

Chapter 2

Sovereign Equality and Non-Liberal Regimes

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Abstract A quarter-century ago in the *Nicaragua* judgment, the International Court of Justice insisted that to disallow a state's adherence to any particular governmental doctrine 'would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State' (para 263). The Court invoked the 1970 Friendly Relations Declaration and related documents that 'envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies' (para 264). Although the continued relevance of this model of sovereign equality has since been called into question – above all, in the name of human rights, international criminal justice, and the 'responsibility to protect' – no systematic replacement has emerged. Notwithstanding some modification and erosion, the sovereign equality principle continues to have significant (and worthy) implications for legal relations between liberal and non-liberal states.

Keywords Sovereignty • Sovereign equality • Non-intervention • Immunity • *Jus Cogens*

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2.1 Introduction

The concept of sovereign equality that grounds the international legal order presents a series of puzzles and paradoxes. The term itself is semantically inept: it demands a reciprocal renunciation of the same unlimited authority that it nominally invokes. Yet, the complexities run far deeper. Not only are a state's legally acknowledged prerogatives to be limited by the identical prerogatives of all other members of the state system, but that system's reconciliation of equal sovereigns has its own distinctive *telos*. The system does not merely acknowledge, but also affirmatively protects and not infrequently establishes the sovereignty of its members (in cases of decolonization, secession, and state dissolution), and distinguishes authentic from inauthentic articulations of sovereign will (in disallowing usurper regimes from exercising a state's sovereign prerogatives).¹ To do so, it needs to be guided by a substantive vision.

As Pieter Kooijmans noted nearly a half-century ago, sovereign equality must be understood as part of a larger project of international community, for a mere 'free association of separate, individual states' is incompatible with 'the existence of a law that stands above the states.'² Yet, even where the international legal order regards a given exercise of state authority as a violation of international law and authorizes countermeasures to induce compliance, that order may continue to acknowledge the ultimate implementation of its own demands as 'indisputably reserved to the competence of the state.'³ Thus, an understanding of sovereign equality requires nothing less than an understanding of the complex of purposes, principles, and policies embodied in the international legal order as a whole.

The modern doctrine of sovereign equality is a product of a world where consensus on political morality is elusive. However true it may be that, as David Mitrany famously proposed, 'the problem of our time is not how to keep nations peacefully apart but how to bring them actively together,'⁴ keeping nations

¹ For a book-length examination of the international legal order's responses to perceived inauthentic articulations of sovereign will, see Roth 1999. Although skeptical about the liberal-democratic legitimism touted by such scholars as Franck (Franck 1992), and Fox (Fox 1992), the book details and analyzes a range of instances in which a ruling apparatus, albeit exercising 'effective control through internal processes', has, by virtue of its perceived unrepresentativeness, been denied legal standing to assert rights, incur obligations, and confer immunities on behalf of the sovereign state.

² Kooijmans 1964, at 247.

³ Kooijmans 1964, at 209-210.

⁴ Mitrany 1966, at 28.

peacefully apart is indispensable to bringing them actively together. In the words of Robert Jackson, ‘perhaps the most fundamental [concern of modern international society] has been ... to confine religious and ideological *weltanschauungen* within the territorial cages of national borders’, the goal being ‘to prevent unnecessary confrontations and collisions between different states that are inspired and driven by the assertion of their own preferred values.’⁵ The Charter and its subsequent glosses thus reconcile communal purpose with guardedness about unilateral invocations of universal principles. The United Nations Charter’s embrace of ‘the principle of ... sovereign equality’ derives directly from the purpose ‘[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.’⁶

Accordingly, over a quarter-century ago in the *Nicaragua* judgment, the International Court of Justice insisted that to disallow a state’s adherence to any particular governmental doctrine ‘would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.’⁷ The Court invoked the 1970 Friendly Relations Declaration and related documents that ‘envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies’.⁸

In the current period, however, the continued relevance of this model of sovereign equality has since been called into question. Putting aside the uncertain juridical impact of the increased role of non-state actors in international relations, new developments in human rights, international criminal justice, and the ‘responsibility to protect’ have come to challenge the premise that all states equally possess a core set of inviolabilities. The international order’s pluralism in regard to what counts as legitimate and just internal public order – never truly unbounded – has narrowed significantly in the post-Cold War era. This narrowing is reflected not only in political pronouncements and formal instruments, but above all in failures of the dogs to bark⁹: intrusive measures that in past eras would have

⁵ Jackson 2000, at 368.

⁶ 1945 Charter of the United Nations, 1 UNTS XVI, arts. 2(1) and 1(2). Owing to its normative foundations, sovereign equality as conceived in the Charter precludes any prerogative (however ‘equal’) to impose the sovereign will of one state upon another; sovereignty as freedom gives way to sovereignty as exclusivity of territorial control. See Charter of the United Nations, arts. 2(4) and 2(7). Moreover, this post-World War II scheme of sovereign rights, based on a logic of states as manifestations of the self-determination of ‘peoples’, has from its inception entailed responsibility for observance of human rights, Charter of the United Nations, arts. 1(3), 55(c) and 56, even though nothing in the Charter’s language conditions sovereign rights on external judgments about whether sovereign responsibilities have been met.

⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ, Jurisdiction and Admissibility, Judgment of 26 November 1984, para 263.

⁸ *Ibid.*, para 264.

⁹ The failure of a dog to bark was a famous clue in the Sherlock Holmes mystery, ‘Silver Blaze’. Doyle 1967, at 277 (indicating that a horse was stolen by someone familiar to the dog).

drawn noisy opposition in international fora are today met with acquiescence, if not express approval.

Going forward, institutions purporting to implement international legal norms face a fundamental dilemma: Will they construe international law as a framework for accommodation among bearers of diverse conceptions – both liberal and non-liberal – of internal public order, or will they construe it as a device for imposition of a predominant vision of public order?¹⁰

The present article will specify the legal implications of sovereign equality in a pluralistic global order that prioritizes constraint on cross-border impositions, and will highlight the growing challenges to the doctrine in an era in which pluralism has diminished salience. It will argue that, although sovereign equality has been increasingly compromised, no systematic replacement has emerged, leaving many of the patterns of state practice and *opinio juris* inspired by the pluralistic vision essentially intact. Notwithstanding both modification and erosion of the sovereign equality framework, the underlying principle continues to have significant implications for positive legal relations between liberal and non-liberal states. Moreover, the discussion below will contend, the principle embodies a vision of global order that – appropriately modified – remains both morally and prudentially defensible.

2.2 Sovereign Equality's Three Legal Presumptions

The terms sovereignty and sovereign equality, historically and to the present day, have admitted of far too many usages to catalog. In this article, sovereign equality denotes the conception of state sovereignty embedded within the UN Charter-based order – that is, sovereignty within international law, rather than against it. The doctrine embodies, not a mere aggregation of the rules produced from time to time by the concurrent wills of individual states, but an animating vision of global order traceable to the *opinio juris* of ‘the international community of states as a whole.’ The doctrine reconciles national and supra-national authority on the basis of substantive principles attributable to that community – principles that are, of course, subject to change as the underlying conditions of international order develop.

Pieter Kooijmans sketched the basic model in his 1964 work on *The Doctrine of the Legal Equality of States*. In general, the state is ‘exclusively entitled to draw up rules for the internal sphere’, whereas ‘in its external relations it is subject only to the international legal order and not also to another, national, legal order’.¹¹ Yet, sovereignty is understood to be a matter of ‘function’ rather than of ‘concrete

¹⁰ Gerry Simpson has elaborated a similar contrast between the pluralist vision associated with the Charter and the ‘liberal anti-pluralism’ of a set of leading U.S.-based international law scholars (i.e., Thomas M. Franck, Anne-Marie Slaughter, W. Michael Reisman, and Fernando Tesón), Simpson 2001. For related defenses of sovereign prerogative grounded in a qualified pluralism, see Cohen 2004; Kingsbury 1998.

