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Sovereignty as Trusteeship for Humanity — Historical Antecedents and Their Impact on International Law

Contents

Introduction

The conceptualization of sovereigns as trustees for humanity, i.e., the notion that sovereigns are accountable not only to their own citizens, but also to noncitizens, can draw on a long history. It has antecedents in sixteenth-century political, philosophical and legal scholarship on sovereignty and the state (and even further back), continuing its development through prominent eighteenth-century scholars, up to the present day. These scholars articulated and developed theoretical and legal justifications for casting responsibilities on sovereigns towards others, thus challenging the perception of sovereignty as being free from any obligations or limitations. For instance, the eighteenth-century scholar Emer de Vattel referred to the earth as belonging to all humankind, therefore obliging sovereigns to preserve their natural resources and share them with others. Similar arguments were voiced by Hugo Grotius during the seventeenth century.

Nonetheless, one cannot ignore the history of the sovereignty-as-trusteeship idea. It served for centuries as a justification for empires and states to conquer other sovereigns' territories in order to seize and exploit their natural resources. Because sovereignty over a territory bears with it the responsibility to use natural resources in a manner that benefits all of humankind, and to share them with other nations, sovereigns who failed to uphold those responsibilities were rightfully subject to a takeover by other sovereigns. The concept of sovereignty as trusteeship also served to justify a paternalistic approach towards conquered nations and native peoples, which in turn reinforced their exploitation. In other words, the concept of sovereignty as trusteeship was deeply embedded within the brutal imperialism of past centuries. It is not surprising, therefore, that for many decades it has been abandoned by most scholars, lawyers, and policymakers.

The idea has recently been revived, in a 2013 article by Prof. Eyal Benvenisti, published in the *American Journal of International Law*, and titled *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*. In light of the growing influence of globalization on the lives of people around the globe, and as a part of the proliferating academic interest in the responsibilities of states towards others in the globalized era, Benvenisti reexamined the idea of sovereign trusteeship. He presented it as a fundamental concept that regards sovereigns as accountable to distant strangers. This renewed idea enfolds within itself questions regarding the responsibility of states to take into account the effects of their actions on

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other states and on noncitizens within their territories; the right and duty of one state to intervene in another state's crisis in order to protect citizens from the harms cast upon them by their own government; the responsibility of a sovereign state to share its resources with other, less fortunate states; and so on. The revival of this idea has been accompanied by the establishment of the Global Trust research project at Tel Aviv University, and by a workshop conducted in June 2014, in which the conceptualization of sovereignty and of the responsibilities it bears was discussed. The articles gathered here are the product of this workshop.

Some authors in this collection scrutinize the idea of sovereignty as trusteeship and its history, raising suspicions with regard to its aptness as a means of promoting human rights. Others suggest solutions to overcome the past legacies of this concept. Some highlight that the concept of sovereignty can be easily reconciled with the responsibility towards others' rights. Others suggest the reconceptualization of sovereign trusteeship in a manner that facilitates using it to promote others' rights without falling back to imperialism, exploitation, and paternalism. Some authors contribute to the idea developed in Benvenisti's article by pointing to other, less familiar scholars, whose writings may be relevant for the cause of redeveloping the concept of sovereignty as trusteeship. Each article in this collection reveals a different aspect, and together they tie between the past and the present, as well as between legal theory and the philosophical foundations of sovereignty and trusteeship. The issue opens with four articles that present competing conceptual accounts of the idea of sovereignty. The following two articles offer an intellectual history of the concept of sovereignty as trusteeship and address its imperialist heritage. The next two articles shift our gaze to contemporary affairs and examine how the idea of sovereignty and trusteeship may illuminate the debate over humanitarian intervention and the challenges posed in the case of indigenous peoples. The concluding comment provides a brief overview of the other articles, as well as some replies to the abovementioned critiques and their suggestions.

Michel Troper opens the issue by analyzing the idea of sovereignty trusteeship in light of the sovereignty paradox: if the sovereign is the highest authority, how can it be subject to a duty towards others? Despite this paradox's strong appeal, and although sovereignty and limitations are commonly referred to as antimonies, Troper shows that they have always been reconcilable. By discussing scholarship on sovereignty — sixteenth-century scholars, as well as contemporary ones — he points to the inclusion of limitations within the concept of sovereignty since its initial development, along with the development of the modern state. Specifically, Troper conceptualizes

sovereignty as necessary to the emergence of the modern state as a hierarchy of norms — hence conceiving the sovereign as both absolute and limited.

David Dyzenhaus also takes the sovereignty paradox as his starting point, but offers a different perspective. He examines the paradox through the writings of three prominent Weimar legal scholars: Carl Schmitt, Hans Kelsen and Hermann Heller. Dyzenhaus shows that both well-known scholars — Schmitt and Kelsen — provide only a partial solution to the paradox. While Kelsen focuses on the legal aspects of sovereignty, Schmitt conceives the sovereign mainly as a political entity. Contrarily, the third, lesser-known scholar — Heller — ties between these two conceptions of sovereignty. Like Schmitt, he interprets sovereignty as inherently political, and at the same time, like Kelsen, he affirms that the sovereign is legally constituted. This provides a useful potential link between sovereignty on the one hand, and responsibility and trusteeship on the other — a link that, according to Dyzenhaus, can be helpful for further promoting and re-conceptualizing the idea of sovereigns as trustees.

