*, 24 YALE J. INT’L L. 485 (1999). The lawfulness of the threat or use of force using nuclear weapons was given a careful juridical appraisal in the ICJ advisory opinion on this issue. A majority of the Court held that nuclear weapons might be used consistently with Article 51 only where the survival of the State was at stake under the prevailing State of international law conditions.

231. See generally *supra* notes 27 and 199.

to weaken the scope of sovereignty under the Charter.²³² The classic tension between what counts as a matter of international concern under the Charter and what is exclusively reserved to the domestic jurisdiction of a State generates controversies in the actual practice of international law and relations. When the U.N. Charter is examined as a process of communication and collaboration, it can be found that the scope of international obligation and domestic sovereign competence is and will remain controverted.

C. *The Practice of International Law in the Twentieth Century and Sovereignty*

The early part of the twentieth century saw a breakdown in the state system as the world was enveloped in the WWI.²³³ There was a recognition that sovereignty, unconstrained by some form of international legal obligation, could lead the way into another global catastrophe.²³⁴ However, the idealism, which generated the League of Nations and its modest mandate system for an extended legal obligation, could not overcome the strength of State commitment to sovereign autonomy.²³⁵ Thus, the League of Nations had a unanimity rule, which meant that a single sovereign could block action in the League.²³⁶ The rise of European totalitarianism accelerated the conflicts of the time precipitating a WWII.²³⁷ After the WWII, there was a renewed resolve to strengthen the force of international obligation and correspondingly constrain the scope of sovereign absolutism.²³⁸ The initial move in this direction was the Charter of Nuremberg, an international agreement among the allies that there would be a criminal justice response to the crimes committed by the Axis Powers.²³⁹ We discuss this matter later in this entry. The second significant development was the adoption of the U.N. Charter in

232. See generally *id.*; see also Hilla, John, *The Literary Effect of Sovereignty in International Law*, 14 WIDENER L. REV. 77 (2008-2009).

233. *Supra* note 159.

234. *Id.*

235. See Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003) (proposing a sociological model of sovereignty that illuminates the ways in which global social constraints empower actors, including states and the ways in which institutions, including the bundle of rules and legitimated identities associated with state sovereignty constrain actors).

236. See generally *supra* note 202.

237. *Supra* note 162-63.

238. See generally *id.*; see generally *supra* notes 67 and 169.

239. Theodor Meron, *From Nuremberg to the Hague*, 149 MIL. L. REV. 107 (1995); see also Nerone, F. Regan, *The Legality of Nuremberg*, 4 DUQ. U. L. REV. 146 (1965-1966).

the form of a treaty obligation.²⁴⁰ Consistent with the positivist view of sovereignty, the Charter was essentially an agreement giving sovereign consent to the compact.²⁴¹ The compact established certain major purposes for international, legal, and political order.²⁴² A central element in the Charter was that it had constitutional characteristics in a global setting.²⁴³ In addition, within this framework two dynamic themes were developed. First, the Charter had to account for the sovereignty of its constituent members and define the scope of that sovereignty in terms of the domestic jurisdiction of the State over its internal affairs.²⁴⁴ This concept of sovereignty was complemented by an effort to develop the jurisdictional concept of international concern. If a matter was exclusive to domestic jurisdiction, it was exclusively a matter of the primacy of sovereignty. If a matter triggered the elements of international concern, then sovereign autonomy would be shared, and, if necessary, constrained by the scope of international jurisdictional concern.²⁴⁵ Notwithstanding this rethinking of sovereign competences in the context of the political reality of global interdependence, the technical instrument used to develop these expectations came in the form of a treaty which States adopted thereby indicating their sovereign consent to be bound by it.²⁴⁶

D. The Treaty Model After the U.N. Charter: Sovereignty and the Control and Regulation of Global Spaces and Resources

One of the most important international instruments clarifying the reach sovereignty and the scope of international concern is indicated in the *Declaration On Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*.²⁴⁷ This Declaration is not a Treaty.²⁴⁸ However,

240. *Supra* note 190–92.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*; see also Randall, Kenneth C., *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785 (1987-1988); see also Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT'L L. 1077 (2003-2004).

247. See United Nations, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8082, (Oct. 24, 1970). This document strengthens the sovereignty foundations of

it is a Declaration based on the foundational principles of international constitutionalism found in the Charter.²⁴⁹ The Declaration expresses, in more concrete ways, matters that constrain States because these are matters of international concern, and protects State sovereignty from inappropriate interference, again because such interference also constitutes a matter of international and constitutional concern.²⁵⁰ It could be suggested that the Declaration is an effort to codify the principle of sovereignty under the rule of law. Additionally, the breath of the Declaration, and its foundation in any international law obligation that requires cooperation in promoting the values of the U.N. Charter, suggests that the Declaration, read in the light of the U.N. Charter and the International Bill of Rights, is a development in entrenching expectations of a global constitutional design. Indeed, prior to the adoption of the U.N. Charter, there already existed important multilateral treaties, which refined the reach of sovereign competence and established by agreement frameworks of collaborative competence over matters of transnational salience.²⁵¹ The Chicago Convention on International Civil Aviation is another international treaty that has an effect on sovereignty.²⁵² When sovereignty ideas were developed, travel over air-space had not been imagined. The development of air travel required some rethinking of the ideas of territorialism, boundaries, regulation, and cooperation. Technological advances reaching into space opened up another dimension of sovereignty and international concern. Logically it could be said that the sovereign States borders extend geometrically as far as the State can exercise its sovereign powers in outer space and that there is a finite rational limit to the indefinite expansion of sovereignty into space. The Outer Space Treaty of 1967 is a recognition that whatever height above the Earth we designate, the space above that will be the common property of mankind's

international legal order by restricting interference with the appropriate internal functioning of a State and at the same time insists that the rules that constraint inappropriate State relations are in effect a positive duty under international law to cooperate in promoting friendly relations and cooperation.

248. *Id.*; see also Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 713-35 (1971).

249. *Id.*

250. *Id.*

251. See generally MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967 (Fred L. Israel ed., 1967).

252. See Chicago Convention on International Civil Aviation, Dec. 7, 1944, ICAO Doc. 7300. Establishes a regime concerning the uses of air-space with a determination of areas of air-space that are exclusive to the sovereign State and areas which are essentially exceptions to permit shared used and shared competences between the parties. Is an illustration of the use of a traditional idea of sovereignty and its malleability in the face of technological advances.

shared inheritance.²⁵³ Its first priority is the peaceful uses of space and a high priority is to keep weapons of mass destruction from been deployed in space.²⁵⁴ The Treaty also prohibits testing nuclear weapons in space.²⁵⁵ It also declares that celestial resources such as the Moon or accessible planets are a common heritage of mankind.²⁵⁶ The Treaty seeks to secure a demilitarization of space and to encourage scientific discovery.²⁵⁷

E. Sovereignty and the Spaces Relating to the Ocean's and Polar Regions of the World

The post-war period was significantly influenced by the development of scientific technologies that permitted the appropriation of resources not traditionally included within the boundaries of the sovereign state. Among these resources were the seas and the Polar Regions. The Geneva Conventions on the Law of the Sea of 1958, which expanded and constrained sovereignty by agreement, was a major instrument to the territorial dimensions of sovereign competence.²⁵⁸ It added to the territorial competence of the State adjoining continental shelf and clarified the principle of the freedom of the seas as an exercise of sovereignty over the uses of the deep-sea ocean.²⁵⁹ It also sought to limit excessive exploitation by limiting sovereignty rights in order to conserve the living resources of the high seas.²⁶⁰ Another important

253. See *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, G.A. Res. 2222 (XXI), U.N. GAOR, 21st Sess., Supp. No. , U.N. Doc. A/6431, (Dec. 19, 1966) (XXI 1967). It is another Treaty that reflects upon the impact of technological advances on national sovereignty and international obligations. It provides for the establishment of the idea that the space that is technologically proximate to the Earth space community should be part of mankind's shared inheritance.

254. *Id.* Annex and Article IV.

255. *Id.*

256. *Id.* Article 1.

257. *Id.* Annex and Article I, IV, and XI.

258. Geneva Conventions on the Law of the Sea, Apr. 29, 1958, A/CONF.13/L.58, Off. Rec. vol. 2 146; (UNCLOS I; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285; Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311)

This Treaty expanded territorial sovereignty so that territories under the oceans in different ways were brought within the sovereign powers of the State clarifying the status of the territorial Sea and the contiguous zone.

259. *Id.*

260. *Id.*

resource was in the region of the Antarctic.²⁶¹ The Antarctic Treaty System of 1959 recognizes that the presence on the Antarctic of nation States' scientific teams occupying parts of this continent would exercise a limited form of occupancy/possessory rights consistent with the flag carried by the research team.²⁶² The recognition of these rights required corresponding obligations. The presence of these teams was limited to peaceful activities, stressing the freedom of scientific inquiry and the distribution of results. Subsequent developments had concerned matters of agreement on conservation regulating mining activity and environmental protection.²⁶³ Another important treaty that shaped sovereignty in inclusive spaces and resources is the most recent Convention on the Law of the Sea of 1982.²⁶⁴ This document extended the territorial sea limits of the State, the contiguous zone adjoining the State, established a 200 nautical mile exclusive economic zone for the State, and clarified the reach of sovereign authority over the continental shelf.²⁶⁵ It was confronted with how to control and regulate certain resources on the high seas such as the manganese nodules, which contain many of the critical minerals for the modern industrial State and exist in high volume on the deep-sea ocean floor.²⁶⁶ The practical problem was that under the traditional law of the sea, a State could use its technology to exploit those common resources for itself. States that monopolize the technology of deep-sea mining could exploit these resources solely for their own benefit.²⁶⁷ The Convention sought to solve this problem by creating a Deep Seabed

261. See generally ARTHUR H. WESTING, GLOBAL RESOURCES AND INTERNATIONAL CONFLICT: ENVIRONMENTAL FACTORS IN STRATEGIC POLICY AND ACTION (Stockholm International Peace Research Institute, Oxford Univ. Press 1986).

262. Antarctic Treaty, Dec. 1, 1959. This Treaty recognizes that the presence on the Antarctic of nation States' scientific teams occupying parts of this continent would exercise a limited form of occupancy/possessory rights consistent with the flag carried by the research team. The recognition of these rights required corresponding obligations like the limited presence for peaceful activities. It stresses the freedom of scientific inquiry and the distribution of results. See also Steven J. Burton, *New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources*, 65 VA. L. REV. 421 (1979).

263. *Id.*

264. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (1982) (UNCLOS III). Significant international effort to change and modify the sovereign competence of the State over certain aspects of the spatial dimension of sovereignty. It extended the territorial sea limits of the State, the contiguous zone adjoining the State, established a 200 nautical mile exclusive economic zone for the State and it clarified the reach of sovereign authority over the continental shelf.

265. *Id.*

266. *Id.*; see also Barbara Ellen Heim, *Exploring the Last Frontiers for Mineral Resources: A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica*, 23 VAND. J. TRANSNAT'L L. 819 (1990-1991).

267. *Id.*

Authority, which could license mining in return for fees which could then be distributed through the U.N. system.²⁶⁸

V. CONTEMPORARY JURIS CONSULTS RELATING TO THE LEGAL THEORY ASPECTS OF SOVEREIGNTY: U.K. SCHOLARSHIP

A. *The Work and Contributions of H.L.A. Hart*

One of the most important contributions to the jurisprudence of sovereignty is reflected in the work of the former Professor of Jurisprudence in Oxford, H.L.A. Hart.²⁶⁹ Hart provided a critical deconstruction of the Austin Theory of Sovereignty as a foundation of jurisprudence.²⁷⁰ His critique exposed the problem that Austin system of orders back by threats totally obliterated one of the most central concepts in jurisprudence, the concept of obligation; coercion may oblige one to act in a certain way but in no way can it suggest that one has an obligation to act in such a manner.²⁷¹ It would seem that the concept of obligation has an affinity with the idea of authority.²⁷² Austin's sovereignty functions in the absence of authority.²⁷³ Thus, implicit in the Hart view was the idea that authority and obligation were central to the idea of law and the idea of the governing authority of law.²⁷⁴ Hart substituted for the idea of sovereignty a complex structure of interdependent rules. For him law was the union of primary and secondary rules, and among the secondary rules was a master secondary rule of recognition,

268. *Id.*; see also Ian Bezpalko, *The Deep Seabed: Customary Law Codified*, 44 NAT. RESOURCES J. 867 (2004); see also Jan Schneider, *Codification and Progressive Development of International Environmental Law at the Third United Nations Conference on the Law of the Sea: The Environmental Aspects of the Treaty Review*, 20 COLUM. J. TRANSNAT'L L. 243 (1981); see also Allen, Philip A. III, *Law of the Sea: The Delimitation of the Maritime Boundary between the United States and the Bahamas*, 33 U. FLA. L. REV. 207 (1980-1981).

269. *Supra* note 17.

270. *Id.*; see also H.L.A. Hart, *THE CONCEPT OF LAW* (1961) (Draws attention to this and other weaknesses in Austin's theory. He therefore reconstructs the foundations of a legal system in terms of a more complex architecture of different kind of legal rules. Within the system of rules, there is a master "secondary rule of recognition" that permits us to identify what is law and what is not.).

271. *Id.*

272. *Id.*; see also H. L. A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175-91 (1955).

273. *Supra* note 10.

274. See generally *supra* note 270.

which identified valid rules and laws.²⁷⁵ It can be inferred that Hart's model was partly inspired by the significant voting right cases in South Africa in the 1950's.²⁷⁶ In the case of *Harris v. Donges* of 1952, the Appellate Division of the South African Supreme Court provided a novel clarification of the scope and limits of Parliamentary Sovereignty.²⁷⁷ In a prior decision, the Court had ruled that Parliament, bicamerally, had passed a law to deprive black South Africans of their voting rights.²⁷⁸ After the war, Parliament, again using the same procedure, stripped colored voters of their voting rights. This time the court ruled that Parliament had acted unconstitutionally.²⁷⁹ The theory of the court was that the prior precedent had not asked the right questions concerning what is "Parliament" and what is an "act of Parliament."²⁸⁰ The answer to the question was, firstly, that entrenched clauses of the South African Constitution required the Parliament to sit unicamerally and that it would be able to terminate constitutional rights with a two thirds majority.²⁸¹ The sovereignty of Parliament was subject to a pre-existing rule of recognition determining what Parliament was and how it was to function in order to exercise sovereign powers.²⁸² Hart's insight was probably inspired by the judgment of the Appellate Division of the South African Supreme Court.²⁸³

B. The Contributions of Ian Brownlie

Brownlie provides two important chapters on the legal aspects of sovereignty. He deals with sovereignty as a subject of international law and examines the legal criteria for determining statehood as well as various aspects of continued statehood, including the complex processes of the recognition of States and governments and the complex

275. *Id.*

276. *Id.*; see also J. C. Hicks, *The Liar Paradox in Legal Reasoning*, 29 CAMBRIDGE L.J. 275, 275-91 (1971).