¹¹ Kooijmans 1964, at 218, approvingly citing Freiherr von der Heydte 1958.

rights'; the particular rights associated with sovereignty are 'determined by historical events and therefore variable'. What endures is the 'fundamental relationship upon which those rights are based', a relationship that 'will continue to exist, as long as ... the structure of international society continues to exist in its present form.'¹² In this structure, 'the particular function of the state is to look after the establishment of a legal order for the benefit of its subjects within the internal sphere'; notwithstanding its embeddedness in the international order, 'the state, on whose cooperation the international legal order still depends so greatly, will not have itself pushed into the background.'¹³

The distinctive principles underlying the Charter-based conception of sovereign equality, reflected most prominently in the UN General Assembly's glosses on Charter norms – and above all, in the 1970 Friendly Relations Declaration – were shaped to a considerable extent by East–West and North–South dynamics over the generation immediately following both the stabilization of the Cold War rivalry and the achievement of decolonization. The principles include distrust of unilateral cross-border exercises of power (including those rationalized by reference to commonly-held values) and respect for the self-determination of territorially-based political communities (including those economically challenged, politically crisis-prone, and militarily vulnerable units that had emerged from colonialism).

The resultant emphasis was on the duty of non-intervention, characterized in the Friendly Relations Declaration as correlative of every State's 'inalienable right to choose its political, economic, social and cultural systems.'¹⁴ Contrary to what is sometimes imagined, the 'State' here referred not directly to the ruling apparatus that exercises effective control through internal processes, but to the underlying territorial political community in whose name that apparatus governs. The 'inalienable right' is the post-decolonization successor to the previously proclaimed right of all (including colonized) 'peoples' to 'freely determine their political status and freely pursue their economic, social, and cultural development.'¹⁵ The idea was that the territorial political community must work out its internal conflicts, however raggedly, without foreign (and especially neo-colonial) interference. Deference to the outcome of internal conflict was thought to embody respect for popular self-determination under circumstances in which the question of legitimate governance lacked uncontested criteria and impartial arbiters – though this deference has never been absolute in practice, and has become less so over time.¹⁶

¹² Koopmans 1964, at 219.

¹³ Ibid., at 204.

¹⁴ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (hereafter 'Friendly Relations Declaration'), UNGA Res. 2625, 24 October 1970 (adopted without a vote).

¹⁵ UNGA Res. 1514 (XV), 14 December 1960 (adopted eighty-nine to none, with nine abstentions); International Covenant on Civil and Political Rights (hereafter ICCPR), 999 UNTS 171, art. 1(1).

¹⁶ See generally Roth 1999, 2011.

In juridical terms, the modern doctrine of sovereign equality of states boils down to three strong, but not irrebuttable, legal presumptions: (1) a state is presumed to be obligated only to the extent of its actual or constructive consent; (2) a state's obligations, while fully binding internationally on the state as a corporative entity, are presumed to have legal effect within the state only to the extent that domestic law has incorporated them; and (3) the inviolability of a state's territorial integrity and political independence, as against the threat or use of force or 'extreme economic or political coercion', is presumed to withstand even the state's violation of international legal norms.¹⁷

The first presumption is the most familiar. Lawmaking in the international order remains presumptively predicated on the notional 'consent' of the individual states subject to it. No international legislature has authority to impose norms on a non-consenting state. To be sure, consent to international lawmaking is often imputed through ingenious methodological devices, rather than derived from an actual expression of governmental will. Nonetheless, a state's freedom of action and exclusivity of territorial control remain the default positions that a claim of international legal obligation must, by some authoritative justification, overcome.¹⁸ Relatedly, amenability to international adjudication is subject to rigorous standards of formal consent, and domestic-court adjudication of a foreign state's breach of international obligation is largely blocked by international norms of sovereign immunity.¹⁹

Second, international and domestic systems operate on different legal planes, and their interconnections are highly differentiated and complex. To be sure, a state 'may not invoke the provisions of its internal law as justification for its failure to perform' its international legal obligations.²⁰ Yet, a state's adoption of international obligations is not necessarily self-executing internally; it is the domestic legal order that dictates which organs will be responsible for implementing the obligation, and the manner by which implementation will be carried out. More importantly, the undertaking of an international obligation need not in itself, from the standpoint of domestic law, entail renunciation of the ultimate authority to violate the obligation for the sake of what domestically authoritative organs deem, unilaterally, to be the national interest – thereby incurring whatever sanctions the

¹⁷ I have devoted a book to these presumptions and their moral justifications, Roth 2011. The present section synthesizes some of the basic points of Chapters I and III.

¹⁸ Though substantially misleading even when it was first articulated, the so-called 'Lotus Principle' remains a viable starting point for international law-finding: '[r]estrictions on the independence of States cannot ... be presumed.' S.S. 'Lotus' (*France v. Turkey*), PCIJ Ser. A, No. 10, 7 September 1927, at 18.

¹⁹ As Kooijmans noted, 'the principle of *par in parem non habet iudicium*, meaning that no state has to subject itself to the jurisdiction of another state, is ... an essential outcome of the structure of international society' (except in respect of the state's commercial transactions). Kooijmans 1964, at 246. See also Higgins 2013.

²⁰ 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 352, art. 27. The provision applies expressly to treaty obligations, but the same principle applies to customary obligations.

international community may duly inflict on the wrongdoing state. Furthermore, an exercise of state authority, albeit in breach of international obligation, may nonetheless generate legal facts cognizable in the international order: certain of international law's own doctrines – including permanent sovereignty over natural resources, *nullum crimen sine lege*, immunity *ratione materiae*, and privileged belligerency – require (at least presumptive) regard for governmental acts that, irrespective of their international unlawfulness, have internal legal validity. Regardless of whether one views interactions of the legal orders through the theoretical lens of 'dualism' or 'monism', there remains a gap – or firewall – for which one must somehow account.

Third, the international system's foundational norms stress the inviolability of a state's territorial integrity and political independence, both as against the threat or use of force and as against extraordinary forms of economic or political coercion.²¹ This inviolability is presumed to hold even where the target state is in breach of international law. Whereas intuition may associate one actor's obligation to obey a norm with another actor's license to do whatever is necessary to effect compliance with the norm, the international order, while providing some scope for recourse in the face of wrongdoing, places durable limits on unilateral cross-border exercises of force and coercion. Apart from the special powers entrusted to the United Nations Security Council under Chapter VII of the Charter, no state or intergovernmental organization has – or even claims – law enforcement authority within the territory of a foreign state.²² Moreover, although the express prohibition was deleted from the final version of the International Law Commission's Articles on State Responsibility, the range of permissible countermeasures still appears to exclude 'extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act.'²³

²¹ See, e.g., Friendly Relations Declaration. 'No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.'

²² 'A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.' Restatement (Third) of Foreign Relations Law of the United States, para 432(2) (1987). See also Jennings and Watts 1992, para 119, at 387-388. ('It is ... a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime.'). The transboundary use of force in self-defense is not properly viewed as an exception, since it is limited to action necessary and proportionate to repulsing an armed attack (or, perhaps, to thwarting an imminently anticipated attack), and so should be regarded as a stop-gap measure rather than as law enforcement.

²³ See International Law Commission, Draft Articles on State Responsibility (1996), UN Doc. A/51/10, art. 50 (b). The ILC's final (2001) version omitted this language, but remained highly restrictive of countermeasures. See International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), art. 49 ('An injured State may only take countermeasures... in order to induce [the wrongdoing] State to comply with its obligations'), art. 51 ('Countermeasures must be commensurate with the injury suffered'), and

The international legal order's primarily horizontal nature explains the paradoxical doctrinal limitations on the imposition of that order's own dictates. Absent centralized instruments of communal will, cross-border enforcement of international norms would ordinarily require unilateral exertions by untrusted (and often untrustworthy) implementers of the collective order. The international order has thus eschewed broad licenses for such cross-border exercises of power, even at the cost of shielding violators of international norms.

The primary beneficiaries of these doctrinal limitations have been weak, often non-liberal, states, and in particular, the lesser developed countries that have historically banded together, in such formations as the Non-Aligned Movement and the Group of 77, to confront the perceived threat of neo-colonialism. Whereas in past eras, the international order made states' standing as sovereign equals contingent on normative requisites,²⁴ the period from the late 1950s to the late 1980s represented a high point of pluralism in the international order, in which the three presumptions were at their strongest. The fruits of that pluralistic era continue to be reflected in authoritative documents, including decisions of the International Court of Justice.