Sergio Dellavalle seeks to ground the duty of sovereigns to act in solidarity with others. He explores two possible conceptual sources for the legitimacy of sovereignty: an "ascending" (bottom-up) conception and a "descending" (top-down) one. The author concludes that while the "ascending" conception indeed provides sovereigns with legitimacy, neither source provides a sufficient conceptual justification for imposing a duty of solidarity of sovereigns towards others. Dellavalle thus contends that the theoretical focus should be shifted from the sources of sovereignty's legitimacy to the rationality of the application of sovereignty. He analyzes six possible rationalities (particularistic, functional, strategic, holistic, deconstructed, and communicative) and shows that only one of them — the communicative rationality — can support the imposition of a duty of solidarity on sovereigns towards others. This reconceptualization of sovereignty as encompassing the duty of solidarity provides another basis for the idea of sovereignty as trusteeship, while overcoming some of its past flaws.

Lorenzo Zucca is similarly seeking an alternative conceptual framework to sovereignty in the global era. Zucca explores the connection between states and sovereignty and presents three models for explaining this connection: one that is grounded in theology (referred to as *Jerusalem*), one that is grounded in reason (*Athens*), and one that conceptualizes the state as a practical solution (*Rome*). While philosophers that have attempted to explain state sovereignty usually focused on normative justifications, i.e., on the first two models, they tended to ignore the practical aspects of states' power. The latter aspect, namely the *Rome* model, according to Zucca, best describes the modern state. Zucca proposes an alternative, evolutionary and dynamic conceptualization of sovereignty. This conceptualization, inspired by Baruch Spinoza, emphasizes

effectivity: the state's existence depends on its ability to guarantee peace and stability and does not necessarily lean on moral superiority. When thus interpreted, the state is tied to sovereignty as long as this tie serves those practical ends, and therefore the demise of states' power in the global era, as well as their obligations towards others, do not conflict with the idea of sovereignty.

Benjamin Straumann moves beyond the history of the idea of sovereignty and its conceptualization to the history of the idea of sovereignty as trusteeship. Straumann explores the origins of the idea by referring to prominent thinkers, such as Hugo Grotius, Emer de Vattel, and others. Straumann shows that much of the sovereignty trusteeship concept was built upon private-law foundations, specifically those developed by Grotius. However, he observes that these foundations are too narrow and insufficient for conceptualizing the obligations of states towards others. He thus turns to Vattel's interpretation of Grotius's idea of imperfect duties, and shows that this aspect of the Grotian scheme — rather than merely the private-law-based perfect duties — is necessary for the conceptualization of sovereignty as trusteeship. Straumann's exploration enables him to situate Benvenisti's contemporary idea *vis-à-vis* past conceptions of sovereign trusteeship.

Andrew Fitzmaurice also delves into the historical roots of the idea of sovereignty as trusteeship, but focuses on empires and their expansion. By analyzing the writings of several seventeenth-century scholars, the author shows how the natural-law-based justifications of the sovereign trusteeship idea — namely, fellowship, self-preservation, and the protection of others' interest — were traditionally used to justify imperialism. Fellowship was expanded to mean rights to commerce, trade, refuge and hospitality, in a manner that legitimized war and expansionism. Self-preservation, which originally meant efficient exploitation of resources, served as a justification for their takings. Protection gradually turned into saving the natives from their own "barbarity" by conquering their lands and ruling them. Nonetheless, beginning in the nineteenth century and throughout the twentieth century, these terms seem to have been transformed again and not only for the better. Fitzmaurice's historical problematization of the concept of sovereignty as trusteeship illuminates its susceptibility to rhetorical manipulation and calls for greater scrutiny to avoid it.

Evan J. Criddle shifts the discussion beyond history to the study of historical ideas and their relevance in current affairs. Criddle draws on the writings of Hugo Grotius to suggest legal and institutional reforms in the realm of humanitarian intervention. The author presents two familiar Grotian theories on international involvement in states' crises. The first theory focuses on punishment and justifies international intervention that is aimed at punishing

violations of international norms. The second theory relates to the residual fiduciary relationship between states and maltreated foreign nationals. It holds that natural law of humanitarian intervention authorizes states to protect foreign citizens from their own states. Criddle provides a different standpoint, leaning on another, long-abandoned Grotian theory of humanitarian intervention as an inherent part of a fiduciary relationship. For elucidating this idea in a contemporary context, three reforms are proposed: obligation of intervening states to consult and respect the preferences of the protected peoples, intervening states' adherence to human rights norms, and accountability of states if they abuse their authority. The discussion of these practical and modern reforms revives Grotius's fiduciary theory of humanitarian intervention and illuminates its contemporary relevance.