277. *Harris v. Donges*, [1952] 1 T.L.R. 1245. Coloured voters deprived of their voting rights relying on an earlier decision that determined the idea of Parliamentary Sovereignty as the supreme expression of law making in the state. Its constitutionality was challenged by suggesting that the wrong questions were addressed.

278. *Id.*; see generally IAN LOVELAND, *BY DUE PROCESS OF LAW?: RACIAL DISCRIMINATION AND THE RIGHT TO VOTE IN SOUTH AFRICA 1855-1960* (Hart Publishing 1999).

279. *Id.*

280. *Id.*

281. Julius Lewin, *Power, Law, and Race Relations in South Africa*, 30 POL. Q. 389, 389-99 (1959).

282. *Id.*; see also Hamish R. Gray, *The Sovereignty of Parliament Today*, 10 U. TORONTO L.J. 54, 54-72 (1953).

283. See generally *supra* note 270; see also Denis V. Cowen, *Agenda for Jurisprudence*, 49 CORNELL L. Q. 609 (1963-1964).

permutations of the territorial aspects of sovereignty.²⁸⁴ One aspect of sovereignty that requires clarification is the extent of the definition of the reach of territorial sovereignty.²⁸⁵ This would have to take into account the existence of other aspects of territory in the global community and their precise legal statuses, for example, are they trust territories; are there territories that are classified as *res nullius* or *res communis*.²⁸⁶ Territory weaves into the juristic concept of jurisdiction and the extent of jurisdiction.²⁸⁷ Sovereignty and territory also have an overlapping meaning with the civil law idea of ownership and title.²⁸⁸ International lawyers distinguish this issue as the difference between *imperium* and *dominium*.²⁸⁹ The idea of title and imperium reflects interminable problems and conflicts, such as the conflict between India and Pakistan over Kashmir²⁹⁰ and the status of Taiwan, which exists somewhat autonomously from the People's Republic of China but which the PRC claims is an integral part of China.²⁹¹ In the 1960's China invaded India because it rejected the boundary understandings that India accepted as a colonial inheritance.²⁹² The problems of sovereignty and jurisdiction also raise

284. Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57–201, 105–67 (7th ed. 2008) (outlining many problems in which there are legal variations on the way sovereign title is exercised. It provides an overview of the imperium exercise over the sub-soil, air spaces and internal waters as well as an analysis concerning the transfer and acquisition of territory and a careful legal appraisal of the way in which title affects the creation and transfer of territorial sovereignty).

285. *Id.*

286. Christopher C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 INT'L & COMP. L. Q. 190–99 (1986); see also Ian Brownlie, *Maintenance of International Peace and Security in Outer Space*, 40 BRIT. Y.B. INT'L L. 1 (1964).

287. *Id.*

288. See generally JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (Stanford Univ. Press 2007); see also Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33 (2006); see also L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263 (1997-1998); see also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927-1928).

289. *Id.*

290. *Id.*; see generally SUNIL KHILNANI, *THE IDEA OF INDIA* (Macmillan 1999).

291. *Id.*; see also MARK ANTON ALLEE, *LAW AND LOCAL SOCIETY IN LATE IMPERIAL CHINA: NORTHERN TAIWAN IN THE NINETEENTH CENTURY* (Stanford Univ. Press 1994).

292. *Id.*; see generally JONATHAN HOLSLAG, *CHINA AND INDIA: PROSPECTS FOR PEACE* (Columbia Univ. Press 2010); see also Q. CHINA, STATE, SOVEREIGNTY, AND THE PEOPLE: A COMPARISON OF THE "RULE OF LAW" IN CHINA AND INDIA (Cambridge Univ. Press (2009).

complexities where the sovereign concedes a long-term control to another sovereign, such as the status of Guantanamo. Concepts of possession and use such as the status the U.S. enjoyed in Panama also required a complex understanding of the law of possession and the scope of uses. Brownlie outlines many problems in which there are legal variations on the way sovereign title is exercised and provides an overview of the imperium exercise over the sub-soil, air spaces, and internal waters. He also discusses concerns about the transfer and acquisition of territory, providing a careful legal appraisal of the way in which title affects the creation and transfer of territorial sovereignty. Brownlie also explores a number of concepts derived from the civil law dealing with scope of property and entitlements including the role of prescription and novation and clarifies the principle that territorial sovereignty cannot be exercised over territory as a consequence of conquest by force of arms. Brownlie's approach is firmly rooted in the positivist tradition of examining international legal phenomena through the lens of operational practice.

C. The Contributions of Nico Schrijver and Anthony Carty

A more ambitious study from a theoretical point of view is found in the work of Nico Schrijver. Schrijver's take off point is the General Assembly Resolution, which articulates the idea of permanent sovereignty over natural resources,²⁹³ a claim that grew out of the processes of decolonization and represented a claim to thick sovereignty by new States over their natural resources.²⁹⁴ This claim, which evolved into the broader claims for a new international economic order, was contested by foreign investor States who disputed its currency.²⁹⁵ Nevertheless, it has had traction in context of environmental and sustainable development, which along international trade and investment, have been undergoing modification and change.

In the context of the theory of sovereignty, one of the most original contributions can also be found in the work of Anthony Carty.²⁹⁶ Carty examined international law generally with an important preference for

293. See generally Nico Schrijver, SOVEREIGNTY OVER NATURAL RESOURCES (1997). The take off point is the General Assembly Resolution articulated in the idea of permanent sovereignty over natural resources which grew out of the processes of decolonization and represented a claim of thick sovereignty by new States over natural resources. It has traction in context of environmental and sustainable development.

294. *Id.*

295. *Id.*

296. See generally ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW (2007); ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW (Edinburgh Univ. Press 2007) (examining international law generally with important preference to sovereignty mainly in the context of the development of practice and theory in the UK.).

sovereignty mainly in the context of the development of practice and theory in the U.K. He explained that the inheritance of nineteenth century scholarship was really directed by statesmen seeking to reinforce the importance of the rule of law.²⁹⁷ He also notes that leading statesmen of the time were more concerned about enhancing British greatness by force and influence of British power and resources. Further, English international lawyers tended to accept the basic positivist position, which separated law from morality and made the analysis of law as it is the most prestigious task of an international lawyer.²⁹⁸ This was an approach that also appealed to the canons of the practice of law because it underscored the objectivity of law.²⁹⁹ More recently, there has been considerable ferment about the foundations of international law and sovereignty. He draws attention to Professor Allott's work, which perhaps inspires him about a more penetrating concept of "international society."³⁰⁰ Allot and Carty were clearly influenced by the New Haven School's concept of international society—there is a responsible network of individuals interacting in a web of international interpersonal relations.³⁰¹ Carty's describes his suggestion as a preliminary, introductory outline, which is "the bare bones of an ethnographic phenomenology of human conduct in which communication with words are critical".³⁰² As suggested, we later seek to produce a map of what this ethnographic phenomenology of human conduct might look like.

297. *Id.*

298. *Id.*; see also ANTHONY CARTY, *English Constitutional Law from a Postmodernist Perspective*, in DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE (Peter Fitzpatrick ed., Duke Univ. Press 1991).

299. See generally *id.*; see also Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66 (1991).

300. See generally *id.*; see also Anthony Carty, *Social Theory and the "Vanishing" of International Law: A Review Article*, 41 INT'L & COMP. L. Q. 939-45 (1992); see generally PHILIP ALLOTT, *New International Law: The First Lecture of the Academic Year 20*, THEORY AND INTERNATIONAL LAW: AN INTRODUCTION 107 (Colin Warbrick & Anthony Carty eds., 1992).

301. *Id.*; see also Koji Teraya, *For the Rights of Nobodies: The Globalising Tension between Human Rights and Democracy*, 38 VICTORIA U. WELLINGTON L. REV. 299 (2007); see also Simpson, Gerry, *Imagined Consent: Democratic Liberalism in International Legal Theory*, 15 J. AUSTL. Y.B. INT'L 103 (1994).

302. See generally *supra* note 300.

*D. The Work and Contributions of Neil MacCormick
and Philip Allot*

Another important contribution to sovereignty is the work of Neil MacCormick. MacCormick's theory is not as far reaching as that of Carty's. His focus is on the European compact and the subordination of European sovereignties to that compact.³⁰³ He raises the question of whether there is a reconfiguration of Europe. The challenge is how to effectively conceptualize this development. MacCormick thinks that conceptualization as a European commonwealth might help. In a sense, it is the implications of moral and political values that might make this appealing. It seems to stimulate active political participation or the ideas of popular self-management and idea that self-government and participatory democracy would be part of such an understanding. Additionally, MacCormick grapples with the problem of commonwealth on one side and nationalism on the other. Modern European identity reflects strong versions of national solidarity, but the question that remains open is whether a pan European identity may moderate and constrain appeals to more parochial national identities. At the back of this question is the extent to which nationalism is central to the idea of sovereignty in the nation State and whether the new European experiment will transcend that. The MacCormick approach also implicitly suggests the need for a better conceptualization of the foundations of sovereignty and international legal order. Allot is one the most theoretically advanced in thinking about the theory of international law from the perspective of a U.K. academic.³⁰⁴ Although there are important differences in the way he conceptualizes central ideas relating to society as an important predicate for constitutionalism and the well-being in the global community, his approach is the closest of a U.K. scholar to the approach of the New Haven School. His stress on the interrelationship between society and the construction of a constitutional order on a global basis is a significant advance in British legal theory and, as mentioned before, Allott's work

303. NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW STATE AND NATION IN THE EUROPEAN COMMONWEALTH* (1999) (focusing on the European compact and the subordination of European sovereignties to that compact raising the question of there is a reconfiguration in Europe that impacts upon sovereignty. He sees the challenge intellectually as how to effectively conceptualize this development. He thinks that conceptualization as a European commonwealth might help.).

304. PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* (1990). One of the most theoretically advanced in thinking about the theory of international law from the perspective of a UK academic. Although there are important differences in the way he conceptualizes central ideas relating to society as an important predicate for constitutionalism and for the outcomes of well-being in the global community his approach is the closest of a U.K. scholar to the approach of the New Haven School.

inspired other scholars to a more penetrating concept of international society. Baeyens shows how recent developments in European thinking on Pan-European governance suggest a skepticism of the tendency to function within the EU on an inter-sovereignty, intergovernmental model.³⁰⁵ The Shadow European Council takes the position that is meant to transcend MacCormick's concerns with national parochialism.³⁰⁶ Baeyens explains how their recommended Action Plan contains an investment program for the transformation of the European economy, a federal act for economic governance, and a change in European mechanisms for banks with a more global vision.³⁰⁷ European leaders suggest that European unity may represent "the best hope the human race has for bring the world together around the twin challenges of global warming and enacting a worldwide economy that can provide a descent standard of living for 6.5 billion people" and they conclude with the question: "if Europe doesn't lead, who will?"³⁰⁸ The ideas that are emerging have an affinity with the approach of Allot as well as the approach of the New Haven School.³⁰⁹

305. See generally ANTONI KUKLINSKI, *The Renaissance of European Strategic Thinking*, LOWER SILESIA FOUNDATION FOR REGIONAL DEVELOPMENT (Paper for the second Lower Silesian Conference, Jun. 16–19, 2011), <http://forum.pl/upload/tmle/file/Eurpa%20Quo%0Vadis%20ISBN.pdf>.

306. *Id.*; see also for example Wolfgang Streeck, *Citizenship Under Regime Competition: The Case of the "European Works Councils"* (MPIfG Working Paper 9/73 Mar. 1997).

307. See generally Herman Baeyens, *European Strategic Planning in the XXI Century*, in EUROPE—THE GLOBAL CHALLENGES VOL. 1 (AntoniKuklinski et al. eds., 2005), <http://www.clubofrome.at/archive/pdf/kuk-twin1.pdf>. In this paper Baeyens focus on European strategic planning in the 21st century to consolidate the European Union and the implications for its enhance role in world affairs. Baeyens focuses on developing the strategies for this possible future. These views would seem to significantly transform sovereignty as it is currently understood. In this paper Baeyens focus on European strategic planning in the 21st century to consolidate the European Union and the implications for it's enhance role in world affairs. Baeyens focuses on developing the strategies for this possible future. These views would seem to significantly transform sovereignty as it is currently understood.

308. *Id.*; see also Steven Hill, *My Lunch at the European Commission: "Why is Europe Losing the Public Relations Battle to China?"*, SOC. EUR. J. (2010), available at <http://www.social-europe.eu/2010/12/my-lunch-at-the-european-commission-why-is-europe-losing-the-public-relations-battle-to-china/>.

309. See generally *supra* notes 42 and 300; see also Richard A. Falk, *Casting the Spell: The New Haven School of International Law Jurisprudence for a Free Society: Studies in Law, Science, and Policy* by Harold D. Lasswell & Myres S. McDougal, 104 YALE L.J. 7, 1991–2008 (1995); see also W. Michael Reisman, *The View from the New Haven School of International Law*, Proceedings of the Annual Meeting (American Society of International Law), Vol. 86, pp. 118–25 (Apr. 1–4, 1992).