Nonetheless, the bases for rebuttal to the three presumptions are firmly established in positive international law. The principle of state consent, residually manifested in the doctrine of 'persistent objection' that allows a state to resist a crystallizing customary norm, yields in the face of insistent near-consensus – a 'peremptory' norm (*jus cogens*) 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'²⁵ State authority's presumptive mediation of the applicability of international norms gives way to direct effect where the international norm specifies individual penal responsibility, and to the extraterritorial reach of foreign-state courts where treaty or custom establishes universal jurisdiction. And of course, the United Nations Security Council, with nine affirmative votes out of fifteen and the acquiescence of each of the five Permanent Members ('P5'), has virtually unlimited discretion to impose crippling economic sanctions or to authorize the use of force in response to perceived threats to the peace – now authoritatively interpreted to include, under the Responsibility to Protect ('R2P') rubric, localized humanitarian catastrophes. (The P5 veto, while seemingly at odds with the principle of sovereign equality,²⁶ actually reinforces that principle by requiring an extraordinary consensus to overcome the anti-interventionist default position.)

(Footnote 23 continued)

art. 54 (mentioning only 'lawful measures,' rather than countermeasures, in regard to responses by '[a]ny State other than an injured State' to breaches of those obligations recognized in Article 48 as being 'owed to the international community as a whole').

²⁴ See generally Simpson 2004, elaborating the historical tendency of the international system to cast particular states as non-right-bearing outlaws.

²⁵ Vienna Convention on the Law of Treaties, art. 53.

²⁶ Kooijmans, while acknowledging the underlying logic that 'there is not much chance of the guarantee of peace and security if those who have been entrusted with peace and security do not

The crucial question is whether, following the dissipation of familiar Marxist-Leninist and Bandung-nationalist ideological challenges, the resulting absence of a coherent and assertive alternative to liberal-democratic conceptions of public order has so eroded the foundations of global pluralism as to weaken substantially, or even to overturn, the legal presumptions of the sovereign equality-based order. The demise of pluralism augurs expansive interpretations of *jus cogens*, greater scope for extraterritorial impositions of liability predicated on international human rights law, and the relaxation (if not evisceration) of the non-intervention norm. Yet, the problem of untrusted (and untrustworthy) implementers of international legal order remains salient.

2.3 The Expansion of *Jus Cogens* and the Diminution of Pluralism

Notwithstanding consensualism's centrality to the history of modern international law, there is considerable pedigree to the idea that some core set of unquestionable norms is indispensable to the project of international legal order.²⁷ As Kooijmans put it in 1964, there are 'general principles of law [that] are obligatory for all,' and even where they have been 'ignored [in] positive law, ... the legal subject is [not] entitled to ignore them.'²⁸ Thus, international law is widely thought to include, along with the great bulk of '*jus dispositivum*,' a '*jus cogens*' that binds states irrespective of their individual wills. Accord on this point, however, masks lingering dispute about the derivation, content, and legal consequences of that set of peremptory norms.

What norms count as indispensable to international public order ultimately depend on one's conception of the *telos* of that order – in particular, on the extent

(Footnote 26 continued)

agree with each other', found the veto problematic from the standpoint of sovereign equality, since 'any Great Power may now make the application of the law upon itself impossible.' Kooijmans 1964, at 242-243. However, it is problematic to regard the Security Council as a law enforcement organ; it is a political body empowered to respond to threats to the peace by light of its own policy determinations. A violation of international law is neither a necessary nor a sufficient condition of the invocation of Chapter VII powers, and the Security Council's demands upon states need not match any pre-existing legal obligations. A Chapter VII action less resembles domestic law enforcement than it resembles a domestic 'state of exception', and a veto of the latter is not subject to the same objection as a veto of the former.

²⁷ See, e.g., Schwelb 1967, at 949.

²⁸ Kooijmans 1964, at 212. 'In order to avoid boundless skepticism and a merely formal concept of law, it must be conceded that the word "law" contains certain values ... like regularity, balance, equality, authority, respect for the legal subject, etc., ... without which a legal order is unthinkable.' Although these elements in themselves 'lack a precise content', they nonetheless have a 'clear legal meaning' and are 'made concrete in a certain legal order', despite the 'varying character' of law in different places and times. Ibid., at 213.

to which the project is thought to embody a pursuit of objective justice as opposed to a framework for accommodation among actors who cannot be expected to agree about justice. This is not an either/or choice, nor is the balance between these two objectives likely to hold constant as international conditions change. Thus, the states parties to the 1969 Vienna Convention on the Law of Treaties saw fit to acknowledge open-endedly, in the words of Mexico's representative, 'rules which derive from principles that the legal conscience of mankind deemed absolutely essential to the co-existence of the international community at a given stage of its historical development.'²⁹

In recent years, the rhetoric of *jus cogens* has shifted dramatically in its orientation toward the sovereign equality framework. The norm's specification in Article 53 of the Vienna Convention appears to have been contemplated as, above all, a safeguard against treaty terms at odds with sovereign equality that might, given the continued admissibility of disparate leverage (other than the unlawful threat or use of force) in treaty negotiation, result from an imbalance of bargaining power among treaty parties. States from the global East and South welcomed the provision as consistent with their far broader campaign to invalidate 'unequal treaties' associated with neo-colonialism.³⁰ And indeed, probably the most prominent controversial treaty during the lead-up to the Vienna Convention was the 1960 Treaty of Guarantee that subordinated Cypriot independence to a right of unilateral armed intervention by any of the treaty parties – the United Kingdom, Greece, and Turkey – should the inter-communal balance fixed in the state's original constitution be disturbed.³¹ Cyprus's denunciation of the treaty, as inconsistent with the UN Charter's prohibition of the use of force, had received considerable but not overwhelming support in the international community.³²

In recent literature, however, *jus cogens* has come to be associated almost exclusively with human rights, nearly to the point where equal sovereignty, non-intervention, and self-determination go unmentioned.³³ The neglect of the latter is

²⁹ van Hoof 1983, at 153.

³⁰ Schwelb 1967, at 961-962, 966.

³¹ For other examples of treaties called into question, though not officially challenged, see Czaplinski 2006.

³² Schwelb 1967, at 953, citing UNGA Res. 2077 (XX). 8 December 1965, which indirectly condemned the treaty by a less than rousing vote of 47 to 5 with 54 abstentions. See also Doswald-Beck 1986, at 246-247 (detailing the Cypriot government's early objection to the Treaty of Guarantee); MacDonald 1981, at 17 (posing the question of whether the treaty was void since a state cannot contract out sovereignty and at the same time keep it). The Treaty of Guarantee also potentially ran afoul of Article 103 of the UN Charter, but the *jus cogens* provision of the Vienna Convention is stronger, voiding an incompatible treaty entirely. Vienna Convention on the Law of Treaties, art. 53.

³³ See, e.g., Bianchi 2008, at 491-492 ('more revealing is that students, whenever they are asked to come up with examples of peremptory norms, invariably answer either "human rights", without any further qualification, or refer to particular human rights obligations like the prohibition of genocide or torture.').

not accidental, for the authors most typically seek to establish and to expand exceptions precisely to these norms through their invocations of *jus cogens*.³⁴

Along with this association of peremptory norms with human rights comes a tendency to derive *jus cogens* from naturalistic rather than positivistic sources. This entails a substantial departure from Article 53 of the Vienna Convention, which establishes *jus cogens* as a category of positive law,³⁵ rooted (however indefinitely) in the insistence of ‘the international community of states as a whole’.³⁶ Although a modicum of teleological interpretation is inevitable, peremptory norms can most plausibly be read into communal will where they appear indispensable to the functioning of the system of international cooperation.³⁷ Previous versions of naturalistic legal thought, drawing on an anthropomorphic image (now justly discredited) of the state as an organic entity, facilitated the derivation of peremptory norms of just this kind. But more recent natural law thinking is unhinged from the project of international cooperation, and asserts rather the primacy of the individual. And since the UN Charter – the one positivistic source of supranational authority definitely relegating the prerogatives and inviolabilities of the state – assigned human rights a subordinate position in the overall scheme, human rights-oriented scholars have had to draw on other sources for implicit acknowledgment of higher authority.