Evan Fox-Decent and Ian Dahlman focus on the hard case of indigenous peoples that reside within sovereign states. Like other authors in this issue, they also explore the problematic history of the sovereign trusteeship idea, and seek to establish a new model of trusteeship of public authority that avoids the pitfall of becoming a moral but paternalistic tyranny. A major part of the new model encompasses the duty to consult with indigenous peoples and include them in decision-making processes that affect their lands and rights. Fox-Decent and Dahlman analyze several cases decided by the Inter-American Court of Human Rights (IACHR), and conclude that they may provide a model that overcomes the moral-busybody challenge and the risk of fiduciary abuse. The IACHR regime offers a pluralist account of the trusteeship model, which recognizes that indigenous peoples are cognizable to international law as sovereign actors.

Eyal Benvenisti concludes the issue by tying all the articles together and locating them within the contemporary discourse on sovereignty in general, and on sovereignty as trusteeship in particular. He distinguishes between the "external" aspect of the sovereignty paradox and its "internal" aspect, i.e., between the responsibilities cast upon sovereigns by other states and international institutions, and the limitations that the sovereign casts upon itself. Both kinds of limitations, according to Benvenisti, are reconcilable with the concept of sovereignty, if the latter is understood not only as power, but also as authority. This conceptualization of sovereignty enfolds within itself the responsibility, both to the states' citizens and to noncitizens within and outside the borders of the state. Benvenisti argues that by going back to the private-law roots of the concept of trusteeship, one can re-conceptualize sovereignty as trusteeship while emancipating it from its tragic history. Trusteeship, under this legal-theoretical framework, is not based on confidence or faith. Quite the opposite: it is the lack of confidence in the decision-maker that necessitates the imposition on her of the duties of a trustee. One must

mistrust the trustees. Therefore, articulating states' responsibility towards others in terms of trusteeship — along with institutionalizing international supervising mechanisms — may prove to be useful for enhancing states' duties and obligations towards others in the globalized era.

As mentioned above, the articles collected here are the product of the *Sovereignty as Trusteeship for Humanity — Historical Antecedents and Their Impact on International Law* Conference held at the Buchmann Faculty of Law, Tel Aviv University, in June 2014. The conference was held with the support of the GlobalTrust Research Project (ERC Advanced Grant no. 323323) and the David Berg Institute for Law and History. *Theoretical Inquiries in Law* thanks Eyal Benvenisti and Doreen Lustig, the organizers of the conference, for bringing together an outstanding group of contributors and for serving as guest editors, Ruvik Danieli for style-editing the articles, and all the conference participants and commentators. Comments on the articles published in this issue are available online in the *Theoretical Inquiries in Law Forum* (http://www.degruyter.com/view/j/til).

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and Assistant Editors

Sovereignty and Natural Law in the Legal Discourse of the *Ancien Régime*

*Michel Troper**

Whenever sovereignty is defined as a supreme, absolute, unfettered and unlimited power, there is an obvious contradiction between two ideas: that states are sovereign and that they can or should be limited. Nevertheless, while many legal texts proclaim sovereignty, there are several signs that states are indeed limited by constitutional or international law. In light of this situation, some authors claim that those texts are mere proclamations and that sovereignty is an obsolete concept, while others argue that states are still sovereign and that there are no real limits, but others still try to conceive of sovereignty as limited by morality or natural law. Professor Benvenisti's remarkable theory of sovereigns as trustees of humanity is part of a very old tradition going back to the sixteenth century where sovereignty was defined as an absolute power, which is unlimited by positive law, yet based on and limited by natural law. This Article tries to show that this concept of sovereignty has emerged because of the necessity to provide a final point of imputation to the hierarchy of norms, and that the limitation by natural law was part of the original definition. Sovereignty so defined can usefully justify not only the power of kings and lawmakers but also that of courts trying to control kings and lawmakers.

Introduction

Whenever sovereignty is defined as a supreme, absolute, unfettered and unlimited power, there is an obvious contradiction between two ideas: that states are sovereign and that they can or should be limited. Nevertheless, while

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a large number of legal documents, national constitutions and international treaties proclaim that states are sovereign, there are many signs that states are actually limited. Some of these limits are purely factual, but others can be found in legal documents, sometimes the same that proclaim states' sovereignty. For example, the Italian constitution simultaneously proclaims that Italy is sovereign, yet that it consents to limitations of sovereignty.[1] Similarly, the U.N. Charter proclaims "the principle of the sovereign equality of all its Members"[2] and at the same time limits the use of force in international relations.[3] The contrast is even sharper today if one compares the Westphalian state with the twenty-first century state after the process of globalization, the spectacular development of international law and the strengthening of international organizations, particularly organizations such as the European Union, whose law prevails over domestic law.