E. The Contributions of Colin Warbrick and Stephen Tierney

Warbrick and Tierney have contributed to the idea of sovereignty in the international legal community from a contemporary perspective. They set to grapple with the adequacy of the traditional concept of sovereignty, as the way in which international law defines its fundamental target community of sovereign nation states.³¹⁰ The state of sovereignty, whose meaning is still influenced by Austin, cannot provide an adequate explanation of the effective role that international law play in both domestic and international legal order.³¹¹ There is a recognition that international law reflects an expansion of the idea of authority and sovereignty cannot account for this as a theoretical matter.³¹² This work notes the growth of institutions of international salience that serve as the foundations of authority behind much of modern international law. The issue they confront is that they still try to understand the changing character of authority in modern international law within the limits of the idea that sovereignty is still the most reliable source of law based on authority and control.³¹³ They suggest that the boundaries of legal order internationally have shifted from rigid territorial sovereignty to the exercise of sovereign competence in functional terms.³¹⁴ Additionally, following traditional positivism, they argue that the transnational source of authority in these institutions involves a transfer of sovereign authority that is voluntary; but sovereign authority still ultimate authority.³¹⁵ This raises the question about whether the quantum of sovereignty voluntarily transferred to the international level requires a significant rethinking of sovereignty itself in its relationship with international law. The difficulty with the sovereignty/authority assumption is that there is a single locus of authority—a criterion of the validation of a law as authoritative.

310. See generally TOWARDS AN 'INTERNATIONAL LEGAL COMMUNITY'? THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW (Colin Warbrick & Stephen Tierney eds., 2006). It sets as a primary task the effort to grapple with the adequacy of the traditional concept of sovereignty, as the way in which international defines its fundamental target community: a community of sovereign nation states. It also recognizes that sovereignty, whose main meaning, still influenced by Austin, cannot provide an adequate explanation of the effective role that international law, plays in both domestic and international legal order. It sets as a primary task the effort to grapple with the adequacy of the traditional concept of sovereignty, as the way in which international defines its fundamental target community: a community of sovereign nation states. It also recognizes that sovereignty, whose main meaning still influenced by Austin cannot provide an adequate explanation of the effective role that international law, plays in both domestic and international legal order.

311. *Id.*; *supra* note 1.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

There is a clear and prudent recognition that the international legal system is in transition and thus, the traditional international legal community of sovereign States model is no longer a serviceable model.³¹⁶ There is a need for a new paradigm.³¹⁷ The phenomenon of globalization has made the traditional boundaries of the sovereign State porous.³¹⁸ This contribution is an important step in attempting to get a better description of the global social process, which includes a changing role of State sovereignty. The concept of contextually mapping this process and understanding its role in the context of the global power and constitutive process provides empirical insights into the foundations of international law in an age of globalization.³¹⁹

VI. SOVEREIGNTY, INSTITUTIONAL COMPETENCE AND U.S. PRACTICE

A. *The Background to the Development of the Sovereignty Idea in U.S. Legal Practice and Scholarship*

The United States was a new State and one whose creation stood as a challenge to the international status quo dominated by European sovereigns.³²⁰ As a consequence, the earlier American State reflected certain cautions about its relations with States whose political orientation could be seen as antagonistic to the Republican/Democratic values that emerged from the American Revolution. In this sense, there is an emergent perspective that gives strength to both, the value of isolationism³²¹ as

316. See J. L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT'L AFF. 1–24 (2004); see also W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 866–76 (1990).

317. *Id.*; Nagan and Hammer *supra* note 27; see also Christoph Schreuer, *The Warning of the Sovereign State: Towards a New Paradigm for International Law*, 4 EUR. J. INT'L L. 447 (1993); see also Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations*, 10(3) EUR J INT'L L. 549, 549–82 (1999).

318. See generally *id.*

319. *Id.*; see also Winston P. Nagan & Craig Hammer, *The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process*, 60 ME. L. REV. 429 (2008); see generally Douglas Torgerson, *Promoting the Policy Orientation: Lasswell in Context*, in HANDBOOK OF PUBLIC POLICY ANALYSIS: THEORY, POLITICS, AND METHODS (Frank Fischer, Gerald Miller, Mara S. Sidney eds., CRC Press 2006).

320. See HOWARD ZINN, *PEOPLE'S HISTORY OF THE UNITED STATES* 59–76 (1999).

321. See generally Bernard Fensterwald Jr., *The Anatomy of American "Isolationism" and Expansionism. Part I*, 2 J. CONFLICT RES. 111, 111–39 (1958).

well as the value of American Exceptionalism.³²² These ideas would find legitimacy in the mantle of emergent American national identity, as well as the idea of an American sovereignty necessary to defend and promote Americanism.³²³ However, the political arrangements of the new State were built upon skepticism of power and the fear of the abuse of power in the new political order.³²⁴ Thus, the new political order based upon an articulate division of powers between the different branches of the government and between the States and the Federal government provided a blueprint for the future. However, it was not a blueprint that could cover every possible future contingency. Hence, the practice of American democracy and the allocation of competence within the body politic and its implications in the nation's foreign relations remained matters of contestation in the political and legal arena. It was in the legal arena that the Supreme Court could carve out a major role for itself as the ultimate decision maker on certain matters that required Constitutional interpretation.³²⁵ The Court asserted a competence within the scope of its reviewing authority based on the importance of the natural law tradition, which had been developing in Europe and England.³²⁶ The natural law tradition permitted the legal profession to appropriate the important processes of reasoned elaboration in the context of vigorous adversarial argument of legal proceedings to justify its limited but important sphere of ultimate authority.³²⁷ The 19th century jurisprudence of the Supreme Court, is therefore, a representation of the importance of the application of practical circumstances and ideas of right reason to the solution of problems where a rational interpretation of the Constitution is required.

In the latter part of the 19th century, the United States came under the influence of the importance of science in the cultural understandings of evolving US culture.³²⁸ Science came in the form of positivism, and in law, positivism expressed itself in terms of Austin's theory of sovereignty.

322. See generally Harold H. Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480–1527 (2003).

323. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 160 (1967).

324. See Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 690, 713, 663–722 (1979-1980).

325. See generally Skelly J. Wright, *Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint*, 54 CORNELL L. REV. 1, 1–28 (1968-1969).

326. CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 131–90 (1922).

327. See NOBERTO BOBBIO, *THOMAS HOBBS AND THE NATURAL LAW TRADITION* 156–60 (Univ. of Chicago Press 1993).

328. See generally George H. Daniels, *The Pure-Science Ideal and Democratic Culture*, 156 SCIENCE 1699 *passim* (1967).

The science behind Austin's theory was that the ultimate source of law—the principle that validated law—was to be found in an empirical and finite sovereign.³²⁹ The sovereign was the source of all law.³³⁰ This idea did not provide an easy fit for a political system that had already created space for natural law ideas as an intrinsic part of how law is made and applied.³³¹ Austin's model therefore would have to be modified to more appropriately fit American circumstances.³³² Clearly, the Austinian model had an influence on such late 19th century thinkers as Oliver Wendell Holmes, Jr., John Chipman Gray, and James Bradley Thayer.³³³

1. James Bradley Thayer

Thayer was a distinguished Harvard Law professor. His most famous article was *The Origin and Scope of the American Doctrine of Constitutional Law*.³³⁴ This article was a powerful application of the sovereignty ideas associated with legal positivism to the practice and theory of American Constitutional law. The central point of Thayer's approach was to vest as much sovereignty as possible in the competence of the legislatures.³³⁵ This is an idea that has an affinity with the idea of Parliamentary sovereignty.³³⁶ The nuanced version of this is that given the existence of a rigid Constitution, sovereignty vest with legislatures which are the primary determinants of the constitutionality of laws.³³⁷ Thayer carves out a space for the Courts. This space significantly limits the discretionary invocation of natural law.³³⁸ The reviewing power of the Court is limited to the idea of a clear error test.³³⁹ There is no *de*

329. *Supra* note 139.

330. *Id.*

331. *Id.*

332. *Id.*; see also Wilfrid E. Rumble, *Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, CORNELL L. REV. 986 (1980-81).

333. *Supra* note 1; see generally WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (Oxford Univ. Press 1994).

334. JAMES BRADLEY THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, in *LEGAL ESSAYS I* (1908).

335. G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48 (1993-1994); see generally JAMES BRADLEY THAYER, *LEGAL ESSAYS* (The Boston Book Co. 1908); see generally JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* (Little, Brown 1893).

336. *Id.*; see generally Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28 (1993).

337. *Id.*

338. *Id.*

339. *Id.*

novo reviewing power. Thus, Thayer brings into the discourse about American sovereignty the importance of legislature sovereignty and the secondary nature of legal sovereignty at least as expressed in the Courts.³⁴⁰ Thayer's theory has had an enormously influential track record in the development of American ideas of sovereign authority.³⁴¹ The idea that the judiciary has a place in the universe of sovereign authority represents a place that can be developed within the larger legal culture only under principles of self-restraint. In short, to the extent that judges use right reason, that reason should be deployed to rationally underscore the limits of judicial authority.

2. John Chipman Gray

John Chipman Gray's work examines more directly the state of legal theory and the influence of legal positivism in the 19th century.³⁴² His most important work was *The Nature and Sources of Law*.³⁴³ Gray's work essentially grappled critically with Austin's sovereignty idea, which he felt was insufficiently empirical to guide proper inquiry into the operational workings of the machinery of government.³⁴⁴ Gray notes that the supreme governors of society, who control and regulate the wills of their fellows, represent a complex empirical question, which often defies easy definition and identification.³⁴⁵ The State essentially creates an architecture to which the machinery of government is attached.³⁴⁶ To add Austin's sovereign as somehow pre-estate and pre-machinery of government, simply adds an idea that is not amenable to empirical specification, but in fact, undiscoverable and intangible.³⁴⁷ The idea is difficult, "purely academic" and irrelevant. Gray also took the position that law is normally declared by the composition of rules which originate in judicial organs.³⁴⁸ Those rules prescribe the determination of rights and duties.³⁴⁹ Gray also took the position that statutes were not law but only

340. *Id.*

341. *Id.*

342. *See generally* ROLAND GRAY, JOHN CHIPMAN GRAY (Priv. print, D.B. Updike 1917).

343. *Id.*; *see generally* JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* (Roland Gray ed., 2nd ed. 1921).

344. *Id.*

345. *Id.*; *see generally* Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513 (2001).

346. *Id.*

347. *See generally supra* notes 139 & 335.

348. *Id.*; *see also* Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513 (2000-2001); *see generally* JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (The Macmillan Co. 1921).

349. *Id.*

a source of law.³⁵⁰ They became law by judicial construction from which a determination of allocation of rights and duties resulted.³⁵¹ To the extent that there is some sort of sovereign, it will be repose in the Supreme Court, composed of nine old men, some of conceivably limited intelligence. From Gray we see that the positivism of Austin is rejected as unrealistically formalistic and a new kind of positivism emerges drawn from the complex of experience of modern governance.³⁵² Austin's original science has essentially been given a different empirical orientation. Gray's orientation, effectually seeks to undermine the formalistic implications of Austin's approach. It does not say that the clarification of authority and control is irrelevant. In fact, it seeks to empirically establish the nature and sources of law on the basis of empirical realism.³⁵³

3. *Oliver Wendell Holmes, Jr.*

Oliver Wendell Holmes was a Harvard Law professor and later, an Associate Justice of the Supreme Court of United States. Holmes was a significant and original legal thinker and his contributions to the practice and the theory of law in United States are without peer.³⁵⁴ Holmes was also a figure influenced by the ubiquity of the influence of science on political and legal culture in the U.S. in the late 19th century. He was therefore, influenced by the general orientation of positivism and in particular, the objective of positivism to state the law as it is, and not as it ought to be. The particular gloss on Holmes' positivism is the imprint of philosophical pragmatism on Holmes' development of legal thought in the direction of a form of positivism. We can distill two forms of positivism in Holmes' work. First, Holmes was committed to a more empirical view of the sources and validity of law. As he stated "the life of the law has not been logic; it has been experience".³⁵⁵ Additionally, his great skepticism of the alleged virtues of logic, as reflected in Austinian positivism, was rejected when Holmes suggested that as a

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *See generally* G. EDWARD WHITE, OLIVER WENDELL HOLMES, JR. (Oxford Univ. Press 2006).

355. *Id.*; *see generally* OLIVER. WENDELL. HOLMES, JR., THE COMMON LAW (1881).

Judge, he could give any conclusion, a logical form.³⁵⁶ Thus, we see a concern that interpretation reflected certain skepticism of doctrine, and therefore there would be skepticism of the source of legal doctrine, the sovereign. Holmes on the other hand was also concerned that the implications of his skepticism might undermine the idea central to scientific approach—that law must be objective and objectively determinable.³⁵⁷ This latter idea is essentially Austinian. In a sense, Holmes promoted both of these ideas and never sought to secure a theoretical reconciliation between the life of the law as experience and the objectivity of law as determined by factors more akin to logical extrapolation.³⁵⁸ In practice, Holmes was impeccably opposed to the natural inclinations of judges who using natural law ideas were in effect putting into judicial form their subjective ideological or idiosyncratic preferences.³⁵⁹ In the case of *Lochner v. New York*, Holmes pointed out that “a Constitution is not intended to embody a particular economic theory,” which relied on natural law.³⁶⁰ Years later, in the dissenting opinion of *S. Pac. Co. v. Jensen*, Holmes added that “[t]he common law is not a brooding omnipresence in the sky and . . . judges are not independent mouthpieces of the infinite.”³⁶¹ In cases like *Lochner*, Holmes followed Thayer by insisting that the legislative supremacy of the States be respected. In this sense, Holmes in practice endorsed a version of State legislature sovereignty.³⁶² Holmes’ great influence on American legal practice ultimately prevailed in the famous case of *Erie v. Tompkins*.³⁶³ Holmes had been a critic of the idea that federal judges could create the common law out of natural law thinking. In *Erie* the Court finally agreed and established the importance of law as emanating from a sovereign State and not from the imaginative insights of natural law thinking in judges.³⁶⁴ The pathway plotted by Holmes, Gray, and Thayer provided a rich foundation from which ideas of sovereignty and constitutionalism could evolve in American theory and practice.

356. *Id.*; see Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 991–1009 (1997).

357. *Id.*

358. *Id.*

359. *Id.*; see also O.W. Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918-1919).

360. *Lochner v. New York*, 198 U.S. 45, 75 (1905).

361. *Id.*; see *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); see generally FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 49 (1960).