The rhetorical association of *jus cogens* with natural law and of natural law with human rights tends, in turn, to give the impression that whereas norms reflecting coordination of state interests derive their validity from the will of states, by virtue of which they are mere *jus dispositivum*, moral norms of the international order derive their validity from a higher source, are therefore *jus cogens*. Any such generalization would constitute a fundamental jurisprudential misunderstanding. Moral questions are no less subject to disagreement than other questions; they find provisional resolution, for a particular legal community at a particular time, in the form of positive law. And not all of the international legal community’s answers to moral questions come in the form of the insistent near-consensus that trumps the principle of persistent objection.

Another striking feature of contemporary *jus cogens* rhetoric is that the use of the term is often disconnected from any call for the legal consequences authoritatively associated with its application; the designation frequently serves the lone purpose of trumpeting the moral significance of the norm in question. In reality, *jus*

³⁴ Schwelb’s study of the deliberations on the Vienna Convention notes the irony of the Ecuadorean representative’s effort to list as *jus cogens* norms both respect for human rights and ‘the prohibition of intervention in matters which are essentially within the domestic jurisdiction of states.’ Schwelb 1967, at 965.

³⁵ See Nieto-Navia 2003.

³⁶ Vienna Convention on the Law of Treaties, art. 53.

³⁷ The Vienna Convention *travaux préparatoires* include such descriptions as ‘rules which derive from principles that the legal conscience of mankind deemed absolutely essential to the co-existence of the international community at a given stage of its historical development.’ van Hoof 1983, at 153.

cogens has had few practical uses, its legal consequences seldom being dispositive of any actual legal problem:³⁸ most often, there is no persistent objector to be bound against its will, no offending treaty provision to be voided,³⁹ no exorbitant countermeasure (or other claim of ‘circumstance precluding wrongfulness’) to be condemned as a wrongful derogation,⁴⁰ and, given the turn away from sovereign equality concerns, no ‘illegal situation’ (such as a pretended exercise of sovereignty in violation of norms on the use of force or self-determination) to be denied recognition.⁴¹ A political drawback of such superfluous usage is a debasement of the currency of legal obligation, with *jus cogens* coming to be identified with norms that genuinely require compliance, and *jus dispositivum* with norms that are somehow routinely ‘derogable’.

International bodies have rarely invoked *jus cogens* to bind states against their clearly expressed will. In the most prominent case, the Inter-American Commission on Human Rights in 2002 deemed the juvenile death penalty – and more specifically, the imposition of capital punishment on those convicted of having committed murder at the age of sixteen or seventeen – to violate a norm binding on the United States,⁴² notwithstanding that state’s reservation to the applicable provision of the International Covenant on Civil and Political Rights and its non-ratification of the American Convention on Human Rights and the Convention on the Rights of the Child.⁴³ To its credit, the Commission articulated a rigorous requisite to its determination:

as customary international law rests on the consent of nations, a state that persistently objects to a norm of customary international law is not bound by that norm. Norms of *jus cogens*, on the other hand, derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence. ... Therefore, while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states.⁴⁴

³⁸ In reality, ‘in most ... cases where peremptory norms have been recognized, the legal consequences of this classification were essentially imperceptible.’ Shelton 2006, at 306. Notably, ‘*jus cogens* is a term often used for rhetorical purposes – to confer *pathos* on legal arguments that otherwise would appear less convincing.’ Linderfalk 2007, at 255.

³⁹ Vienna Convention on the Law of Treaties, art. 53.

⁴⁰ Articles on State Responsibility, art. 50(1)(d).

⁴¹ Articles on State Responsibility, art. 41(2).

⁴² A US Supreme Court decision three years later ended this practice. *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴³ *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R., 22 October 2002, Doc. 5 rev. 1, para 913.

⁴⁴ *Ibid.*, at 49-50.

The evidence proffered here was significant,⁴⁵ though not incontrovertible. For example: eleven states had objected to the U.S. ICCPR reservation on this matter, but all of them were Western European states; the Human Rights Committee's General Comment 24 had deemed the U.S. reservation both invalid and severable from the instrument of ratification,⁴⁶ but that General Comment was, in multiple respects (including, but not limited to, its assertion of the severability of reservations likely indispensable to the consent to ratification), less than a model of positivistic rigor;⁴⁷ the right against the juvenile death penalty was 'non-derogable' within the ICCPR's provisions on exigencies of 'public emergency',⁴⁸ but that scheme of non-derogability is conceptually distinct from the requisites of *jus cogens*. Although there could be little question that treaty law, intergovernmental resolutions, and near-universal domestic practice had established eighteen years of age as a limit, the execution of those convicted of having committed aggravated murder at the age of sixteen or seventeen scarcely seemed to jeopardize either the practical or the moral foundations of international order.

If the Inter-American Commission's 2002 assignment of *jus cogens* status to the age-eighteen requisite for capital punishment might be regarded as at the methodological borderline, the following year's Advisory Opinion of the Inter-American Court of Human Rights on the rights of undocumented migrants may be seen to have stepped over the borderline.⁴⁹ While conceding that 'the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights',⁵⁰ the Court went on, without any specific showing of state practice or *opinio juris*, to interpret peremptory norms of equality and non-discrimination as dictating that '[u]ndocumented migrant workers possess the same labor rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice', and that 'States may not subordinate or condition observance of the principle of equality before the law

⁴⁵ Ibid., at 51-76.

⁴⁶ Human Rights Committee, General Comment 24, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994. That General Comment was a thinly veiled response to the provocatively elaborate package of 'Reservations, Understandings, and Declarations' (RUDs) attached to the US instrument of ratification, and it drew a highly vituperative response from the U.S. Department of State.

⁴⁷ Among other provocation assertions, the Committee concluded that 'a State may not reserve the right ... to permit the advocacy of national, racial or religious hatred', even though ICCPR Article 20 is directly at odds with a time-honored, if controverted, conception of the freedom of expression. Ibid, para 8.

⁴⁸ ICCPR, art. 4.

⁴⁹ *Juridical Condition and Rights of the Undocumented Migrants*, Inter-Am. Ct. H.R., Advisory Opinion, OC-18/03, 17 September 2003.

⁵⁰ Ibid., para 119.

and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.⁵¹ In the words of a highly sympathetic commentator, ‘the somewhat axiomatic reasoning of the Court, linked with fairly vague notions of natural law, is unlikely to foster the cause of *jus cogens*, particularly among the sceptics.’⁵²

It is noteworthy that the above examples took aim at the United States, a state that distinguishes itself among powerful states by clearly articulating its non-conforming practices. Broad invocations of *jus cogens* in these instances have a righteous air of ‘speaking truth to power’. It stands to reason, however, that such methodological innovation will end up being most amenable in the longer term to use as a bludgeon against weaker and more marginal states that do not conform to the prevalent liberal-democratic ideology.

2.4 The Expansion of Direct Effect and the Disparagement of the Sovereign Decision

The presumption in favour of state mediation of international law’s application within national territory has unquestionably undergone substantial revision since Kooijmans wrote on *The Doctrine of the Legal Equality of States* in 1964. In keeping with a then-prevalent interpretation of UN Charter Article 2(7)’s proscription of non-intervention in matters ‘essentially within the domestic jurisdiction’, Kooijmans offered the following thoughts on the relationship between international anti-*apartheid* norms and South African public order:

What can the larger community, i.e., the United Nations, do in this instance? It may make all attempts to make South Africa, one of its members, turn back from the course it has taken; it may apply sanctions in the proper cases, but it may never put its decisions in the place of those of the South African government. The care for and the treatment of its subjects is and remains essentially the task of the national authorities and can never – *other than provisionally* – be taken over by the organs of another, i.e., the international community. The latter may point out that a certain legal system is in conflict with the general principles of law; it may never prescribe for the national authorities how they *must* act. The ‘positivization’ of the material directives for this field remains a task that is indisputably reserved to the competence of the state.⁵³

It is difficult to imagine so blunt a statement being offered today, especially in regard to *apartheid*, from which the protections of the sovereign equality order were soon afterward expressly withheld.⁵⁴ In the half-century since, the

⁵¹ Ibid., para 173 (10) and (11).