In light of these historical developments, some authors speak of a decline or a demise of sovereignty. They claim that the state has lost its sovereignty and that it is not necessarily a bad thing.[4] A few even want to get rid of the concept altogether. To appearances, they thus evade the problem of the contradiction in the idea that states can be at the same time both sovereign and limited. According to this view, the state was sovereign in the past and thus unlimited; today it is limited and therefore not sovereign.

But other authors find it difficult to eliminate the concept of sovereignty altogether, because it is an essential part of the language of the law. Governments, national and international courts as well as international organizations constantly use it. However, they see unfettered sovereignty as dangerous and seek a way to reconcile the theory of sovereignty with the need to set it some boundaries.

There are, however, two ways to attempt such reconciliation. The first presents itself as a description of positive law. One can argue that states, because they are sovereign, can make rules and build institutions in order to set limits to themselves. Just as Ulysses had himself bound to the mast, states

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1 Arts. 1-2 Costituzione [Cost.] (It.) ("Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution . . . ."); *id.* art. 11 ("Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations.").

2 U.N. Charter art. 2, para. 1.

3 U.N. Charter art. 2, para. 4.

4 Sabino Cassese, La crisi dello Stato [The Crisis of the State] (2002) (It.); Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (1999); Neil MacCormick, Law, State, and Practical Reason (2007).

can create constitutional courts or bind themselves by international treaties.[5] The capacity to enter into international treaties is thus one of the signs of sovereignty.[6] One may object that such theories are but variations on the theme of the state's self-limitation, and that self-limitations are not real limitations. States cannot be coerced to accept them or respect those limitations that they have accepted. Even when they do commit themselves by some constitutional provision to accept limitations, the constituent power remains sovereign and can always make exceptions to a principle.

The second way is normative. One can justify the moral necessity to limit the power of states and then suggest the creation or strengthening of some rules or institutions that would make those limitations effective. This seems to be the path followed by Professor Benvenisti. In an important contribution to the theme, he writes that states should be considered "trustees of humanity."[7] He, thus inevitably encounters the puzzle of a limited sovereignty, because a trustee does not act or decide in his own right (*suo jure*). A trustee must have been empowered by a rule or deputed by some entity, his powers are not unlimited, and he can be held accountable. Thus, if a state were a trustee in the full sense of the word, it could not be considered sovereign. But Professor Benvenisti does not endorse the thesis of the demise of sovereignty, on neither a descriptive nor normative level. He believes that "sovereignty must not be condemned but, instead, celebrated, as long as it incorporates some responsibilities toward the rest of humanity."[8] This clearly implies a redefinition of sovereign, a redefinition that incorporates the idea of some limits.

But if sovereignty is thus both preserved and limited, the paradox has been solved only apparently. There is obviously no contradiction between sovereignty defined as a power that can be limited and the thesis that it should be. However, the original contradiction is between this thesis and a power defined as without limits. And that contradiction unfortunately remains.

Therefore, one cannot avoid the paradox either by describing positive law or by suggesting new developments of international law; only one way remains open: to describe the law is not to describe some metaphysical

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5 Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality (1979).

6 Jean Combacau, *La souveraineté internationale de l'État dans la jurisprudence du Conseil constitutionnel français* [*International Sovereignty of the State in the Jurisprudence of the French Constitutional Council*], 9 Cahiers du Conseil constitutionnel 113 (2000) (citing the case of the S.S. Wimbledon, 1923.08.17: Judgment No.1 (1923) P.C.I.J. (ser. A) No. 1).

7 Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295, 300 (2013).

8 *Id.* at 301.

entities, such as sovereignty, but to describe rules. Rules can be described not only as to their form, but also as to their content: what they command, prohibit or authorize, what concepts they use to formulate these commands or prohibitions, and what justifications are provided for using these concepts. This description does not aim at solving the paradox, but at showing why, in spite of all its contradiction, a doctrine of sovereignty is inevitable and becomes a key element in the language of the law. The circumstance that legal conceptions are sometimes self-contradictory does not make them less effective. Some theories are necessary and the legal system cannot work without them. This is precisely what emerges from Professor Benvenisti's attempt: that it is logically impossible to reconcile the concept of sovereignty with the idea of limits to the power of the state, and yet impossible to talk about the state without using this concept and at the same time difficult to avoid looking for some basis for it. Since such a basis cannot be found within the legal system, it has to be found in some metalegal system, such as natural law or morality. Professor Benvenisti hence discusses "normative bases for considering sovereigns as global trustees" and defines those bases as moral.[9]

Thus, while we cannot describe the essence of sovereignty or answer the question whether it is limited or unlimited, we can describe the language of the law and see that at least some of those who have written on sovereignty have been constrained to consider it as both legally unlimited and based on and limited by metalegal norms.