362. Gerald Leonard, *Holmes on the Lochner Court*, 85 B.U. L. REV. 1001, 1013 (2005).

363. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

364. *Id.*

B. Hart and Sacks: The Legal Process Approach

The approach of H.L.A. Hart may be contrasted with the approach of the idea of sovereignty in the work of two Harvard Professors: Hart and Sacks, who developed a legal process approach to legal theory.³⁶⁵ That approach provides insights into the nature of sovereignty itself. Central to their approach is the sense that traditional positivism, asking the question of what is law, essentially misdirected the focus of relevant inquiry and description.³⁶⁶ In their view, a better focus is developed if we change the question to what is a legal question.³⁶⁷ In effect, one could not answer this question without taking into account the idea that a legal question must be differentiated from a legislative, an administrative, and an executive question.³⁶⁸ This therefore refers to institutions of governance and therefore the unpacking of sovereignty was tied to the processes by which human beings settled problems in society. On the idea of law as institutional settlement, and according to Hart:

It is a by no means indefensible view of law to think of it as consisting most importantly of an operating system of general propositions, established by authority of the society, answering the questions of the *who* and *how* with respect to all methods of concern to the members of society, and so making possible their peaceable settlement. . . [L]aw comprises (although it may not be confined to) a series of institutionalized processes for settling by authority of the group various types of questions of concern to the group.³⁶⁹

From this perspective, they develop a principle of institutional settlement, which is a foundation of governance in the modern state.³⁷⁰ Some

365. See generally HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994). This study is not directly focused on the elucidation of sovereignty as such. However, these authors have clarified the conception of sovereignty from a functional point of view by underscoring a deeper understanding of the appropriate sphere of institutional competences in the modern state. This suggests that for different purposes different institutions may be charged with making final or ultimate decisions in the body politic.

366. *Id.*; see also Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413 (1987).

367. *Id.*

368. *Id.*

369. See Henry M. Hart, *Note on some Essentials of a Working Theory of Law* (Hart Papers, Box 1, Folder 1, 1950); see also HENRY M. HART, *NOTES AND OTHER MATERIALS FOR THE STUDY OF LEGISLATION* (1950). Legal theory, however, still generates important insights into the nature of sovereignty; see also Winston P. Nagan, *Lasswell and McDougal and Contemporary Theories of Justice*, presentation at Yale, Sept. 14, 2010.

370. Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607 (1999); see also Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND.

problems are quintessentially juridical.³⁷¹ Thus, the institution specialized to generating distinctively legal decisions will be the ultimate institutional authority for the expression of final legal decisions.³⁷² In this sense, some ultimate decision-making competence is vested with distinctively legal institutions. The institution whose competence is specialized to legislation will be the ultimate authority of legislative expression. The same could be indicated for administrative and executive competence. In this sense, sovereignty, seen in the complex of institutional competences of specialized institutions of governance, is not undifferentiated but an aspect of sovereign power, which is vested in different institutional mechanisms whose competences may be objectively delineated as legislative, judicial, administrative, or vested with executive authority.³⁷³ This approach to the idea of sovereignty is more complex and requires a searching determination of the precise locus of ultimate authority in terms of the specialized institutional context.³⁷⁴

C. Carl Schmitt: Sovereignty Rooted in the Political Exception

Although Schmitt was German, his ideas about sovereignty, and the political exception have had influence on the American theory and practice of sovereignty. Carl Schmitt was a philosophic theorist of sovereignty during the Third Reich.³⁷⁵ His ideas about sovereignty and its place above the law placement in the political culture of the State have important parallels in the developing discourse in the United States about the scope of presidential authority and power. His views have attracted the attention of American theorists. Schmitt developed his view of sovereignty on the concept described as “the exception”.³⁷⁶ This idea suggests that the sovereign or executive may invoke the idea of exceptional powers which are distinct from the general theory of the State. In Schmitt’s view, the normal condition of the functions of the theory of a State, rides with the existence of the idea of the “exception.” The exception is in effect intrinsic to the idea of a normal State. In his view,

L. REV. 953 (1994); see also William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1993–1994).

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. MICHAEL ARGYLE, *THE PSYCHOLOGY OF HAPPINESS* 274 (Routledge 2d ed. 2001) (1987).

376. GEORGE SCHWAB, *THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEAS OF CARL SCHMITT BETWEEN 1921 AND 1936* (Duncker & Humblot 1970).

the normal legal order of a State depends on the existence of an exception.³⁷⁷ The exception is based on the continuing existence of an existential threat to the State and it is the sovereign that must decide on the exception.³⁷⁸ In short, the political life of a State comprises allies and enemies. For the purpose of Statecraft, “an enemy exists only when at least potentially, one fighting collectively of people confronts another similar collectivity.”³⁷⁹ In this sense, the political reality of the State always confronts the issue of the survival of the group. This reality is explained as follows:

The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping. *** [A]s an ever present possibility [war] is the leading presupposition which determines in a characteristic way human action and thinking and hereby creates a specifically political behavior.*** A world in which the possibility of war is utterly eliminated, a completely pacified globe, would be a world without the distinction between friend and enemy and hence a world without politics.³⁸⁰

Schmitt's view bases the supremacy of the exception on the supremacy of politics and power.³⁸¹ Thus, the exception, as rooted in the competence of the executive, is not dependent on law for its authority but on the conditions of power and conflict, which are implicitly pre-legal.³⁸² The central idea is that in an emergency, the power to decide based on the exception accepts its normal superiority over law on the basis that the suspension of the law is justified by the pre-legal right to self-preservation.³⁸³ Schmitt's view is a powerful justification for the exercise of extraordinary powers, which he regards as ordinary, by executive authority. This is a tempting view for executive officers but it may not be an adequate explanation of the interplay of power, legitimacy, and the constitutional foundations of a rule of law State. In a later section, we draw on insights from the New Haven School, which deals empirically with the problem of power and the problem of constituting authority using the methods of contextual mapping. Nonetheless, Schmitt's

377. *Id.*

378. *Id.*

379. *Id.*; see CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 10 (George Schwab trans., Univ. of Chicago Press 2007).

380. *Id.* at 29, 34–35.

381. *Id.*; see generally *THE CHALLENGE OF CARL SCHMITT* (Chantal Mouffe ed., Verso 1999).

382. *Id.*

383. *Id.*

view provides support for theorists who seek to enlarge executive power on the unitary presidency theory.³⁸⁴

D. Hannah Arendt: Sovereignty Rooted in People's Expectations

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

The man of the American Revolution, on the contrary, understood by the very opposite of a pre-political natural violence. To them, power came into being when and where people would get together and bind themselves through promises, covenants, and mutual pledges; only such power, which rested on reciprocity and mutuality, was real power and legitimate.³⁸⁵

In Arendt's view, law is in part constitutive of politics because it "produces the arena where politics occurs."³⁸⁶ Additionally it "defines the space in which men live with one another without using force".³⁸⁷ In her view law is not post-political, it is pre-political. This is a social scientist's way of justifying the supremacy of law and the limitations of claims to sovereign absolutism implicit in Schmitt. Again, Arendt is dealing with the interplay of politics and law but suggests the notion that social forces and power relations somehow pre-politically create law and thus the space for politics. This too is an approach that is not unproblematic. The relationships between the social processes, which generate outcomes of effective power, also generate the processes by which effective power is moderated by understandings of mutual cooperation and self-interests among power brokers. It is here that understandings about managing power and expectations generate the framework of legal orders for political space. We refer again to this issue when we outline the social and power process background to law and map those processes onto the idea of a constitutive process. Additionally, the dynamics of power and power generated understandings operate across State lines as well.

384. *Id.*

385. HANNAH ARENDT, ON REVOLUTION 173 (Penguin Books 2006) (1963).

386. HANNAH ARENDT, THE PROMISE OF POLITICS 181 (Random House Digital, Inc. 2009).

387. *Id.*

E. Justice Samuel A. Alito Jr.: The Unitary Executive

Justice Alito is generally regarded as the initiator of the so-called “unitary executive theory.”³⁸⁸ It is a theory developed in the context of constitutional interpretation, but appears to have a strong affinity with the philosophical reflections of the German political theorist Carl Schmitt.³⁸⁹ It is not clear whether Alito was aware of Schmitt’s work and was influenced by him or whether he had come to a position concerning the powers of the President that have strong parallels with the philosophical justification given by Schmitt about the idea of unfettered powers vesting in the executive. In any event, we reproduced Schmitt’s fundamental ideas above because they provide a broader philosophical justification for Alito’s theory of the unitary executive based on a textual analysis of the Constitution.³⁹⁰ Alito was a lawyer in the Office of Legal Counsel. His tenure with the Reagan Justice Department came in the aftermath of the still lingering political effects of the removal of Republican President Richard Nixon from office. Nixon’s demise in the context of the Watergate Scandal resulted in stronger assertions of legislative supremacy to constrain the abuse of power by the executive.³⁹¹ President Ford sought to find ways to reestablish presidential power without unduly drawing the attention of Congress to it.³⁹² When Reagan came into office, there remained an urge with this new Republican Administration that presidential powers, which had been reduced in the fall of Nixon, should be recaptured by the executive branch.³⁹³ Alito was well placed to consider what legal strategies might be used to advance the cause of presidential power within the framework of executive authority.

The central problem Alito saw as a lawyer representing the executive interests was the expansion of congressional power and a corresponding

388. JUDGE SAMUEL ALITO, *Administrative Law and Regulation: Presidential Oversight and the Administrative State*, in 2 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY’S PRACTICE GROUPS 12 (2001).

389. Jeffrey Steinberg, *Judge Samuel Alito and The ‘Führerprinzip’*, EXECUTIVE INTELLIGENCE REV. 5 (2006).

390. See generally, Peter M. Shane, *Legislative Delegation, The Unitary Executive, and the Legitimacy of the Administrative State* 33 HARV. J.L. & PUB. POL’Y 103 (2010).

391. Barton J. Bernstein, *The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority since 1940*, 40 LAW & CONTEMP. PROBS. 58, 74 (1976).

392. Arthur M. Schlesinger Jr., *The Constitution and Presidential Leadership*, 47 MD. L. REV. 54, 65 (1987-88).

393. *Id.*

limitation of presidential power.³⁹⁴ His approach was therefore to develop an interpretative logic that sought to narrowly characterize the scope of congressional power. Additionally, in order to expand the power of the executive, he provided a bold, unjudicially tested theory of the executive, which had implicated that its boundaries were expansive and unlimited. In Alito's view, the unitary executive theory "best captures the meaning of the Constitution's text and structure."³⁹⁵ Central to his analysis is the ideal that the text of the Constitution vests "all executive power" in "the President."³⁹⁶ Alito additionally stressed that the national interest required "a vigorous executive."³⁹⁷ Prime reliance is placed on Article 2 of the Constitution, which stipulates "the executive power shall be vested in the President of the United States of America."³⁹⁸ There is no guidance as to the scope of this power. The Constitution also stipulates that "the President shall be commander in chief of the Army and the Navy . . ."³⁹⁹ However, the Constitution also, and separately assigns the power to declare war, raise Armies, and regulate the taking of prisoners to Congress.⁴⁰⁰ Essentially the Constitution is much more explicit about specifying the powers of Congress. Implicit in this fact is the idea that what is not specifically enumerated is presumptively outside of the competence of Congress. On the other hand, the vesting of competence in the executive is over all matters of an executive character (however this is defined). Since the specific allocation of competence to the President is not enumerated in detail, it is an appropriate Constitutional interpretation to give as expansive an interpretation of executive power as can plausibly be claimed. Professor Steven Calabresi has been a strong supporter of Judge Alito's theory. According to Calabresi, "[u]nitary executive theorists read th[e Constitution] . . . as creating a hierarchical, unified executive department under the direct control of the President. . . . The practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power."⁴⁰¹ The importance of the Alito view lies in the fact that he was widely supported by a legal interest

394. Charles F. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 3, 3–4, 36 (2007).

395. See Steinberg, *supra* note 389, at 4.

396. PEOPLE FOR THE AMERICAN WAY, THE RECORD AND LEGAL PHILOSOPHY OF SAMUEL ALITO: "NO ONE TO THE RIGHT OF SAMUEL ALITO ON THIS COURT" 21, SPECIAL REPORT (2006).

397. *Id.*

398. U.S. CONST. art. II, § 1.

399. U.S. CONST. art. II, § 2.

400. U.S. CONST. art. I, § 8.

401. Steven A. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992).

group identified with conservative causes: The Federalist Society. One of the techniques used to secure the allocation of greater competence to the executive at the expense of the Congress was the Alito's suggestion of the use of presidential signing statements.⁴⁰²

After the momentous events of 9/11, the issue of the scope of the President's powers under emergency conditions became an acute issue.⁴⁰³ In addition to these conditions, Vice President Cheney brought to the office of the executive a long memory of the loss of presidential powers in the aftermath of Watergate.⁴⁰⁴ The events of 9/11 provided an ideal justification for the executive to reclaim these powers.⁴⁰⁵ In the conduct of the war against terrorism, the administration's lawyers placed reliance on the unitary presidency theory for broad assertions of unaccountable power.⁴⁰⁶ The President's lawyers maintained that the unitary nature of the power of the executive could not be limited by treaty obligations or congressional legislation, which purported to govern the treatment of enemy prisoners.⁴⁰⁷ On September 25, 2001, John Yoo wrote that "the centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and can mobilize national resources with a speed and energy that is far superior to any other branch."⁴⁰⁸ An even stronger claim emerged from Assistant Attorney General Jay Bybee in August 2002.⁴⁰⁹ Bybee's advice to the President was that "even if an interrogation method were to arguably violate (an anti-

402. Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 366 (1987).

403. *Id.*; see generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (Univ. of Chicago Press 2006).

404. *Id.*; see also Bruce P. Montgomery, *Congressional Oversight: Vice President Richard B. Cheney's Executive Branch Triumph*, 20 POL. SCI. Q. 581, 581-617 (2005/2006); see also Mark J. Rozell, *Executive Privilege Revived: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403 (2002-2003).

405. *Id.*

406. *Id.*; see also David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 GOLDEN GATE U. L. REV. 195 (2008).

407. *Id.*

408. Robert J. Delahunty, John C. Yoo, *The President's constitutional authority to conduct military operations against terrorist organizations and the nations that harbor or support them*, 25 HARV. J.L. & PUB. POL'Y 487, 492 (2002).