⁵² Bianchi 2008, at 506.

⁵³ Kooijmans 1964, at 209-210.

⁵⁴ Friendly Relations Declaration, preamble (‘subjection of peoples to alien subjugation, domination and exploitation ... is contrary to the Charter’); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 UNTS 243, (108 states parties as of

international community has established a range of mechanisms, both centralized and decentralized, for direct external implementation of norms where the states in question are unwilling or unable to prevent or redress the most grave atrocities occurring in their territories. Yet, Kooijmans' statement remains largely valid as applied to 'garden-variety' lawbreaking regimes.

There can be little question that most international legal norms are addressed exclusively to states in their corporative capacity, and do not provide for individuals within states to be held liable, even for taking the official decisions to breach their states' obligations. To be sure, the International Military Tribunal at Nuremberg, in famously noting that unlawful state acts are 'committed by men, not by abstract entities', held that '[h]e 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.'⁵⁵ But there is a difference, in this usage, between a state breaching a legal obligation and a state, in purporting to authorize internationally recognized war crimes, 'moving outside its competence' – i.e., acting *ultra vires* of acknowledged sovereign authority. A state's renunciation of a practice does not, in itself, equate to its renunciation of the legal capacity to authorize the practice, and thus to immunize participants in the practice from external exercises of jurisdiction; renunciation of that legal capacity is specific to international criminal law.

The international order cannot be analogized to a federal system of domestic governance, in which something akin to the United States Constitution's Supremacy Clause simply nullifies all exercises of legal authority in contradiction to the overarching scheme. As Kooijmans observed, the idea that '[f]ederal organization need not stop at the state level, but may be carried through to the international level ... is based upon a misunderstanding of the structure of the international society.'⁵⁶

As Louis Henkin starkly put it, '[i]nternational law ... recognizes the power – though not the right – to break a treaty and abide the international consequences.'⁵⁷ This comports with the Bodinian conception of sovereignty: a prince is

(Footnote 54 continued)

2012, though notably excepting the core Western liberal democracies); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res. 36/103, 9 December 1981, (4) (non-intervention norms shall not 'prejudice in any manner the right to self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes').

⁵⁵ International Military Tribunal (Nuremberg), Judgment and Sentence, 1 October 1946, 41 *American Journal of International Law* (1947) 172, at 221.

⁵⁶ Kooijmans 1964, at 233. Kooijmans analogized the relationship of the international and national legal orders to that of the state to 'other human social relationships, such as family, industry, church, etc.': '[e]ach social relationship has its own sphere and ... competences should be executed within this sphere. If the state occupies itself with the regulations in industry or in the church without due regard for the boundaries of its own sphere, it makes an improper inroad on the sphere of competence of business or church.' *Ibid.*, at 206-207.

⁵⁷ Henkin 1972, at 168.

bound by the covenants he undertakes, yet retains the unchallengeable authority to contravene them when, in his unilateral judgment, ‘they cease to satisfy the claims of justice.’⁵⁸ Sovereignty thus does not negate the existence of a legal obligation, but rather consists, above all, in retention of the capacity to act in breach of the obligation, at whatever lawful cost this might entail. As Carl Schmitt put it, ‘[t]he authority to suspend valid law – be it in general or in a specific case – is ... the actual mark of sovereignty’;⁵⁹ Schmitt went so far as to say that ‘[i]f individual states no longer have the power to declare the exception, ... then they no longer enjoy the status of states.’⁶⁰ And while the extent and manner of incorporation of international law into domestic legal systems vary widely, domestic orders typically do, indeed, to one extent or another, contemplate the possibility of authoritative decisions to breach international obligations.

The same act, therefore, can be lawful and unlawful simultaneously – lawful within the domestic system, while unlawful within the international system. One can insist on seeing this phenomenon through the lens of ‘monism’, and thus on characterizing the breaches of international law as unequivocally unlawful, so long as one acknowledges that international law – understood as a framework for accommodation embodying distrust for unilateral implementation of universal norms – does not broadly license external actors to treat the unlawful state acts in question as legal nullities.

Accordingly, the doctrine of immunity *ratione materiae*, or functional immunity, impedes an external court’s exercise of jurisdiction over both current and former state agents for acts that those agents committed inside their national territory within the scope of their governmental functions, except insofar as those acts have been established as international crimes subject to an external system’s jurisdiction.⁶¹ Antonio Cassese construed immunity *ratione materiae*, not as a procedural bar to jurisdiction, but as a ‘substantive defence’, available to ‘any de jure or de facto State agent’ performing official acts, establishing that the ‘violation is not legally imputable to [the agent] but to his state.’⁶² Cassese may have overstated the case slightly; it may be more precise to characterize the doctrine as

⁵⁸ Bodin 1955, at 30.

⁵⁹ Schmitt 1985, at 9.

⁶⁰ Ibid., at 11.

⁶¹ See, e.g., Akande 2004, at 412-413; Akehurst 1972-1973, at 240-244. This immunity follows from the traditional view that ‘[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.’ *Underhill v. Hernandez*, 168 US 250, 252 (1897).

⁶² Cassese 2003, at 266; accord Akande 2004, at 412-415. Indeed, as Hazel Fox has pointed out, even the International Criminal Tribunal for the former Yugoslavia has acknowledged that the immunity *ratione materiae* of state agents trumps the Tribunal’s contempt powers (in response to an official’s failure to comply with a subpoena *duces tecum*). Fox 2003, at 299-300.

coinciding with the limitations of substantive international norms,⁶³ and also as a procedural bar that has substantive implications under particular circumstances.⁶⁴

In anti-pluralist circles, however, this paradoxical phenomenon draws antipathy, at least inasmuch as it affects moral norms of the international order – human rights – as opposed to the mere legal coordination of interests. This antipathy, in turn, is manifested in claims for an additional legal consequence of *jus cogens*. As W. Michael Reisman reports (with no indication of either endorsement or disavowal):

[i]n human rights discourse, *jus cogens* has acquired a much more radical meaning [than that contained in the Vienna Convention on the Law of Treaties], evolving into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity. This new understanding of *jus cogens* renders national law that is inconsistent with it devoid of international and national legal effect, such that national officials who purport to act on the putative authority of that national law may now incur direct international responsibility.⁶⁵

Such claims are not limited to the realm of advocacy rhetoric. The ICTY Trial Chamber in *Prosecutor v. Furundžija* notably posited, as automatic consequences of *jus cogens*, the establishment of universal criminal and civil jurisdiction and the voiding of immunities.⁶⁶ More famously, the 3-2 decision of the first House of Lords panel in the *Pinochet* extradition matter sweepingly nullified the former Chilean dictator's immunity *ratione materiae* on the ground that torture, being a *jus cogens* violation, cannot count in international law as a state function.⁶⁷

These assertions draw encouragement from the increasing prevalence of the ambiguous term '*jus cogens* crimes.'⁶⁸ This term tends to encourage a conflation of *jus cogens* and international crimes – phenomena that do frequently coincide –

⁶³ Fox 2003, at 301.

⁶⁴ Insofar as an individual's criminal or civil liability is dependent on a foreign state's jurisdiction to legislate, that jurisdiction to legislate is blocked for as long as immunity *ratione materiae* exists. It therefore logically follows that in such cases (i.e., in cases where the act did not constitute a fully established international crime when committed), a state waiver of immunity *ratione materiae* cannot have retroactive effect, for in respect of the application of another state's extraterritorial legislation to those acting within the scope of official capacity, it represents a substantive rather than merely procedural bar to prosecution.

⁶⁵ Reisman 2000, at 15, n. 29.

⁶⁶ *Prosecutor v. Furundžija*, Trial Chamber, Case No. IT-95-17/1-T, 10 December 1998, para 155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally delegitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.

⁶⁷ *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet I)*, 1 A.C. 61 (2000). That judgment was vacated after the disclosure of one Law Lord's ties to a human rights group participating in the litigation.