Since the language of sovereignty is not universal, but emerged in the context of sixteenth century Western Europe in close association with the development of the modern state, we can ask what the word meant for the men who used it in that period and whether they thought of sovereignty as limited or unlimited. One traditional way of dealing with that question is through the history of ideas, looking at Bodin, Hobbes, Puffendorf and others. This has been done with considerable talent and success. According to one of its major exponents, this method aims at identifying "the views of specific writers about the concept of the state [by examining] the precise circumstances in which they invoke and discuss the term *state*."[10] The circumstances that modern historians of ideas have in mind are political circumstances. They include the political debates in which canonical authors have participated. The history of political theory thus appears to be a history of ideologies.[11]

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9 *Id.*

10 Quentin Skinner, *The Sovereign State: a Genealogy*, *in* Sovereignty in Fragments: The Past, Present, and Future of a Contested Concept 26 (Hent Kalmo & Quentin Skinner eds., 2010).

11 Quentin Skinner, *Surveying the Foundations: A Retrospect and Reassessment*,

One might, however, try to extend this method and view such concepts as state or sovereignty as elements not only of political but also of legal theories. This could help answer two questions. First, if these concepts were really engineered as responses to precise political circumstances, one would expect that from different circumstances would see the emergence of different concepts. Why then did authors like Bodin, Puffendorf, Hobbes, or Rousseau, writing at very different moments under very different political circumstances, use similar concepts? Second, why was it necessary for legal actors, such as kings or courts, to make such intensive and consistent use of these concepts in political contexts that were so different? Naturally, kings who wished to proclaim their supremacy could find the concept of sovereignty useful, but why courts?

One possible explanation could be that the concept of the king's sovereignty was rendered necessary and emerged with the structuration of the modern state as a hierarchy of norms in the sixteenth and seventeenth centuries. In Part I, I will try to test that hypothesis. In Part II, as a second step, I will try to show that lawyers had little choice but to conceive of a sovereign both absolute and limited. What is striking is that, in the theory of sovereignty that emerged from the hierarchy of norms at the beginning of the modern era, the sovereign was at the same time unbound by law and bound by natural law, the two of which obviously have a different content but not a different function from the normative bases listed by Professor Benvenisti.

I. Sovereignty as a Product of the Hierarchy of Norms

A. The Modern State as a Specific Form of Political Power

There is an ongoing debate among legal historians about the emergence of the state. Some see it "in the transition from the nomadic subsistence of hunter-gatherers to more agrarian societies, characterized, increasingly, by organized agriculture,"[12] while others date it from the sixteenth century and

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in Rethinking the Foundations of Modern Political Thought 236, 242 (Annabel Brett, James Tully & Holly Hamilton-Bleakley eds., 2006) ("[T]he most illuminating way of writing even about Hobbes's political theory may be to treat it essentially as a political act, then perhaps this may be the most illuminating way of writing about political theory tout court.").

12 Colin Hay & Michael Lister, *Introduction: Theories of the State*, *in* The State: Theories and Issues 1, 5 (Colin Hay, Michael Lister & David Marsh eds., 2006).

others still at various periods in the Middle Ages.[13] They obviously rely on different definitions of the state. The former will be satisfied with the presence of some relatively centralized political institutions or a distinct territory, and will find that there is a state in most human societies other than primitive groups.[14] The latter would want a definition not of the state in general, but of the modern state, and use other criteria such as a legislative power or the fact that the government is defined as sovereign, and there is no agreement as to what counts as "legislative power" or "sovereign." Take legislation: for some, it is enough that the French King could and did indeed make some general rules already in the twelfth century, but others will stress that he was far from having a monopoly on the production of these rules; that these laws, unlike modern statutes, did not deal with every possible human conduct; and that the King's legislative power did not extend to private law, which remained regulated by other independent sources, such as custom, ecclesiastic law or the jurisprudence of the courts. Thus, depending on the definition of the state that they choose, historians date its existence from the beginning of human societies, from the late Middle Ages, or from the sixteenth century.

As for "sovereignty," although the word was not used before the sixteenth century, we find some occurrences of "sovereign" in the Middle Ages and a few other terms, such as *maiestas*, *potestas absoluta*, *summa potestas*, or *imperium*, have been considered by some historians as conveying at least part of that meaning.[15] But how can we be sure that the part of the meaning that these terms fail to convey is not precisely what is so important about sovereignty? If sovereignty is a defining feature of the modern state and plays an essential role in the system, this must be related to the specificity of the system itself. It is not enough to say that the state is a political system with a sovereign, which is different from other forms of political organization without a sovereign.

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13 *See, e.g.*, Bernard Guenée, *Espace et État dans la France du bas Moyen Âge* [*Space and State in the France of the Late Middle Ages*], 23 Annales: Économies, Sociétés, Civilisations 744 (1968) (Fr.).

14 *See* Pierre Clasteres, Society Against the State: Essays in Political Anthropology (1989).