409. *The Bybee Torture Memo*, Memorandum for Alberto R. Gonzales Counsel to the President, Re. Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (2002).

torture law), the statute would be unconstitutional if it impermissibly encroached on the President's power to conduct a military campaign."⁴¹⁰ So reliant was the Bush policies in conducting the war on terror on the unitary presidency theory that according to Calabresi, "if the theory were wrong there would be no way the Bush administration's anti-terrorism policies could be constitutionally justified."⁴¹¹ The technique that Judge Alito effectively advocated to the executive was the President's use of signing statements to exempt himself from otherwise lawfully enacted congressional legislation.⁴¹² The Bush administration claimed the inherent power to authorize the torture of military detainees in violation of U.S. law and Treaty obligations. The President's use of the technique of signing statements attached to bills that were become U.S. law involved the President issuing over a hundred signing statements, which in effect exempted him from those laws when he felt that they interfered with these unitary executive powers. The unitary theory relied on a claim of powers inherent in the idea of executive authority. It should be noted however that the concept of "inherent" is itself littered with flexibility and therefore represents an unpredictable and undefined ambit for a unified authority claim by the President. The President relied on his inherent powers as Commander in Chief to authorize warrantless domestic spying in violation of the Foreign Intelligence Services Act.⁴¹³ He also claimed inherent authority to have subordinates torture military detainees in violation of U.S. law and treaty obligations.

Although Alito's supporters, like Yoo, did provide functional justifications for the assertion of executive powers in the context of national security emergencies, even these justifications should be understood in terms of little noticed historical fact about the Constitution.⁴¹⁴ The American Revolution was fought and justified on the basis of the concentrated, arbitrary powers of the Monarch.⁴¹⁵ A major purpose in the drafting of the Constitution was to avoid the concentration of power and to provide for a text that would provide guidance concerning the balance of power.⁴¹⁶ Moreover, the founders were deeply concerned to

410. *Id.* at 31.

411. Jess Bravin, *Judge Alito's View of the Presidency: Expansive Powers; A Debate Over Terror Tactics: Court Pick Endorsed Theory of Far-Reaching Authority; Tenet of Bush White House*, WALL ST. J., Jan. 5, 2006, at A1.

412. Marc N. Garber & Kurt A. Wimmer, *supra* note 402, at 366.

413. *See generally* Federal Intelligence Surveillance Act § 36, 50 U.S.C.A. § 1801, Pub.L. 95-511, 92 Stat. 1783, (enacted 50 U.S.C. ch.36, S. 1566 (2006)).

414. *See generally supra* notes 409-13; *infra* notes 415-19.

415. *See generally* BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (Harvard Univ. Press 1992).

416. *See generally* JAMES M. BECK, *THE CONSTITUTION OF THE UNITED STATES*, (Kessinger Pub. 2004).

not create an American Monarchy, an executive that would fit the role of a monarch-like sovereign.⁴¹⁷ This major purpose, which guided the drafting of the Constitution, appears to be a value that remains unconsidered by the proponents of the executive theory.⁴¹⁸

Jeffrey Steinberg, writing in *Executive Intelligence Review*, has argued that the unitary executive idea, which carries strong support from ultra right wing constituencies, represents in contemporary terms, the idea of the Führerprinzip version of a sovereignty dominated executive identified with Carl Schmitt.⁴¹⁹ Schmitt placed ultimate sovereignty in the Führer as a position above the law.⁴²⁰ Steinberg notes that Schmitt's view has been used to legitimate the emergence of totalitarian regimes in for example Franco's Spain and Pinochet's Chile and he sees the Schmitt's footprint on the Alito/Bush/Chaney reconstruction of an above the law office of the President.⁴²¹ He refers specifically to the McCain amendment, which banned the torture of American held prisoners in the war on terrorism.⁴²² The President signing order simply permitted him to ignore the bill's ban on torture.⁴²³ This was a bill passed by a bipartisan, veto proof majority.⁴²⁴ The dangers of the unitary executive idea, as with the dangers of Carl Schmitt's Führerprinzip, are well expressed by Steinberg as follows:

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

417. *Id.*

418. *Id.*

419. *See generally* Federal Intelligence Surveillance Act § 36, 50 U.S.C.A. § 1801, Pub.L. 95-511, 92 Stat. 1783, (enacted 50 U.S.C. ch.36, S. 1566 (2006)).

420. *Id.*

421. *Id.*; *see also* Jeffrey Steinberg, *Cheney and His Patsy, Bush, Face Impeachment Furor*, EIRNATIONAL (Dec. 30, 2005).

422. *Id.*

423. *Id.*; *supra* note 419.

424. *Id.*; *see also* Koh, Harold Hongju, *Can the President be Torturer in Chief*, 81 IND. L.J. 1145 (2006).

In the case of the Pinochet coup in Chile, Schmitt's student-protégé Jaime Guzman, argued that the government had to use violence to impose order. Guzman was the sole source of legal justification for the Pinochet coup and dictatorship, and he insisted that violence was a precondition for success. In effect, Schmitt acolyte Guzman ran fascist Chile—in the name of the same doctrine of “unitary executive” power that Schmitt had earlier codified in the Führerprinzip. It is the same doctrine that Cheney et al. seek to impose today on the U.S.A.

This is fascism—pure and simple, and it must be crushed, now, if the United States is to survive as a constitutional republic.⁴²⁵

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

F. John Yoo: The Unitary Presidency

John Yoo was an Assistant Attorney General in the office of Legal Counsel.⁴²⁶ In short, he was a lawyer for the executive branch. Yoo gained prominence for a number of memoranda he offered, which sought to expand the powers of the executive so as to make them superior to those of the legislature or the judiciary.⁴²⁷ At the heart of these memoranda was the theory of the executive, which came to be known as the theory of the “unitary executive.”⁴²⁸ This theory carried the implication that when exercising certain emergency powers, the executive was exercising ultimate, non-accountable sovereign powers.⁴²⁹ There appeared to be an affinity to the Carl Schmitt view of the exception being a normal part of the theory of the State.⁴³⁰ Yoo consolidated these views in a recent book, which provides a vigorous defense of the unitary presidency idea.⁴³¹ In Yoo's view, Hamilton and the other Federalists understood the executive

425. *Supra* note 389, at 5–6.

426. *See* Jim Wilson, *JOHN YOO*, N.Y. TIMES, May 4, 2011.

427. *Id.*

428. *See* John C. Yoo, *Unitary, Executive, or Both?*, 77 U. CHI. L. REV. 1935 (2009), available at <http://works.bepress.com/johnyoo50>.

429. *Id.*

430. *Id.*; *see generally* SIBYLLE SCHEIPERS, *PRISONERS IN WAR* (Oxford Univ. Press 2010); *see also* Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835 (2005-2006).

431. *See generally* John YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* vii–xiii (2010).

to be functionally best matched in speech, unity, and decisiveness to the unpredictable high-stakes nature of foreign affairs, and rational action on behalf of the nation in a dangerous world would be best advanced by executive action. The gist of Yoo's theory for a robust appreciation of executive power is expressed in the following quotation from his book:

As Edward Corwin observed, the executive's advantages in foreign affairs include "the unity of office, its capacity for secrecy and dispatch, and its superior sources of information, to which should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time."⁴³²

This power does not ebb and flow with the political tides, but finds its origins in the very creation of the executive. The Framers rejected the legislative supremacy of the revolutionary state governments in favor of a Presidency that would be independent of Congress, elected by the people, and possessed with speed, decision, and vigor to guide the nation through war and emergency. They did not carefully define and limit the executive power, as they did the legislative, because they understood that they could not see the future.⁴³³

The Yoo view rests on a historical, and in some ways functional, reconstruction of the separation of powers and the distinctiveness of powers reserved to the President.⁴³⁴ It also stresses the role of expanded powers in the context of emergencies and war and underlines the fact that the lack of specification of presidential powers in the Constitution should not be read as a limitation, but a potential, exponential expansion of those powers.⁴³⁵ For example, if the President invokes his power as commander in chief, what limits are there on the exercise of these powers that may be exercised by the legislature or the courts. The President must determine what is required by military necessity, and to what extent is his determination subject to review by the coordinate branches of government.⁴³⁶ Some writers suggest that the Constitution represents

432. *See id.* at 20.

433. *See generally* JOHN YOO, *CRISIS AND COMMAND: A HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH 1-52* (2009).

434. *Id.*

435. *Id.*

436. *Id.*; *see generally* CHARLES AUSTIN BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (Transaction Publishers 1913); *see generally* WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (Transaction Publishers 1908).

a more complex multi-branch framework of cooperation, collaboration, and guidance.⁴³⁷

G. Bruce Ackerman: Legislative Emergency Sovereignty

Professor Bruce Ackerman expresses concern about the authority foundations of the executive to conduct activities that are essentially extra-constitutional.⁴³⁸ The question put here is how a scholar committed to the basic values of the Constitution can approach the problem of the possible excesses of the extra-constitutional decision-making. In short, the events related to the terrorist attacks have served to weaken the fundamental Constitutional values that Americans cherish. The central issue that Ackerman addresses is the claim of executive emergency sovereignty, which in general emerges as a temporary suspension of the Constitution, but the fear is that the temporary becomes a relatively permanent fixture of government unless we can develop a constitutional strategy to better secure constitutional values and to restrain the claims of emergency unaccountable sovereignty.⁴³⁹ Ackerman suggests the following as a fix to the problem of runaway sovereignty:

The first and most fundamental dimension focuses on an innovative system of political checks and balances, ***[including] constitutional mechanisms that enable effective short-run responses without allowing states of emergency to become permanent fixtures.*** Given the formidable obstacle course presented by Article V of the U.S. Constitution, my proposal is a nonstarter as a formal amendment. Nevertheless, much of the design could be introduced as a “framework statute” within the terms of the existing Constitution. Congress took a first step in this direction in the 1970s when it passed the National Emergencies Act. But the experience under this Act demonstrates the need for radical revision.⁴⁴⁰

Professor Ackerman’s concern is that once the State travels the road of emergency jurisdiction as a justification for the preclusion of fundamental constitutional values, it is difficult to limit such constraints on the Constitution.⁴⁴¹ The late Professor Anthony Mathews, an expert on the national security law experience in South Africa, wrote an article titled

437. Deborah N. Pearlstein, *The Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1553–54 (2009).

438. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1031–32 (2004).

439. *Id.*; see generally BRUCE A. ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* (Seven Stories Press 1999); see also Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHIC. L. REV. 475–573 (1995).

440. *Supra* note 438.

441. *Id.*; see generally *supra* notes 438–39.

The Permanence of the Temporary, in which he identifies this problem.⁴⁴² The problem with the enactment of such legislation is really the concern of the legislators about the politics of patriotism. When an appeal is made for exceptional powers in a security context, it is usually justified by strident appeals to patriotism with the implicit assumption that opposition or restraints on such claims to competence reflect an inadequate or lukewarm form of patriotic loyalty.⁴⁴³ For example, the far-reaching Patriot Act had not been read by most members of Congress, yet the fear of voting against the Act was a fear of voting against popularly understood patriotism.⁴⁴⁴ We therefore do not believe that the Ackerman position has political traction in the real world of legislative politics. It is a position that can work only if a multitude of constituencies and interest groups with compelling media access can constrain the appeals to crass patriotism and formulate a structure of public opinion that reflects mature judgment that moderates destructive emotionalism. That is a tall order.

H. Laurence Tribe and Patrick Gudridge: The Supremacy of Law

Professors Tribe and Gudridge provide a considered response to the Ackerman view that the last resort for the protection of fundamental values in a state of emergency must rest within the Congress.⁴⁴⁵ In their view, they believe that the substantial reliance on the legislative process rather than on the explicit expectations coded in the Constitution concedes too much to the legislative branch and too little to the culture of constitutional prescription, application, and enforcement.⁴⁴⁶ In essence, Ackerman's theory of an emergency constitution whose protections are vested within the legislative branch suggests a concession that the Constitution itself has no political and legal efficacy. It essentially involves giving up on the Constitution and its practices as conventionally understood. This is a grand bargain that Tribe and Gudridge believe should be rejected because it represents the prospect that threatens us

442. See A.S. Mathews & R. C. Albino, *The Permanence of the Temporary. An Examination of the 90 and 180 Day Detention Laws*, 83 S. AFR. L.J. 16 (1966).

443. *Id.*

444. *Id.*; see generally Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435 (2002).

445. See Laurence H. Tribe & Patrick O. Gudridge, *Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2003-2004); see also Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2003-2004).

446. *Id.*

with less vigilance about the government's encroachment on the Constitution in the interest of patriotism.⁴⁴⁷ They suggest, "the lessons of history teach us [that] we had best be most on our guard" if Ackerman's grand bargain is acted upon.⁴⁴⁸ In the Tribe view, there is skepticism of legislative sovereignty and its capacity to respect the Constitution in the context of a national security crisis. The Tribe view believes that there should be no compromising on the strength and institutions of legal culture to constrain the abuse of sovereign power under the Constitution.⁴⁴⁹ The implications of this view may suggest that in the context of national emergencies, sovereignty under the Constitution is inappropriate if it sidelines the legal profession and the judicial branch of government.⁴⁵⁰ In this sense, it is implicit that sovereignty is a shared complex competence in peace or war between the executive, the legislative, and the judicial branches of government.⁴⁵¹

VII. CONTEMPORARY PROBLEMS IN THEORY AND PRACTICE

The meaning of sovereignty in the 16th century is obviously different from its meaning in the 20th century. Although there is such an institution as the Queen in Parliament, the central idea of sovereignty is reflected in the idea of Parliamentary Sovereignty.⁴⁵² The authority foundation of sovereignty has shifted to the sovereignty of the people expressed in their elected representatives.⁴⁵³ The diverse and often partial meanings attributed to the term sovereignty mean that its invocation is unclear and fraught with ambiguity.⁴⁵⁴ Indeed, from the practice of decision-makers and the writings of eminent scholars, there are certain identifiable core references, which the term sovereignty evokes.⁴⁵⁵ For example, the term includes a reference to the notion of a body politic, which is a complex idea of which the nation-State is simply one example; it includes a

447. *Id.*

448. *Id.*

449. *Id.*; see also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1221–1303 (1995); see generally LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (Harvard Univ. Press 1985); see generally LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (New York, Random House 1985); see also Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063–80 (1980).

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 705–06 (1988) (stressing the importance of international obligation and legitimacy as conditioning sovereign authority).