⁶⁸ See, e.g., Bassiouni 1996; Sadat 2006, at 966, n. 31.

notwithstanding that, as the International Law Commission has noted, ‘the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime.’⁶⁹

As a logical matter, a prohibition’s *jus cogens* status in no way implies the same status for the duty to prosecute the offense, and therefore in no way implies that the *jus cogens* character of the offense sweeps away immunities or other limitations on cross-border exercises of power.⁷⁰ Indeed, the great bulk of juridical authority, both on state immunity and on the immunities *ratione personae* and *ratione materiae* of state officials, reaffirms that *jus cogens* alone does not trump immunity.⁷¹

What vitiates the immunities of state officials in international criminal tribunals are the authorizing statutes for those tribunals, and what vitiates the immunity *ratione materiae* (but not *ratione personae*) of state officials in external domestic criminal prosecutions is the manifest establishment, by treaty or custom, of universal penal jurisdiction. Lord Browne-Wilkinson’s lead opinion in the ultimate *Pinochet* judgment – representing the prevailing middle view among the Law Lords – made the immunity *ratione materiae* point as follows:

I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction.⁷²

The international system’s decisive refusal to allow even this carefully grounded rationale to override the immunity *ratione personae* of sitting diplomatic officials is explained in the Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in the ICJ *Arrest Warrant* case:

the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not ipso facto mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by

⁶⁹ International Law Commission, Commentary to the Draft Articles on State Responsibility, UN Doc. A/51/10, 1996, art. 19, para 62, quoted in Byers 1999, at 184–185, n. 95. See also Brown 2001, at 392–393, cautioning against the over-identification of *jus cogens* with universal jurisdiction.

⁷⁰ Ferdinandusse 2006, at 182; Shany 2007, at 867. Indeed, the International Criminal Court Statute seems to counterindicate *jus cogens* status for such prosecutorial obligations, since its call for surrender of suspects expressly yields to states parties’ contrary treaty obligations to non-parties. Rome Statute of the International Criminal Court, 2187 UNTS 90, art. 98.

⁷¹ See *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, ICJ, Merits, Judgment of 3 February 2012, para 95. To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition.’

⁷² *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet III)*, 1 AC 147, 204–05 (2000).

making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials.⁷³

Moreover, even the UK House of Lords has refused to apply its own *Pinochet* international crimes exception to immunity *ratione materiae* in the context of civil litigation against current or former foreign state officials who acted within the scope of official capacity.⁷⁴ Less accepted still is any *jus cogens* or human rights exception to immunity that would subject foreign states themselves to civil litigation in domestic courts.⁷⁵

The limitations on the capacity of a domestic court to impose extraterritorial direct effect on foreign state officials are central to international order conceptualized as a framework of accommodation. Exercises of residual sovereign prerogative reflect moral difference at the moment of decision; states jealously guard ‘the authority to suspend valid law’ in those situations in which the end – potentially associated with the very survival of a system of public order – is deemed to justify presumptively inadmissible means. States have renounced the capacity to authorize acts that do not figure to be useful in this regard – means that most typically, by their very nature (e.g., genocide, crimes against humanity, and gross or systematic violation of the laws and customs of war) embody or suggest ends that are not cognizable in the present international order – but these same states evince reluctance to expose their agents to accountability at the hands of foreign legal systems that lack commitment to the ends of the official acts in question and that act unilaterally. Moreover, from the standpoint of international peace and cooperation, it is a fateful step to license domestic courts to exercise jurisdiction over a foreign-state agent acting inside the latter’s national territory

⁷³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ, Merits, Judgment of 14 February 2002, Separate Opinion of Higgins, Kooijmans, and Buergenthal, para 79.

⁷⁴ *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, 2006 U.K.H.L. 26.

⁷⁵ *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, paras. 93–94. ‘The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State’, and therefore hold even in the face of – because they are uncontradicted by – both *jus cogens* violations and the duty to make reparation. See also *Al-Adsani v. United Kingdom*, ECtHR, No. 35763/97, 21 November 2001. In this case a closely divided Grand Chamber of the European Court of Human Rights held that human rights law does not require a state court to void foreign state immunity in civil suits for torture. The joint dissenting opinion insisted that ‘the *jus cogens* nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules (in this case, those on state immunity) to avoid the consequences of the illegality of its actions.’ *Ibid.*, Joint Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para 3.

within the scope of official capacity; treating a foreign government as an outlaw within one's own courts does not augur well for acceptance of the outlaw's international legal prerogatives as a constraint on more direct (and likely the sole potentially effective) efforts to redress the grievance.⁷⁶

As the international order becomes less willing to acknowledge the legitimacy of disagreement over serious human rights violations, however, obstructions to unilateral impositions of direct effect come to appear more at odds with the international rule of law. Insofar as impunity displaces widespread and unregulated self-help as legality's perceived *summum malum*, freelance law enforcement becomes more broadly 'deputized'. A stripping away of obstructions to unilateral enforcement of purportedly universal norms would predictably, at least in the long run, enhance the position of the most dominant and efficacious members of the international state system at the expense of weaker and less influential states.

2.5 The Erosion of the Non-Intervention Norm and the Crisis of Sovereign Equality

Sovereign equality's mantra is found in the 1970 Friendly Relations Declaration:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. ... Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.⁷⁷

Although these were always overstatements in relation to actual international practice, and although Security Council acted coercively and forcibly in internal matters long before the official adoption of the 'R2P' doctrine,⁷⁸ a cross-cutting majority of states for decades expressed strong support for the norm of territorial inviolability, both in the abstract and in application to specific cases.⁷⁹ This strong support reflected the Cold War-era divisions of 'First, Second, and Third Worlds', and a general appreciation of distrust and dissensus in matters relating to the legitimacy of internal systems of public order. As noted above, the non-intervention norm found forceful and authoritative expression in the ICJ's 1986 *Nicaragua* decision.⁸⁰

⁷⁶ I have given book-length treatment to this theme, Roth 2011.

⁷⁷ Friendly Relations Declaration.

⁷⁸ In its 2005 invocation of R2P theme, the U.N. General Assembly obviated the need for such elaborate rationalizations, acknowledging that the Security Council's extraordinary authority extends to circumstances where 'national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.' UNGA Res. 60/1, 24 October 2005 (adopted without a vote), para 139; UNSC Res. 1674, 28 April 2006 (reaffirming same).

⁷⁹ Instances and patterns are elaborated throughout Roth 1999, 2011.

⁸⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, at 263-264.

The former systematic emphasis on non-intervention should not be understood as entailing indifference either to humanitarianism or to popular sovereignty. Rather, given the era's geopolitical and ideological conflicts, the bulk of states tended to see exploitive or partisan intentions behind even the most plausibly humanitarian interventions – for instance, of India in East Pakistan,⁸¹ Vietnam in Cambodia,⁸² or the United States in Grenada⁸³ – and dismissed any externally-specified normative formula for ascertaining ‘the will of the people’ that was to be ‘the basis of the authority of government’.⁸⁴ A regime's legal capacity to assert the right of non-intervention stemmed from the test of ‘effective control through internal processes’, a trial by ordeal; the non-intervention norm amounted in practice to a right of territorial political communities to be ruled by their own thugs and to fight their civil wars in peace.⁸⁵

During this era, internal armed conflict was widely perceived, not as an anomaly or as evidence of ‘state failure’, but as a legitimate way for questions of public order to be worked out within states. Internal wars typically succeeded in presenting themselves as struggles between ideologically-motivated factions for standing to speak for the undivided population, rather than as ethno-nationalist bloodletting or as the simple thuggery of armed gangs.⁸⁶ After all, during this period, most governments in the world traced their origins more or less directly to a *coup d'état*, insurrection, or decisive civil war. In the prevailing imagination, a winning faction – absent unlawful assistance from a foreign power – demonstrated its worthiness of representing a given political community by achieving and maintaining effective control, i.e., acquiescence of the bulk of the populace in that faction's project of public order.⁸⁷ Civil strife, far from generating exceptions to

⁸¹ UNGA Res. 2793 (XXVI), 7 December 1971 (calling ‘upon the Governments of India and Pakistan to take forthwith all measures for an immediate cease-fire and withdrawal of their armed forces on the territory of the other to their own side of the India-Pakistan borders,’ thereby indirectly repudiating the Indian intervention that resulted in the establishment of Bangladesh).