15 M.J Wilks, The Problem of Sovereignty in the Later Middle Ages 152 (1963); Marcel David, La souveraineté du peuple [Sovereignty of the People] (1996). *Contra* Helmut Quaritsch, Souveränität: Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland von 13 Jh. bis 1806 [Sovereignty: Emergence and Development of the Concept in France and Germany from the Tirteenth Century to 1806] 34 (1986) (Gr.) ("Uber die Unmögligkeit 'mitttelaterlicher' Souveränität." ["On the impossibility of a medieval sovereignty."]).

We must thus use a definition of the state independent of that particular character, and we may start from Max Weber's famous definition: "an entity, which successfully claims a monopoly on the *legitimate* use of violence."[16] Kelsen rightly stresses that this monopoly cannot be a *de facto* monopoly, because there are many acts of violence that are not committed by the state; it is a monopoly on the legitimate use of violence. But the word "legitimate" does not imply that the use of violence by the state is just or in accordance with certain fundamental values. It means that acts of violence are performed according to legal rules. On the other hand, the state is an abstraction and thus incapable of exercising violence. Only human beings can exercise violence, but the acts accomplished by some individuals are imputed to the state and this is only made possible by way of legal rules that prescribe which actions by which individuals will be imputed to the state.[17]

Thus, the state is simply that entity that acts by means of legal rules. These rules serve to appoint some individuals whose actions will be the state's, and they are considered legal rules when they have been produced in accordance with higher rules. Weber's rational legitimacy functions when there is a hierarchy of norms characteristic of a legal system.

Kelsen concludes that the state and the law are two words for one and the same phenomenon. This view is not at odds with Weber's. On the contrary, it supplements it.[18] Kelsen does not deny that the state is law instead of politics or instead of force. He merely stresses that in the state, political power is exercised by means of rules. As he famously wrote on several occasions:

> Whoever looks for an answer to the eternal question of what stands behind the positive law will never find, I fear, either an absolute metaphysical truth nor the absolute justice of natural law. Who lifts the veil and does not shut his eyes will find staring at him the hideous Gorgon head of power . . . .[19]

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16 Max Weber, Politik als Beruf [Politics as a Vocation], Lecture at Munich university (1918), *printed in* Max Weber, Gesammelte politische Schriften [Collected Political Works] 396 (l921), *available at* http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf.

17 Hans Kelsen, der soziologische und der juristische staatsbegriff: kritische untersuchungen des verhältnisses von staat und recht [The Sociological and the Legal Concept of the State: Critical Investigation on the Relation Between State and Law] (1928).

18 Michel Troper, Le droit et la nécessité [Law and Necessity] 61-76 (2011) (Fr.).

19 Metall R., Hans Kelsen, Sein Leben und Werk [Hans Kelsen, His Life and Work] 30 (1969) (Gr.). Kelsen had already used the image of the Gorgona in

Exercising political power by means of a legal system structured in a hierarchy brings several advantages. The highest authority can at the same time empower lower authorities to make decisions, and retain control over the content of these decisions by enacting general rules that the lower authorities are bound to apply. As for the lowest authorities, their decisions will be rationally justified since they will appear as mere applications of higher norms, though they will retain some discretion. This is both because the empowering rules explicitly grant it and also because most of these authorities, particularly law courts, can always interpret the words of the rules that they are applying.

Kelsen's thesis of the unity of law and state nevertheless faces a difficulty regarding the common use of the word "state" to refer not to the national legal order but to a group of centralized authorities, differentiated from civil society and from local authorities. In that sense, the state is obviously not identical with the legal order. He is thus constrained to make a capital distinction between the state *lato sensu* (the legal order) and the state *stricto sensu* (the set of centralized authorities) and writes that the latter concept presupposes the former. By this, he means that one cannot think of the state *stricto sensu* without conceiving it as the set of those organs that produce the norms that are at the top of the entire legal order, i.e., at the top of the state *lato sensu*. In other words, the legal system, structured in a hierarchy of norms, presupposes a state *lato sensu*. That state is then personified, conceived as an entity distinct from the individuals who hold an office and endowed with certain qualities, such as unity, continuity and, above all, sovereignty.

Although Kelsen's theory is not a historical one, it is of great importance for the problem of the date of the emergence of the state: the state appeared with the hierarchy of norms, i.e., in the sixteenth century. In the Middle Ages, there was no hierarchy in the modern sense, where a human act of will has the meaning of a legal norm when its author has been empowered by a higher norm and all norms are part of a single system. Such a hierarchy took shape gradually between the fifteenth and seventeenth centuries, when the King succeeded in subordinating all existing sources of law, such as custom or judge-made law, under the royal legislation; and when lower authorities, particularly courts, justified their own decisions by claiming that they were applying higher laws.