455. See generally *supra* notes 1 & 27.

reference to control or efficacy in political and legal processes; and it includes an ambiguous reference to the idea of governance with either an implicit legitimacy or an authority component.⁴⁵⁶ These core designations have been implicit in the many partial and incomplete references the term has come to symbolize, such as Sovereignty as a personalized monarch (real or ritualized); as a symbol for absolute, unlimited control or power; as a symbol of political legitimacy; as a symbol of political authority; as a symbol of self-determined, national independence; as a symbol of governance and constitutional order; as a criterion of jurisprudential validation of all law (grundnorm, rule of recognition, sovereign); as a symbol of the juridical personality of Sovereign Equality; as a symbol of "recognition;" as a formal unit of a legal system; as a symbol of powers, immunities, or privileges; as a symbol of jurisdictional competence to make and/or apply law; and as a symbol of basic governance competencies (constitutive process).⁴⁵⁷ The multitude of meanings attributable to the sovereignty idea reflects its usability in many diverse contexts of social organization. One of the most important of these contexts is the global environment. The sovereignty issue was critical to understanding the conduct and abuses of the parties to the Second World War and its aftermath.⁴⁵⁸ This background problem and the variability in the meaning of sovereignty serve as an important background for developments relating to sovereignty in the twentieth century.⁴⁵⁹

A. Empirical Perspectives and Theories of Decolonization

There is an alternative approach to clarifying the theory of the sovereignty idea.⁴⁶⁰ This approach is more empirical and draws on the jurisprudence of the New Haven School of international law.⁴⁶¹ This

456. *Id.*

457. Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 144-45 (1995). The contemporary challenges relating to State sovereignty include the idea of non intervention in the domestic jurisdiction of the state. Humanitarian law is essentially a law that stresses the idea of international concerns which involves humanitarian values and which are a justification for establishing the jurisdictional predicate of international concern which therefore validates some form of humanitarian intervention.

458. *See generally supra* notes 162-63.

459. *Id.*; *see generally supra* notes 1 & 27.

460. *Id.*

461. *Id.*; *see generally supra* note 309; *see also* Janet Koven Levit, *Bottom-up International Lawmaking: Reflections on the New Haven School of International Law*, 32

approach, which is rooted in the reality of the global social and power processes, generates a concern that this reality generates astonishing complexity.⁴⁶² We therefore outline some of the components of this complexity for understanding the idea of sovereignty and proceed to apply novel ideas of theory and method that are empirically grounded to clarify the idea of sovereignty in the world community today. Distinguished international law publicists recognize what they regard as the “[i]nescapability of the concept of sovereignty as a quality of the State under present-day international law.”⁴⁶³ They also recognize it as a “fundamental principle of the law of nations.”⁴⁶⁴ However, even the strongest proponents of the positivist view of international law conditioned by sovereign states assert that international law strongly rejects the admissibility of absolute sovereignty as the basic principle of international law. Surveys of the writings of diverse authors indicate a clear repudiation of any absolutist notion of sovereignty implicit in the command theory of law and its progeny.⁴⁶⁵ It will doubtless be recalled that Austin relegated international law to the domain of positive morality, a dubious status it shared with constitutional law.⁴⁶⁶

Theory and practice concede certain flexibility about what aspects of international and constitutional law are to be designated sovereign.⁴⁶⁷ However, the criteria by which such practical designations are made often reflect levels of reification and porousness about what is and is not sovereign, and what effect and deference are in practice to be accorded such characterizations. The law of sovereign immunity is a good example of this proposition.⁴⁶⁸ The reification of State behaviors labeled

YALE J. INT’L L. 393 (2007); *see also* Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT’L L. 421 (2007).

462. *Id.*

463. MAREK STANISLAW KORWICZ, *SOME PRESENT ASPECTS OF SOVEREIGNTY IN INTERNATIONAL LAW* 16–17 (1961). This study remains one of the leading international law texts on the elucidation of sovereignty from a multitude of vantage points and disciplines. *See also* Winston P. Nagan, *International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia*, 6 DUKE J. COMP. & INT’L L. 127 (1995-1996).

464. *Id.*

465. A. LARSON & W. JENCKS, *SOVEREIGNTY WITHIN THE LAW* 463, 465 (1965) (discussing the issue of sovereignty and international obligation).

466. John Austin, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 12, 140 (Isaiah Berlin, Stuart Hampshire & Richard Wollheim eds., 1954) (explaining author’s imperative theory of law founded on the idea of an objective and identifiable sovereign as the source of all positive law); *contra* J.W. HARRIS, *LEGAL PHILOSOPHIES* 226–30 (1980). This book is based on Austin’s lectures on the University of London. It spells out his imperative theory of law founded on the idea of an objective and identifiable sovereign as the source of all positive law.

467. *See generally supra* notes 1 & 27.

468. *Id.*; *see generally* HAZEL FOX, *THE LAW OF STATE IMMUNITY* (Oxford Univ. Press 2008).

jure imperii gave ground in practice to State behaviors that could be juridically classified as *jure gestionis*, or the competence of a domestic court or tribunal to treat a foreign sovereign State just like any other litigant.⁴⁶⁹ The act of State doctrine in U.S. practice has been similarly eroded, including the implicit sovereignty assumptions that served to insulate acts of sovereign states done within their own territories from adjudication in the courts of other sovereign states.⁴⁷⁰ The roots of reification and porousness in modern international law practice and custom are tied to the processes of decolonization and the expansion of the State sovereign system.⁴⁷¹ The post World War II processes of decolonization penetrated, and later eroded, the claims of colonial powers that their colonies fell within their sovereignty and were thus beyond the reach of international law concern.⁴⁷² The key doctrine that eroded the colonial sovereignty idea was the claim of indigenous political movements to self-determination, which in post Cold War practice became a *jus cogens*.⁴⁷³ In this context, the claim to self-determination simultaneously denied colonial sovereignty and affirmed sovereignty sustained by self-determination.⁴⁷⁴ Latent in claims to self-determination was the idea of sovereign independence.⁴⁷⁵ The outcome of the decolonization self-determination process was a radical increase in internationally recognized claims to national State sovereignty.⁴⁷⁶ However, vast numbers of these

469. Nagan, *supra* note 457, at 142 (providing an explanation to the importance of strengthening humanitarian law and human rights law, which is evident in light of the recourse to violence to resolve international and internal conflicts).

470. *Id.*

471. *Id.*; see generally S.E. Merry, *Colonial and Postcolonial Law*, in *The Blackwell Companion to Law and Society*, (A. Sarat ed., Blackwell Publishing Ltd, Oxford, UK, 2008); see also James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy Governmental Illegitimacy in International Law* by Brad R. Roth, 98 MICH. L. REV. 1996-2055 (2000) (2000 Survey of Books Related to the Law).

472. *Id.*; see generally *supra* notes 162-63.

473. *Id.*; see also Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255 (1996).

474. *Id.*; see generally JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL 'NATIONAL' IDENTITY (Martinus Nijhoff Publishers 2000); see also Ediberto Roman, *Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. OF MIAMI L. REV. (1999); Florida International University Legal Studies Research Paper No. 10-18 (July 1, 1999).

475. *Id.*

476. *Id.*

newly independent sovereign states were weak in terms of national integration and foreign relations. Moreover, many new states were both products and victims of cold war politics.⁴⁷⁷ This led to widespread reification of sovereignty in vast numbers of newly independent states, justified under the internal affairs domestic jurisdiction clause of the U.N. Charter, Article 2(7).⁴⁷⁸ At the same time that states were claiming widespread immunity from international duties and obligations (especially in the human rights sphere), these same states were claiming expanded sovereign rights as a form of compensation for the wrongs of colonial-imperialist exploitation and hegemony.⁴⁷⁹

B. The United Nations and the International Criminal Justice

The term “sovereignty” in the U.N. Charter is most visible in the context of sovereign equality.⁴⁸⁰ Outside this context, the term is rarely used in the text of the Charter. Indeed, Charter Article 2.7 uses the term “domestic jurisdiction” as a precept that seems intentionally less inclusive than the term “sovereign” suggests.⁴⁸¹ The U.N. Charter is part of a world constitutional instrument. As a constitution, the Charter is the formal basis of an international rule of law. One of its primary purposes is to constrain sovereign behaviors inconsistent with its key precepts. It was in fact the United Nations Security Council, operating under the authority of Chapter VII, that gave its backing to an international constitutional innovation, the Tribunals for the former Yugoslavia and Rwanda, even if that innovation is only an ad hoc one.⁴⁸² On the other hand, it is well known that the United Nations is going through a crisis of redefinition in the post-cold war era, and its credibility in the security

477. *Id.*; see also MICHAEL BARNETT, *THE NEW UNITED NATIONS POLITICS OF PEACE: FROM JURIDICAL SOVEREIGNTY TO EMPIRICAL SOVEREIGNTY GLOBAL GOVERNANCE*, Vol. 1, No. 1, at 79–97 (1995).

478. *Id.*; see U.N. Charter art. 2, para. 7. This section shifts the focus from the analytical and normative to the empirical. It provides a short overview of continuing problems in exploring the nature of sovereignty and why an empirical approach may advance around the standing of the sovereignty idea. U.N. Charter Article 2.7 is the Charter’s reference to sovereignty. However, it avoids the term. It stipulates that nothing in the Charter authorizes the U.N. to intervene in matters which are “essentially within the domestic jurisdiction of any State.”

479. *Id.*

480. *Id.*

481. *Id.*

482. Robert Marquand, *U.S. Must Support War Crimes Prosecution*, CHRISTIAN SCI. MONITOR (1994) (stating that at the moment it was well known that the United Nations was going through a crisis of post-cold war era redefinition about how the credibility in its security and peace-protecting arena was severely tarnished).

and peace-protecting arena has been severely tarnished.⁴⁸³ United Nations officials have been quick to project blame onto the sovereignty aspect of international power. They hold that stripped of all the trimmings, the United Nations serves as a directorate of states. If this is the reality, then two of the most important premises built into the Charter may be severely compromised. We refer to use of the “people” and the “individual” as important constraints and components of international legal order. The crisis that the United Nations faces is not simply focused on the legal and policy dimensions of its constitutional architecture in the post-cold war era. Rather, the situation the United Nations finds itself in raises the important issue of international public opinion regarding the organization. That opinion is an authority base crucial to maintaining the effective role and function of the organization.

C. Nuremberg and Individual Responsibility

The work of Fogelson gives a good explanation of why the war crimes trials in Nuremberg and Tokyo represent the most remarkable exception to the decentralized character of international criminal law.⁴⁸⁴ The great historic question about Nuremberg is whether it was an aberration, or whether it represents a sufficiently strong institutional expression of the international rule of law in action such that the process of criminal justice it created will become central to an improved world order. Indeed, a central policy feature of Nuremberg was the ancient function of the law of preventive politics. In this sense, the law serves as a restraint on unlimited decisional competence because it requires some minimal responsibility and accountability for decisions. The Nuremberg Tribunal held the agents of State decision-making personally responsible for crimes against peace, war crimes, and crimes against humanity.⁴⁸⁵

483. Barbara Crossette, *U.N. Finds Skepticism Is Eroding the Hope That Is Its Foundation*, N.Y. TIMES, June 25, 1995, at 1 (quoting Indiana Representative Lee H. Hamilton in 1991 regarding the relationship between the role of the United Nations and United States policy. He stated that notions of threats to American independence of action are important issues to Americans: “In some groups of Americans, there is a distinct fear of loss of U.S. sovereignty to the U.N.”).

484. Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 853 (1990). The critics of Nuremberg in the United States included Robert Taft and Norman Thomas.

485. R.H. JACKSON, *THE NUREMBERG CASE* (1971). Prosecutor Jackson declared that the trial in the eyes of the world were to be candidly faced before getting into evidence considerations because the record on which those defendants were to be judged

These transgressions were not only international legal wrongs, but also punishable through the ascription of personal responsibility by criminal law sanctions.⁴⁸⁶ The message of Nuremberg is clear; those who authorized and committed crimes against the peace, war crimes, and humanitarian crimes would be personally responsible for those crimes and would be made to suffer the consequences of their conduct.⁴⁸⁷ To hold the perpetrators of these proscribed forms of conduct accountable signifies that terrible things cannot be done to people without a resulting meaningful international sense of responsibility. Nuremberg's detractors have attacked it on two grounds: it was seen to represent the victors' justice, and it was thought to compromise the *nulla poena* principle. These are not the strongest objections to the Nuremberg process. The real objections to Nuremberg are tied to sovereignty issues.⁴⁸⁸ First, Nuremberg made the sovereign State and its officials subject to the international rule of law. This was precisely the point that U.S. Secretary of War Henry Stimson had in mind when he lent his weight to the idea of trying the Nazi war criminals. At the core of his thinking was the idea of a crime against the peace as part of the indictment. Second, Nuremberg permitted penetration of the veil of sovereignty in order to identify the concrete agents of decision who were responsible for criminal behavior. From an international law perspective, the idea that individuals could be directly responsible under international law subverted a cardinal tenet of the positivist conception of international law.

was to be the record on which history will judge them in the future; *see also* W.J. BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARDS THE MAJOR GERMAN WAR-CRIME TRIALS (1970). Critics of Nuremberg in the United States included Robert Taft and Norman Thomas. The problem with the argument of victors' justice is that it ignores the decentralized character of the international constitutive process, and argues essentially that because there is no central, neutral authority, war crimes must be consigned to a legal vacuum. Victors' justice is an aspect of the principle of jurisdiction by necessity.

486. *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (New York: Oxford Univ. Press, 2d ed. 2001); *see generally* LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS (Martinus Nijhoff Publishers (1992); *see generally* *Affirmation of the Principles of International Law recognized in the Charter of the Nuremberg Tribunal*, G.A. Res. 95(1), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/236 (1947). This resolution sought to extinguish any lingering doubts concerning the legality of the Nuremberg Trials.

487. *Id.*

488. B.F. SMITH, THE ROAD TO NUREMBERG 46 (1981). Smith notes that Lord Simon prepared a draft advocating summary execution of high-ranking Nazis with a number of legal and political arguments to show the trials were inappropriate because the Moscow Declaration contentions implied that the problem would be dealt with politically, not judicially and that the best thing to do was simply to shoot a handful of the top Nazi leaders.