⁸² UNGA Res. 34/22, 14 November 1979 (demanding an ‘immediate withdrawal’ of Vietnamese forces).

⁸³ UNGA Res. 38/7, 2 November 1983 (denouncing the invasion as a ‘flagrant violation of international law’).

⁸⁴ Universal Declaration of Human Rights, UNGA Res. 217A (III), 10 December 1948, art. 21(3).

⁸⁵ For elaboration of and evidence for this assertion, see Roth 2011, at 81–85, 200–205.

⁸⁶ There is no doubt that the latter frequently masqueraded as the former, often for the sake of procuring weapons and other assistance from the rival blocs. Somali dictator Mohammed Siad Barre and Angolan rebel leader Jonas Savimbi are two notorious examples of leaders who shifted ideological affectations, as convenient, to enlist foreign support for essentially non-ideological agendas. For an empirically supported argument that the cross-era difference in the character of civil wars was more appearance than reality, see Kalyvas 2001.

⁸⁷ See generally Roth 1999, at 136–149, 160–171, 253–364 (detailing the history of that era's practice and pronouncements on civil wars, recognition contests, and political participation).

the non-intervention rule, was precisely the circumstance in which the non-intervention norm was most strongly emphasized.⁸⁸

Perhaps for better and perhaps for worse, neutrality in internal conflicts is no longer the international community's standard, as leading governments and intergovernmental organizations increasingly appear to regard coups, insurrections, and civil wars as outbreaks of criminal violence and as justifications for imposing something akin to international trusteeship. Meanwhile, internationally brokered solutions to conflicts typically, if rather raggedly, seek to predicate governmental legitimacy on liberal-democratic electoral mechanisms.⁸⁹ Obstruction of the mechanisms so established has thereupon drawn sharply – and at times, decisively – non-neutral impositions by the UN and other external actors, in turn generating international practice and *opinio juris* on questions of governmental illegitimacy once considered to be 'essentially within the domestic jurisdiction'.⁹⁰ Although the international community initially took great care to avoid any implication that such practice would 'call into question each State's sovereign right freely to choose and develop its political, social, economic, and cultural systems, whether or not they conform to the preferences of other States',⁹¹ this insistence has ebbed over time, lending increased credibility to Franck's 1992 proclamation of an 'emerging right to democratic governance'.⁹²

Even a very short time ago, the evidence that these episodes augured the demise of the basic principle of neutrality in civil strife seemed highly equivocal. Jean d'Aspremont's 2010 assertion that 'the recognition of overthrown democratic

⁸⁸ See Friendly Relations Declaration. 'Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State'; Convention on Duties and Rights of States in the Event of Civil Strife, 134 LNTS 45, (Inter-American treaty forbidding 'the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied').

⁸⁹ In some cases, such as Cambodia, Kenya, and Zimbabwe, the international community has promoted or at least abided power-sharing between electoral winners and losers that entailed, from a liberal-democratic perspective, undue concessions to losers. In Bosnia, an Office of High Representative administers what is effectively an international trusteeship, occasionally removing elected leaders (including two members of the collective Presidency) for obstructionism in the implementation of the consociational settlement.

⁹⁰ See generally Roth 1999.

⁹¹ UNGA Res. 45/150, 18 December 1990. Resolutions of this nature, endorsing the international promotion of liberal-democratic mechanisms, not only contained such qualifiers, but were also accompanied by counterpart resolutions, passed by majority over the objection of the most strongly liberal-democratic states, that reaffirmed 'respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes', acknowledging the plurality of approaches, reserving to the domestic jurisdiction control over implementation, and criticizing unwelcome external influences on local processes. UNGA Res. 45/151, 18 December 1990; UNGA Res. 49/180, 23 December 1994; UNGA Res. 54/168, 25 February 2000. Fox and Roth 2001, at 344-345.

⁹² Franck 1992; see also Fox 1992. For a balanced attempt (co-authored by a proponent and a skeptic) to evaluate Franck's claim just short of a decade later, see Fox and Roth 2001.

governments is generally not questioned and the recognition of putschists [is] systematically denied⁹³ could be still questioned as reliant on cases bearing exceptional circumstances⁹⁴ or inclusive of cases where the international community, even if condemning the coup, did not manifestly treat as a nullity the coup regime's authority to represent the state.⁹⁵ And it remains true, as Mikulas Fabry has noted, that responses to coups 'have varied not just across different organisations or countries, but also in the course of the same organisations' or countries' treatment of nominally like cases.'⁹⁶

However, the most recent cases – responses since 2010 to crises in Cote d'Ivoire,⁹⁷ Libya,⁹⁸ Mali,⁹⁹ and Guinea-Bissau¹⁰⁰ – reflect strikingly little regard

⁹³ d'Aspremont 2010, at 455–456; see also d'Aspremont 2006.

⁹⁴ For example, in Haiti in 1994 and Sierra Leone in 1997–1998, there had been a landslide victory of the ousted President in a very recent, internationally-monitored election, as well as notorious brutality and demonstrable unpopularity on the part of the forces involved in the coup. As a result, a vast diversity of international actors, cutting across the international system's plurality of interests and values, were able to perceive in common a population's manifest will to restore an ousted government. See Roth 1999, at 366–387, 405–409.

⁹⁵ Roth 2011, at 208–217.

⁹⁶ Fabry 2009, at 735.

⁹⁷ UN peacekeepers, deployed under UNSC Res. 1967, 19 January 2011, took partisan military action after the Southern-based government of Laurent Gbagbo, defeated in internationally supervised elections by 54 to 46 %, refused to yield power to the Northern-based opposition movement led by Presidential candidate Alassane Ouattara. One could still characterize this as an exceptional case, since the election had been part of an internationally-brokered agreement to end an internal armed conflict that had drawn a Chapter VII intervention. See UNSC Res. 1880, 30 July 2009; UNSC Res. 1893, 29 October 2009; UNSC Res. 1911, 28 January 2010.

⁹⁸ North Atlantic Treaty Association (NATO) forces, authorized in UNSC Res. 1973, 17 March 2011 'to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya', successfully pursued regime change. That interpretation of the Security Council mandate was highly controversial. The Western powers' alleged breach of faith in the Libyan case has been invoked (whether ingenuously or opportunistically) to explain Russian and Chinese vetoes of Chapter VII measures in the ensuing Syrian crisis.

⁹⁹ See S/PRST/2012/9 of 4 April 2012 (UN Security Council Presidential Statement that affirms the Council's 'strong condemnation of the forcible seizure of power from the democratically-elected Government of Mali [and] renews its call for the immediate restoration of constitutional rule and the democratically-elected Government and for the preservation of the electoral process'). To be sure, there is some irony in the fact that the same UN Security Council Presidential Statement that condemned the Mali coup in the name of constitutionalism and democracy also 'commends the work of President Blaise Compaoré, as ECOWAS facilitator, in promoting the return to full civilian authority and the effective reestablishment of constitutional order in Mali.' S/PRST/2012/9 of 4 April 2012. Compaoré has held power in Burkino Faso ever since his own coup in 1987.

¹⁰⁰ See UNSC Res. 2048, 18 May 2012 (demanding the 'immediate restoration of the constitutional order' and imposing Article 41 personal sanctions on Guinea-Bissau's coup leaders).

for the older standard of neutrality in civil strife.¹⁰¹ Outcomes have been prejudged, to the point where the insurrectional faction in Libya won recognition from major states as the legitimate government, and consequent access to Libyan state assets held in foreign banks, even while its military prospects remained uncertain.¹⁰²

Moreover, given that war crimes are almost inevitably endemic in internal armed conflict, the mandate for R2P action in any case where ‘national authorities are manifestly failing to protect their populations from [*inter alia*] war crimes’¹⁰³ renders almost any civil war a candidate for forcible intervention. In Libya, the authorization of intervention appeared to stem more from anticipated than from verified killings.¹⁰⁴ This quickness to judge may, of course, be salutary insofar as it actually pre-empts rather than merely reacts to catastrophe. But the nebulousness of the substantive threshold is troubling, especially if the procedural safeguard – the Security Council’s deadlock-oriented decision rule – comes to be delegitimated and, ultimately (as has been keenly advocated in many quarters), circumvented.