The state thus appears as a system of legitimation in two different ways. First, the hierarchy of norms provides a rational justification for the decisions of the various subordinate authorities, which can argue that they are applying

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3 Veröffentlichungen derVereinigung der Deutschen Staatsrechtslehrer [Publications of the Association of German Teachers of Constitutional Law] 54-55 (1927) (Gr.) (translated by the author).

higher rules. Second, the authorities use a type of political discourse that is specific to this form of political power. It is made up of a number of principles that can be said to be constitutive, because we recognize that a political system is a state when power is justified by invoking some specific principles such as sovereignty, representation, and distinctions between office and office holder, public and private law, state and civil society, and personality and continuity of the state. The most important of these constitutive principles is sovereignty, so that the emergence of the principle of sovereignty is rightly considered the sign of the emergence of the state. It emerged in the sixteenth century as a consequence of the hierarchy of norms.[20]

B. The Hierarchy of Norms and Sovereignty

The word "sovereignty," as it is used in the modern state, has been defined by the foremost modern French legal theorist Carré de Malberg, who broke up the notion of sovereignty into three concepts:

> In the original sense, the word "sovereignty" refers to the supreme character of the State's power. In a second sense, it refers to the whole range of the powers included in the State's authority and it is therefore synonymous with that authority. Thirdly, it is used to characterize the position occupied within the State by the highest organ of the State's authority and in that sense, sovereignty is the same thing as the power of that organ.[21]

This distinction helps to clarify the way we use the term "sovereignty" and the various functions that the notion performs.

One issue is whether it is possible to divide sovereignty. On the basis of Carré de Malberg's distinction, it is easy to see that sovereignty in the third sense, the quality of the highest organ of the state, is indeed indivisible, because as soon as one divides it between several organs, none is the highest.[22] On the other hand, if sovereignty in the second sense is the range of powers

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20 Michel Troper, *The Hierarchy of Norms and the Emergence of the State* (The Straus Ins. for the Advanced Studies of Law & Justice, Straus Working Paper No. 06/12, 2012), *available at* http://www.law.nyu.edu/sites/default/files/siwp/WP6Troper.pdf.

21 Raymond Carré de Malberg, Contribution à la théorie générale de l'Etat; spécialement d'après les données fournies par le droit constitutionnel français [A Contribution to the General Theory of the State, Particularly from Data Drawn from French Constitutional Law] 79 (Dalloz 2003) (1920) (translated by the author).

22 However, several organs could exercise sovereignty jointly.

that can be exercised by the state, it is perfectly divisible. It is even possible to divide them by their subject matters (the power to wage war, to control a currency, to render justice, etc.), as Samuel Puffendorf did with the "*potential parts of supreme sovereignty*,"[23] or by the type of legal acts that are necessary to exercise them (like legislation, execution and adjudication). Separation of powers is precisely a division of sovereignty in this sense.

In the same way, these distinctions help us to understand why some sentences using the concept of sovereignty, which seem incompatible or contradictory, can nevertheless be simultaneously true. Thus, at the time of Carré de Malberg, during the French Third Republic, it was possible to answer the question "who is the sovereign?" by any one of three sentences: "the French State is the sovereign," "the French Parliament is the sovereign," and "legislation is a sovereign power." In the first sentence, sovereignty refers to the supreme character of the state's power, which enables it to act on the international level and interfere with other sovereigns, or to dominate the church or any other institution; in the second sentence, sovereignty is a quality of an organ of the state; and in the third sentence, it is one of the powers that the state may exercise.

However, Carré de Malberg's distinction does not provide a sufficient account of some sentences that we find in constitutional and political discourse. Take, for example, "the sovereign is the French people," or "sovereignty belongs to the people."[24] Such a sentence obviously does not mean that the French people *is* the state and effectively acts on an international level, nor that it exercises a power of domination, and certainly not that the people alone can really exercise a range of powers. These propositions do not refer to any reality and they are only used to justify other sentences. For example, in French legal discourse, "sovereignty belongs to the people" was used during the Third Republic to justify "Parliament is sovereign" or "the law is sovereign." It meant that Parliament exercised a sovereignty that was not its own, but belonged to the people and was exercised *in the name of* the people, or that statutes were presumed to express the general will, i.e., the will of the sovereign, and were therefore supreme. In this context, when imputed to the people, the word "sovereignty" is thus used in a fourth sense: it refers to the quality of a being in whose name some power, in any one of the first three senses, is exercised. Indeed, the theory of sovereignty generally implies a distinction between the essence and the exercise of sovereignty.

Because of the hierarchy of norms, what is imputed to a sovereign is not only legislation or decisions in international affairs, but also every single

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23 Samuel Pufendorf, On the Laws of Nature and of Nations (1672).

24 1958 Const. 3 (Fr.).

act presumed to have been performed by virtue of a delegation. This is why, for example, justice is rendered in European countries "in the name of" the French, Italian or German people, as it was before "in the name of the king." To Carré de Malberg's three concepts, we must therefore add a fourth: the doctrine of sovereignty is a principle of imputation. A sovereign in that fourth sense is the entity presumed to possess the essence of a sovereignty that is exercised by others in its name and thus to be the author, direct or indirect, of every single norm in the system.