D. The Nuremberg Principles

If we view the operational state of international criminal law as constitutionally allocated to sovereign states by custom, practice, and treaty law, then Nuremberg was an important constitutional allocation of competence to the international community and away from the sovereign nation state. This is the accurate juridical position which Nuremberg (and Tokyo) occupied in the global constitutive process. The Nuremberg tribunal confronted the dualism between sovereign versus personal responsibility directly: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law."⁴⁸⁹ Shortly after the Nuremberg decision, the United Nations General Assembly, in a unanimous resolution, affirmed the Nuremberg principles as accepted principles of international criminal law. Perhaps the most concise statement of the essential juridical meaning of the Nuremberg process came from Justice Jackson:

[A]n Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations is an international crime, and that for the commission of such crimes individuals are responsible."⁴⁹⁰

Nuremberg was technically based on an agreement between the States who became the victors over the Axis Powers.⁴⁹¹ However, it should be acknowledged that even among the allies, there was no agreement on the precise legal foundation of the proposed proceedings. Stalin, for example,

489. ROBERT H. JACKSON, *THE NUREMBERG CASE* at XIV–XV (1946) (citing R.H. JACKSON, *FINAL REPORT TO THE PRESIDENT OF THE UNITED STATES ON THE NUREMBERG TRIALS* (1947)). Jackson outlined the invasions of other countries and initiation of wars of aggression in violation of international law or treaties as one out of three categories of crimes that the defendants would be asked to account for. He regarded this crime as central to the entire conception of the trial.

490. *Justice Jackson's Final Report to the President Concerning the Nurnberg War Crimes Trial*, 20 TEMP. L. Q. 338 (1946); see also *The Nuremberg Decision*, 6 F.R.D. 69, 110 (1946). This was a major innovation in international law in which the victorious allies held Nazi leaders criminally responsible for the crimes committed under the banner of the Nazi State.

491. *Id.*; see also note 243.

thought that the execution of fifty-thousand SS Operatives would satisfy the demand for post-conflict justice. Churchill thought this was excessive and speculated with a figure of 5,000 SS executions. From the record it appears that the English Legal establishments were opposed to the idea of trying the sovereign or its representatives. Somehow, the Nuremberg proposal went through negotiations and then the novel trials subjecting the sovereigns officials to international criminal justice became a living global institution of legal accountability. The Nuremberg Trials had to solve important problems. For example, although the defendants were on trial for unprecedented crimes, according to the Principles, they were entitled to the idea of a fair trial with competent legal representation, meaning that they had certain fundamental rights granted by international legal order.⁴⁹²

VIII. CONSTITUTIVE PROCESS AND SOVEREIGNTY IN THE AFTERMATH OF NUREMBERG

A further question of the Nuremberg Trials, crucial to the defense, was that since they were acting under the authority of a sovereign State, they could not be personally liable. Here Nuremberg made a major advance in legal thinking. Essentially the sovereign is an abstraction from reality. Behind the sovereign are the active human agents of decision-making. In that role they were legally accountable and appropriately prosecuted in the Nuremberg proceedings. The significant innovation here was to refute the idea that the sovereign, assuming traditional monarchical powers, could do no wrong. This version of sovereignty was subject to principles that today significantly inform the legitimacy of the concept because they stress the ideas of transparency, responsibility, and accountability and reject the idea that invoking the idea of sovereignty provides a cloud in which there is no responsible agent of decision. The discourse of international criminal law would be greatly improved if the reification and porousness of the term sovereignty is put into a more disciplined theoretical focus that stresses the issue of constitutive competencies and interests, permitting analysis to clarify which interests are sovereignty exclusive and which are sovereignty inclusive. Such a focus would do a great deal to clarify the reach, purpose and competence to apply, prescribe and enforce what is called "international criminal law."⁴⁹³ One of the major vices of the term "sovereignty" is the

492. Colin Warbrick, *International Criminal Courts and Fair Trial*, 3 J. ARMED CONFLICT L. 45 (1998); see also David Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, 16 INT'L & COMP. L. Q. 16, 352-78 (1967).

493. See generally Myres S. McDougal et al., *supra* note 43.

designative reference given to the analytically distinct concepts of authority and control. The sovereignty idea in reified garb continues to perpetuate the Austinian fallacy of collapsing authority and control, making it extremely difficult to properly appreciate how international criminal law is rationally prescribed and applied. Indeed, a proper appreciation of these processes is crucial to developing a more rational approach to the international and constitutional allocation of competence in controlling and regulating criminal behaviors that require effective community interventions. The destructive impact of criminal behaviors on important world order values are serious enough that effective policing is required from local to global levels in the name of the world community as a whole. To strengthen the conceptual and doctrinal basis of humanitarian law we must purge the sovereignty precept of the conceptual and normative confusion it generates and use more precision about the nature of the specific problems in which sovereignty is invoked as a sword or a shield.⁴⁹⁴

A clearer perception of the common and special interest of the term sovereignty sometimes seeks to promote, protect, or compromise a clearer delineation of the precise role in the constitutional order and promise of the U.N. Charter. We must map and locate sovereignty more precisely within the context of global power and constitutive processes. As applied to the constitutional position of the ad hoc Tribunals, the practical question is whether the common interest of sovereign entities is better protected by this constitutional innovation, or whether exclusive parochial interests of a reified sovereignty precept undermine this effort at grounding international justice in its practical application. Some states may view them as just an exception to the overriding imperium of State sovereign competence over international criminal law. Other State parties have seen this constitutional innovation as an important step in creating an independent, international criminal court. Contextual mapping,

494. See generally Myres S. McDougal et al., *supra* note 43; compare with Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decisions*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (Richard A. Falk & Cyril E. Black eds., 1969), reprinted in MYRES MCDUGAL & MICHAEL W. REISMAN, *INTERNATIONAL LAW ESSAYS* 191 (1981). The founding members of Yale's New Haven School examined how governing hegemons manipulate social development and world public order. The technique of contextual mapping provides indicators that locate sovereignty within the interpenetrating regional, national, and global constitutive processes allowing an inquiring scholar to locate sovereignty within an appropriately comprehensive social and power context.

a technique associated with the New Haven School, can be used to clarify the meaning and workings of sovereignty.⁴⁹⁵ The technique is based on the principle that concepts and terms are better understood when the contexts in which they are used are better understood. We argue that contextual mapping shows that among and within nation-States, the concept of sovereignty is used as an instrument by which to establish and maintain authority. We may define nation-States by four essential characteristics. First, and according to U.N. SCOR 1948, traditional international law requires a State to control a territorial base with determinable boundaries.⁴⁹⁶ Second, a State is required to control a population connected by solidarity, loyalty, and primary notions of group affiliation and identity.⁴⁹⁷ Third, it is the related aspect of internal governance that requires a controlling internal power and competencies.⁴⁹⁸ The fourth traditional criterion is the requirement of a controlling power to represent the State or territorially organized body politic in the international environment. However, the four traditional criteria obscure what is arguably the most vital building block of the “State”; how authority is constituted. Contextual mapping clarifies that process.

A. The New Haven Approach: Empirical and Normative Integration

The New Haven School identifies three fundamental processes of contextual mapping: the social process, the power process, and the

495. See generally *supra* notes 25 and 461. (Consisting initially of Harold Lasswell, Myres McDougal, and their colleagues, the New Haven School seeks to illumine the world political process by ascertaining and examining meaningful cultural, financial, psychological, and emblematic factors that lay beneath social behaviors. To track this examination, the New Haven School created a comprehensive contextual mapping system of human social structures.)

496. U.N. SCOR, 383d mtg. Supp. No. 128 at 9–12, U.N. Doc. S/P.V. 383 (Dec. 2, 1948). Jessup, Phillip, U.S. Representative to the Security Council, remarked on the definition of a State to the U.N. that: “the reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some position of the earth’s surface which its people inhabit and over which its government exercises authority.”

497. George Simmel, *Social Interaction as the Definition of the Group in Time and Space*, in *INTRODUCTION TO THE SCIENCE OF SOCIOLOGY* 348, 348 (Robert E. Park & Ernest W. Burgess eds., 3d ed. 1969). This emerging human element is the foundation of community norm generation.

498. Henry T. Wright, *Toward an Explanation of the Origin of the State*, in *EXPLANATION OF PREHISTORIC CHANGE* 215, 217 (James N. Hill ed., 1977) (citing Robert L. Carneiro, *A Theory of the Origin of the State*, 169 *Sci.* 733 (1970)). A State may be characterized as “an autonomous territorial and political unit having a central government with coercive power over men and wealth.” A State may be identified by its ability to defend itself against external international pressures or conflicts.

constitutive process.⁴⁹⁹ The social process is simply the activity of human beings seeking, through institutions, to promote their values. The power process is a specialized aspect of the social process; it is the activity of human beings pursuing power through institutions. The constitutive process is an aspect of the power process; it is the process by which institutions for the management of power are effectively and authoritatively developed. The constitutive process is the creation of reasonably predictable expectations about the allocation of fundamental decision-making authority. When the power process is mapped onto the constitutive process, we begin to observe the emergence of authority in constituting fundamental power arrangements, where authority is understood, in contradistinction from power, as having a normative element. To illustrate, any community exhibits contestations for power that may take the form of violent rebellions or revolution. The winners will seek to “constitute” or institutionalize their authority.⁵⁰⁰ They may have won a battle, but winning the peace and stabilizing their power basis may require more concrete formulations of the “authoritative” and “controlling” aspects of power. Even if no clear winner emerges from the conflict, the contesting parties may see that stabilizing their claims and expectations about power is in their mutual self-interest. This is because stabilizing expectations about how the basic institutions of decision are established and continuously sustained are vital to the constitution of power and its concurrent and subsequent “recognition.”⁵⁰¹ From an empirical view, constitutions, written or otherwise, are nothing but codified expectations of authority and stability in contradistinction to the

499. See generally HAROLD D. LASSWELL & MYRES S. MCDUGAL, *supra* note 176 (Decisions which identify and characterize the different authoritative decision makers, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for making the different kinds of decisions, and secure the continuous performance of all the different kinds of decision functions necessary to making and administering general community policy.).

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

501. See MYRES MCDUGAL & MICHAEL W. REISMAN, *INTERNATIONAL LAW ESSAYS* (1981) (discussing the three aspects of prescriptive communication that essentially convey legal norms because they designate policy that both emanates from a source of authority and creates an expectation in the target audience that the policy content of the communication is intended to control).

prospect of continuous conflict over how power and authority are to be constituted and exercised.⁵⁰² Conflict and its polar opposite, collaboration, are present in all forms of social organization.⁵⁰³ Even when authority is provided for in a formal constitution, there will always be conflict regarding the precise allocations of power and competence. Even when the high intensity violent conflict is contained, the settlement will be fraught with contestations for power. Conflict cannot be banished from human relations, but its form can change. Often, post-conflict settlements generate situations of constructive conflict. Thus, some forms of conflict may be socially beneficial.

B. *The Map and Markers of the Global Social Process*

The work of McDougal, Reisman, and Willard identifies the markers used to map the social process context.⁵⁰⁴ Lasswell and McDougal provide an extensively developed map of the Social Process Context of Law.⁵⁰⁵ The first marker is the identification of participants.⁵⁰⁶ These include the governmental groups, including national and transnational; and the nongovernmental groups, which includes political parties, pressure groups and private associations; and finally individuals.⁵⁰⁷ These participants emerge with subjectivities, which are mark as perspectives, that include the markers of identity, claim, and expectation.⁵⁰⁸ Claiming includes demands for all the central values in social organization such as power, respect, enlightenment, wealth, skill, well-being, skill, rectitude,

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

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

504. Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988). This article provides the most comprehensive map of the Social Process Context of Law. From the perspective of the New Haven School, international lawmaking, or prescription is seen as a process of communication involving a communicator and a target audience. The substance of this communication functions as signs or symbols of policy content, symbols of authority, and symbols of controlling intention.

505. See MYRES S. MCDUGAL & HAROLD D. LASSWELL, *supra* note 176 at 336. This source also provides an extensively developed map of the Social Process Context of Law.

506. *Id.*

507. *Id.*

508. *Id.*

and affection.⁵⁰⁹ All subjectivities implicated in human perspectives may result in claims generating problems, which require social responses.⁵¹⁰ These problems related to subjectivities are located in identifiable situational context⁵¹¹—geographic, temporal, institutionalization and crisis.⁵¹² Each of these situational contexts will influence the efficacy and realism of the claims of perspective. In order to proceed with the claims of perspective in different situations, the claimant must have some access to bases of power to give the claim a sense of efficacy and realism.⁵¹³ In law, it is the skill in the mobilization of authority, as base of power, which is helpful. However, any value may not only be sought for its own sake but may serve as a base of power to facilitate the realization of a claimed perspective.⁵¹⁴ The participant mobilizing bases of power must still use available strategies to achieve the satisfaction of demand.⁵¹⁵ In general, these strategies include the following: diplomatic, ideological, economic, and military.⁵¹⁶ In short, strategies may be persuasive or coercive. The penultimate marker identifies the outcomes of interaction between perspectives, values, strategies, and institutions.⁵¹⁷ These outcomes reflect upon the production, conservation, distribution, and consumption of all values.⁵¹⁸ The final marker requires the identification of the effects of social interaction on social process in terms of the shaping and sharing of values.⁵¹⁹ One of the major outcomes and effects of social interaction concerns specialized feature of the social

509. *Id.*510. *Id.*511. *Id.*512. *Id.*513. *Id.*; See generally Myres S. McDougal et al., *supra* note 43 (A core philosophy of the New Haven School is that in order to count as law, international law must have a prescriptive policy content, it must be accompanied by symbols or signs indicative of widespread community acceptance, and it must be accompanied by a conception that some institutionalized control exists to ensure that the prescribed law is real.)514. *Id.*; see also Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 9 (1959). The New Haven School is not concerned with formal structures of government. It instead remains focused on policy so that it can explore the interplay between law and the world community through the lens of social processes. The New Haven School explores the processes of decision-making with specific regard to the legal process, by which the authors meant the making of authoritative and controlling decisions.515. *Id.*516. *Id.*517. *Id.*518. *Id.*519. *Id.*

process specialized to the production and distribution of power; the identifiable power process.⁵²⁰

COMMUNITY PROCESS						
I. Participants	II. Perspectives	III. Situations	IV. Strategies	V. Base Values	VI. Outcomes	VII. Effects
I. Group A. Governmental (1) National (2) Transnational B. Nongovernmental (1) Political Parties (2) Pressure Groups (3) Private Assoc. 2. Individual	1. Demands (1) Power (2) Respect (3) Enlightenment (4) Wealth (5) Well-being (6) Skill (7) Revenge (8) Affection 2. Identifications 3. Expectations	1. Geographic 2. Temporal 3. Institutionalization 4. Crisis	1. Diplomatic 2. Ideological 3. Economic 4. Military	(When values perform a power function)	Generating Problems of 1. Production 2. Conservation 3. Distribution 4. Consumption	Effects on social process include all values. Most critical problems of power, decision, and organizing power authoritatively. This in turn will effect the production and distribution of all values other than power.