All of these developments cast doubt on the continued viability of the principle of sovereign equality of states governed by liberal and non-liberal governmental orders. Although liberal-democratic forms have scarcely achieved universality in the international community, and liberal-democratic substantive values even less so, the absence of an assertive alternative vision of legitimate political authority has led to acquiescence in solutions predicated on liberal ideological assumptions.¹⁰⁵ This process has produced no clear standards to replace the non-intervention norm, but it cannot be said to have left that norm intact. The international legal order is at a cross-roads; it remains to be seen whether and to what extent international law will continue to stand for a broadly pluralistic, as opposed to a more nearly hegemonic, approach to struggles over the terms of internal public order.

¹⁰¹ The question of a decisive collective response to the 2012 Syrian crisis remains unresolved at this writing.

¹⁰² See, e.g., BBC News, ‘US recognises Libyan rebel TNC as legitimate authority’, 15 July 2011, available at <<http://www.bbc.co.uk/news/world-africa-14164517>>. ‘The move means billions of dollars of Libyan assets frozen in US banks could be released to the rebels.’

¹⁰³ UNGA Res. 60/1, 24 October 2005, 139. It should be noted that the human costs of intervention by technologically sophisticated foreign military forces, while typically more likely to be attributed to ‘collateral damage’ than to war crime, can similarly amount to humanitarian catastrophe. One scholarly source places at 11,516 the number of civilians killed by Coalition forces in Iraq between March 20, 2003 and March 19, 2008. Hicks et al. 2011, at 3.

¹⁰⁴ According to one journalistic estimate, ‘the death toll in Libya when NATO intervened was perhaps around 1,000-2,000.’ Seumas Milne, ‘If the Libyan war was about saving lives, it was a catastrophic failure’, *The Guardian*, 26 October 2011, available at <<http://www.guardian.co.uk/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure>>.

¹⁰⁵ An exception has been a small group of states (Venezuela, Bolivia, Ecuador, Nicaragua, Cuba, and for a time, Honduras), led by Venezuelan President Hugo Chavez, that has articulated a rival vision reminiscent of the state socialism and Bandung nationalism of a previous era. During his 2008-2009 Presidency of the UN General Assembly, veteran Nicaraguan diplomat Miguel d’Escoto vigorously sought to revitalize this critique of Western capitalist hegemony. The effort generated some debate, but failed to inspire a significant push-back against recent trends.

2.6 Concluding Remarks: Whither Sovereign Equality?

As Kooijmans indicated a half-century ago, a legal order's content depends on the specific character of the community that it seeks to regulate.¹⁰⁶ The modern doctrine of sovereign equality, rooted in the language of the UN Charter as glossed by the authoritative pronouncements of succeeding decades, draws its distinctive content from the pluralism that explicitly marked the international community in the period from the late 1950s to the late 1980s. Subsequent historical developments have called that pluralism into question, prompting doctrinal challenges. Most provocatively, the notion of 'sovereignty as responsibility' has been invoked, not merely to highlight sovereignty's compatibility with human rights obligations or its subordination to Security Council authority over apprehended instances of humanitarian catastrophe, but as a general nullification of a lawbreaking state's authority to resist impositions from self-styled guarantors of global order.¹⁰⁷ While no such sweeping assertion has gained widespread acceptance, insistence on respect for previously-upheld sovereign prerogatives has noticeably ebbed.

It is tempting to regard the erosion of the sovereign equality doctrine as a victory for moral principle over *realpolitik*. The barriers posed by that doctrine tend to interfere with redress of morally imperative grievances. If the doctrine favored weak states, one might say that this was so only in the sense that it favored armed factions that had usurped control over territorial political communities on the global periphery, and that therefore these very sovereign prerogatives were a bane to those states' inhabitants.

Such an attitude, however, reflects too uncomplicated a view of internal political conflict. To be sure, there are real instances of confrontation between 'the regime' and 'the people', and even more frequent instances in which the regime resembles a criminal enterprise or a street gang more than anything that can properly be called a government. A major problem with the conventional wisdom of the period from the late 1950s to the late 1980s was the tendency to dignify, as a manifestation of a political community's self-determination, whatever patterns of effective control might emerge from internal processes. However, the current conventional wisdom overcorrects by far, and tends to deny that coercion, force, and violence are natural consequences of societal polarization. Harsh measures

¹⁰⁶ Kooijmans 1964, at 195.

¹⁰⁷ In the George W. Bush Administration's assertion: '[s]overeignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone inside your own territory. Other governments, including the United States, gain the right to intervene.' Richard Haass, Director of Policy Planning for the George W. Bush State Department, quoted in Nicolas Lemann, 'The Next World Order', *The New Yorker*, 1 April 2002, available at <http://www.newyorker.com/archive/2002/04/01/020401fa_FACT1>.

and departures from liberal-democratic mechanisms have often had substantial bases of popular support.¹⁰⁸ It is frequently difficult to gauge these matters in real time – and sometimes difficult in retrospect, as participants and observers often re-write their histories. Even some of the more celebrated recent events have given rise to significant misperceptions about the popular support for, and real significance of, particular movements.

The sovereign equality doctrine is an unromantic set of norms befitting an unromantic global reality. While departures from it in extreme situations are clearly justified, extreme cases tend to generate exaggerated dicta. Global consensus on basic political values is easily overstated, especially given the complexity of application to unfamiliar contexts. Moreover, unilateral implementation of purported universal principles lies in the hands of untrusted – and, it is fair to say, untrustworthy – implementers. A world that jettisons the sovereign equality doctrine may turn out to be a more dangerous, rather than a more just or rule-of-law-oriented, world.

As Kooijmans' 1964 text timelessly teaches, '[w]e must ... proceed from the structure of the international community as it actually is without, however, relapsing into a fatal empiricism.'¹⁰⁹ The critical question for the current period is to what extent recent historical developments have rendered anachronistic the pluralism that gave shape to the sovereign equality doctrine in its heyday. There can be no doubt that the international community today is far more capable of rendering authoritative judgments about domestic governance than it was amid the robust ideological contestation that grounded the 1970 Friendly Relations Declaration. Not only has the international human rights system established far more determinate public order norms, but international criminal justice and humanitarian intervention have, in a subset of instances, become legally valid instruments for human rights implementation. Yet it is always tempting for commentators to focus on how much of international life has changed, at the expense of how much has remained the same. The resulting idealism is not necessarily benign, as illusory consensus lends

¹⁰⁸ Latin America's many 'dirty wars' of the 1960s through the 1980s are quintessential in this respect, as in many cases both sides, notwithstanding their recourse to ruthlessness, maintained substantial and enduring popular constituencies. On the Right, Chile's General Augusto Pinochet and Peru's President Alberto Fujimori enjoyed substantial periods of widespread support, and El Salvador's death-squad-linked ARENA party won a long string of post-war elections. On the Left, current Presidents Dilma Rousseff of Brazil and Jose Mujica of Uruguay were both participants in urban guerrilla movements once condemned as 'terrorist', and current Nicaraguan President Daniel Ortega has renewed popularity despite past (and, some say, present) 'dictatorial' tendencies. And it is instructive that whereas the first forcible removal of Haitian President Jean-Bertrand Aristide in 1994 met with the uniform repudiation of the international community, his second forcible removal in 2004 drew no such response. The legislatively and judicially backed 2009 Honduran *coup d'état* that ousted elected President Manuel Zelaya and led to the election of a pro-coup government is similarly a reminder that internal struggles remain fraught with ambiguity.

¹⁰⁹ Kooijmans 1964, at 247. 'A blue-print for castles in the air can never serve as a design for a habitable house.'

itself to selective invocation by powerful actors in the service of partisan projects. Consequently, the sovereign equality doctrine's constraints on the cross-border exercise of power in the name of justice, notwithstanding their modification and partial erosion, retain a significant place in the international legal order.

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