C. The Map and Markers of the World Power Process

The World Power Process includes claims to become sovereign, to remain sovereign, and to change or realign sovereign competence.⁵²¹ Mapping this process requires the identification of operative participants in the world social and power processes, their perspectives, demands, and expectations, their bases of power, the situations in which they operate, their general strategies for action, and the basic outcomes and effects of politically conditioned action.⁵²² One of the major outcomes of the process of effective power has been the creation and maintenance of the institutions of authoritative decision-making.⁵²³ Placing the concept of

520. *Id.*

521. *Id.*

522. *Id.*

523. *Id.*; see also Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decisions*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* (C. Black & R. Falk eds., 1969), reprinted in MYRES S. McDOUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (1981). The founding members of Yale's New Haven School examined how governing hegemony manipulate social development and world public order. Discusses three aspects of prescriptive communication that essentially convey legal norms because they designate policy that

sovereignty within the map of the social, power, and constitutive processes, we find that sovereignty reflects the allocation of fundamental decision-making competencies about the basic institutions of governance itself.⁵²⁴ Within a nation-State, it is the authorization and recognition of persons or institutions competent to make basic decisions about governing power at all levels.⁵²⁵ On the international stage, the stabilization of expectations in political bodies with effective control over populations, territorial bases, as well as over the instruments of internal governance and external recognition leads to the creation of sovereignty with independence and international legal personality.⁵²⁶ The term "sovereignty," by itself, gives us no clues as to its creation, how it is maintained, its changing character, or how it is terminated. The empirical focus of contextual mapping may provide a useful bridge between the different disciplines and cultural contexts in which the term is used, often abused, and certainly misunderstood.⁵²⁷ The sovereignty idea is a critical component of the processes by which authority and control are institutionalized in different contexts, from the Global Constitutional Process to the National and Local Constitutional Processes.⁵²⁸ An important insight into both theory and the practice of sovereignty is that a precise meaning is still elusive. This may reflect the tough reality that power at all levels is a contested matter.⁵²⁹ Additionally, the salience of authority is as contested as the nature of power.⁵³⁰ Whether this is a problem that may be solved by conceptual/analytical analysis or whether, as suggested by the theorists of the New Haven approach, the approach should be empirical using the

both emanates from a source of authority and creates an expectation in the target audience that the policy content of the communication is intended to control.

524. *Id.*

525. *Id.*

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

527. *Id.*; see also MCDUGAL & LASSWELL, *supra* note 176. They offer a configurative conception of jurisprudence that is the end result of an authoritative decision-making process. They argue that a scientifically grounded answer to any policy-oriented problem can be reached that might promote the common interest to achieve a world order based on fundamental principles of human dignity. Scholars and policymakers regard their approach to decision-making as a rigorous one embedded in a social context.

528. *Id.*

529. *Id.*

530. *Id.*

techniques of contextual mapping to secure a more precise contextually defined description and justification of the sovereignty concept, is a matter for future theoretical speculation.

According to McDougal and Reisman,⁵³¹ expanding on Lasswell and Kaplan,⁵³² the global power process is an outcome of the global social process, which generates claims about the shaping and the sharing of power. The relevant markers start with the marker that identifies *Participants*. Participants include groups that are governmental non state groups, i.e. the individual.⁵³³ These groups may be national or transnational. They include groups that are non-governmental, pressure groups as well as the myriad global and national associations of civil society. The next marker focuses on the *Power* directed subjectivities of both groups and individual participants in the global power process. These subjectivities comprise the *Perspectives* of claiming or demanding power to participate in the shaping and sharing of power and in the maintenance of the processes of authoritative decision-making. Perspectives also include claims to identification that have power implications as well as claims to perspectives of expectations that implicate the shaping and the sharing of power. The actions implicating the perspectives of power occur in *Arenas* which are the same as those marked in the social process. The next marker identifies the *Basis of Power* that the claimants and contestants for power may deploy. They require that all values that the claimant has access to or control over may be used as a base to advance the claim with regard the shaping and sharing of power. Power may be a base of power to get more power. Wealth may be used to get power and all other values, such as respect, enlightenment, health, and well-being. Affection and rectitude may also be used as bases to enhance the power position. The next marker focuses on the *Strategies* of the use of power which are usually strategies of coercion or persuasion. They include at the global level the strategies of diplomacy, ideology, economy and military values. The penultimate marker is one that generates the process of decision-making since power can only be deployed as a function of decision. The outcomes of the power process will be decision and its functions which include intelligence, promotion, prescription, invocation, application, termination and appraisal. The final marker for a description of the power process lies in the identification of its *Effects* on public order as well as the elements of

531. *Id.*; see also Myres S. McDougal & W. Michael Reisman, *THE WORLD PROCESS OF EFFECTIVE POWER: THE GLOBAL WAR SYSTEM, POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW* (1985).

532. *Id.*; see also Harold D. Lasswell & Abraham Kaplan, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL ENQUIRY* (1950).

533. *Id.*; see also W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L. L. 1 (1973).

stability and change in it. This map is developed in greater detail in Lasswell and McDougall.⁵³⁴

EFFECTIVE POWER PROCESS						
Participants	Perspectives	Arenas	Bases of Power	Strategies	Outcomes	Effects
1. Group A. Governmental (1) National (2) Transnational B. Nongovernmental (1) Political Parties (2) Pressure Groups (3) Global and National Civil Society 2. Individual	1. Demands To participate in the shaping and sharing of power. For maintenance of processes of authoritative decision. 2. Identification 3. Expectations	(Same as Community Process)	(All Values)	1. Diplomatic 2. Ideological 3. Economic 4. Military	Decision: 1. Intelligence 2. Promoting 3. Presenting 4. Invoking 5. Applying 6. Terminating 7. Appraising	1. Consequences for Public Order 2. Changes in Participants

D. Map and Markers of the Global Constitutive Process

The constitutive process is an outcome of the power process.⁵³⁵ It is a continuous process but it does not render irrelevant the similarly continuing process of conflict in accordance with the constitution. There is an intuitive, ongoing relationship between contestations for power and the constituting and stabilizing of such contestations. The continuing constitutive process shapes communication regarding conflict management and collaboration to establish and maintain the basic political and juridical institutions of effective and authoritative decision-making.⁵³⁶ One of the most important outcomes of the power process is the patterns of communication regarding conflict and possible collaboration. The understandings generated by power brokers in their contestations for power frequently involve communications and understandings about the limits, constitution, and uses of power for collaboration rather than

534. *Id.*; see also MYRES S. MCDUGAL & HAROLD D. LASSWELL, *supra* note 176 at 147-77; see also MYRES S. MCDUGAL & HAROLD D. LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, VOL. II, pp. 1439-1475 (1992) (A detailed development of the map of the power process is provided in Appendix IV, titled *The Community Power Process: An Outline for Policy-Oriented Inquiry*. *Id.* at 1439-88.)

535. For a summary of the map of the constitutive process, see MYRES S. MCDUGAL & HAROLD D. LASSWELL, VOL. II, *supra* note 534, at 1475-88.

536. *Id.*; see generally Myres S. McDougal et al., *supra* note 43.

conflict. From an observer's point of view, a central feature of what is called "constitutional law" is that it is a way of institutionalizing expectations relating to the management of power in the basic institutions of authoritative and controlling decision-making.⁵³⁷ The understandings that emerge from the power process reflect the development, however imperfect, of cultural forms that seek to constrain excessive, destructive conflicts and structure conflicts productively. Practical frameworks of communication and collaboration are generated, and basic human expectations that, under scrutiny, may reveal a "living" constitutional arrangement where cultural expectations of how decision-making is fundamentally interwoven with social organization are actually or behaviorally constitutionalized.⁵³⁸ This might happen without a written constitution and still be an effective instrument of constitutive authority. Alternatively, the outcomes of social conflict, such as civil war, anti-colonial wars, or agitation for self-determination, might lead to the formulation of written expectations about the management of basic decision-making competences in the political culture. In short, conflict sometimes provokes the creation of a written constitution. On the international stage, wars and multi-State conflicts have historically stimulated the development of regional compacts and mutual understandings.⁵³⁹ Indeed, perhaps the clearest example yet of a global compact representing the parties' common interest is the U.N. Charter. One of the most important outcomes of the global constitutive and power process is the creation of the sovereign State.

As indicated above, the constitutive process is an outcome of the power process and the critical outcome of the power process is the process of decision-making according to power and decision function.⁵⁴⁰ The constitutive process emerges from the understandings of the dominant

537. *Id.*; see also MYRES S. MCDUGAL & HAROLD D. LASSWELL, VOL. II, *supra* note 534, at 1489–1526 (THE APPLICATION OF CONSTITUTIVE PRESCRIPTION: AN ADDENDUM TO JUSTICE CARDOZO, APPENDIX V) (examining the way on which sovereign constituted authority develops procedures for grounding value judgments in instances of particular application). These principles are applied to the challenges of sovereign decision-making implicating human rights decision-making.

538. *Id.*; see also MYRES S. MCDUGAL & HAROLD D. LASSWELL, VOL. II, *supra* note 534, at 1527–64 (demonstrating the importance of sovereign authority in global public order developing principles of content and procedure for giving practical application to international human rights).

539. *Id.*; see also M.S. McDougal & H.D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959). The School's lead scholars suggest that international law is a "world constitutive process of authoritative decision" perhaps referring to existing legal regimes such as the U.N. Charter. The goal of international law, the School's founders argue, is the establishment of world public order by instituting regimes of effective control and moving away from existing regimes of ineffective control and authority.

540. *Id.*

claimants to power. Those understandings reflect expectations about how decisions are to be authorized and allocated for the purpose of vesting those decisions with a degree of “authorization.” This is the constitutive process.⁵⁴¹ The markers for the purpose of mapping the global constitutive process start with the marker of *participation*.⁵⁴² This marker covers the same range of participants as the social process. The critical indicators of participation reflect under inclusivity of the process and the assignment of responsibility. The second marker touches on the subjectivities of *perspectives*.⁵⁴³ The perspective of demand focuses on claims that are directly toward the clarification of the common interest of the community and focuses on the degree of inclusivity or exclusivity involved in the process of clarifying the common interest. This marker also requires a preference for inclusivity in the clarification of the common interest and the rejection of special interests redefining the community interests. The perspectives of identification require an identification with the entire community. The perspectives of expectation require that it be contextual, realistic, and rational. The perspectives of expectation also recognize that constitutive expectations are complementary in character and therefore require some supplementation to strengthen and support fundamental community expectations about the constitution of power.⁵⁴⁴

From the markers that touch on participants and their subjectivities (subjectivities of identification, demand and expectation) we now mark the *arenas* within which power condition participants interact.⁵⁴⁵ Lasswell and McDougal identified the arenas of the constitutive process, which are socially important for the institutional and geographic reach.⁵⁴⁶ At the level of institutionalization, the constitutive process generates institutions of decision that are legislative, judicial, executive, and administrative. The reach of the constitutive process in geographic terms touches on the problems of the degree of centrality and the reach of authority to the periphery.⁵⁴⁷ This process has an important temporal

541. *Id.* For a concise summary of the constitutive process and the overriding principles that provide guidance in understanding this process, see MYRES S. MCDUGAL & HAROLD D. LASSWELL, VOL. II, *supra* note 534, at 1131–54.

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*

dimension, which may be random and occasional or sustained and continuous. The geographic and temporal arena of the constitutive process is a crucial component of the territorially organized sovereign state. Another important marker is the marker of *crisis*.⁵⁴⁸ Constitutive process claims are claims about power and therefore represent the prospect of the clash of power and conflict. Decision-making in this context has to account for the effects of crisis on decision-making. A critical dimension of the constitutive process is the issue of *access*. The question of whether access is open and or compulsory indicates a great deal about the nature and quality of the constitutional culture. The *bases of power* are bases that reflect decision-making and its invocation that are both authoritative and controlling. The *strategies* are essentially the same as community process. Detailed procedures implicating specialized types of decision-making are an important part of the strategies of the constitutive process. The penultimate marker refers to *outcomes*. The outcomes of constituting power in effect vest power with authority. One of the outcomes of constitutionalizing power and authority in a territorially organized body politic is the outcome of sovereign competence. The last marker reflects on the *effects*. Clearly the constitutive process has important consequences for the system of public order. One of the important outcomes is the outcome of sovereign nation State competence. The critical question is whether the dominance of the sovereign nation State will endure from a global perspective.

548. *Id.*

THE MAP OF THE CONSTITUTIVE PROCESS						
I. Participation	II. Perspectives	III. Arenas	IV. Bases of Power	V. Strategies	VI. Outcomes	VII. Effects
(Same as Community Process) Inclusivity Responsibility	1. Demands A. Directed toward classification of common interests (a) inclusive (b) exclusive B. Rejection of special interests 2. Identifications Degree of identification with whose community 3. Expectations - Contextual - Realistic - Rational 4. Interests Complementary character plus supporting aspects	1. Establishment A. Institutionalization Legislative Executive Judicial Administrative B. Geographic Central Peripheral C. Temporal Occasional Continuous D. Crisis 2. Access A. Open B. Compulsory 1. Authoritative 2. Constraining	(Same as Effective Power Process)	(Same as Community Process)	(Detailed Procedure specialized to various types of decision) 1. Sovereign Nation States 2. Political Parties and Processes Groups 3. International Governmental Organizations 4. The United Nations 5. Regional Governmental Organizations 6. African Union 7. European Union 8. Organization of American States 9. Arab League 10. World Bank 11. IMF 12. Multinational Corporations 13. IGO's 14. The Individual	1. Consequence for Public Order 2. Changes in Participants