We thus have four different concepts of sovereignty, and we can see that in the Middle Ages there might have been a sovereign in the first and third senses, but certainly not in the second and fourth. Only after the sixteenth century do we find sovereignty in all four senses of the word. What is different from the Middle Ages, regarding the second sense, is the type and the range of powers that the King can exercise: while he could not legislate in matters related to private law up to the sixteenth century, he then started making laws on marriage and even on ecclesiastical matters. As for sovereignty in the fourth sense, imputation, we also find it only in the modern state. Because of the unity of the legal system, every single norm belonging to that system has either been produced directly by the will of the King — he wrote at the end of the laws "*car tel est notre plaisir*" ("for this is our pleasure") — or has been produced by the will of an authority empowered by the King, in the name of the King.

The emergence of the concept of sovereignty was directly related to the hierarchy of norms, because the King was the only authority in the system whose power could not be justified by referring to an empowering rule, because there was no such higher rule. The only possible justification was therefore to presuppose that his power was of a different nature and had a godlike quality.

II. A Sovereign Both Absolute and Limited

The sovereign can thus be defined as the supreme point of imputation. This implies that there is no higher authority that could have empowered him and simultaneously limited his rights.[25] In this sense, the King sovereign was truly absolute. However *absolutus only* meant the absence of *legal* limits and nothing else. *Legal* limits were limits in positive law. Thus, sovereignty

25 Jean Bodin, Six Books of the Commonwealth (Les Six livres de la République) bk. I, ch. VIII (M.J. Tooley trans., Basil Blackwell Oxford 1955) (1579), *available at* http://www.yorku.ca/comninel/courses/3020pdf/six_books.pdf ("Sovereign power given to a prince charged with conditions is neither properly sovereign, nor absolute.") (translated by the author).

did not preclude limits other than *legal* limits, strictly speaking. However, these other limits were not real and effective limits. On the contrary, this character of the King's power being limited by natural law and by natural law only was part of the definition of sovereignty.[26] As Gérard Mairet writes, "the doctrine that the prince is subject to natural and divine law, far from limiting his power helps on the contrary to justify that it is without limits."[27] A reference to natural law can serve several functions. It helps to distinguish between monarchy and tyranny or despotism; it provides a metajuridical basis for the power of the sovereign; and it allows for some form of judicial review of the sovereign's actions.

A. The Distinction Between Monarchy and Tyranny or Despotism

Bodin knew that the word "tyrant" referred in Ancient Greece to a mode of accession to power, a conquest without the consent of the subjects, but not to a mode of governance.[28] The tyrant could, after all, exercise power fairly.[29] But Bodin also knew that in his time it had become a synonym for arbitrary and evil power, independently of the means by which that power had been gained. According to some theories, the killing of the tyrant was justified.[30]

If monarchy were defined simply as a form of government where sovereignty is vested in one man, who is *legibus solutus* (not bound by the laws), tyranny would be the same as monarchy and the King could be called a tyrant. It was

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26 *Id.* ("If we insist however that absolute power means exemption from all law whatsoever, there is no prince in the world who can be regarded as sovereign, since all the princes of the earth are subject to the laws of God and of nature, and even to certain human laws common to all nations.") (translated by the author).

27 Gérard Mairet, *Introduction* to Bodin, les Six livres de la République (Paris: Librairie générale française 1993).

28 Bodin, *supra* note 25, bk. 1, ch. VIII:

> If a sovereign magistrate is given office for one year, or for any other predetermined period, and continues to exercise the authority bestowed on him after the conclusion of his term, he does so either by consent or by force and violence. If he does so by force, it is manifest tyranny. The tyrant is a true sovereign for all that.

29 *Id.* bk. II, ch. IV:

> The word tyrant, which in Greek was originally an honourable term, merely signified the prince who had come into power without the goodwill of his subjects, and from being an equal had raised himself to be their master. Such a one, even though he proved a wise and just prince, was called a tyrant.

30 Mario Turchetti, Tyrannie et tyrannicide de l'Antiquité à nos jours [Tyranny and Tyrannicide from Antiquity to the Present] (2001) (Fr.).

therefore crucial to distinguish between the two, and the only way to do so was to say, as Bodin did, that whereas the King respects the laws of nature, the tyrant violates them.[31]

Montesquieu faced the same difficulty and solved it in exactly the same way. It is well known that he substitutes a new typology for the traditional one. Instead of a distinction between monarchy, aristocracy and democracy, based simply on the number of power holders (one, a few, or all), he distinguishes between monarchy, despotism, a synonym for tyranny, and republic.[32] Monarchy and despotism have a common character: in both cases, power is vested in one person, but in a monarchy the king exercises it according or by means of fixed and established laws, while in a despotism, power is also exercised by one man, but without laws, i.e., "according to the prince's whims." It follows that the principles or mainsprings of both systems are completely different: while the principle of monarchy is honor, the principle of despotism is fear and that of the republic virtue. They also have different ends or objects, which each of them will tend to produce by virtue of its nature: for monarchy, it is the glory of the prince and the state; for despotism, his pleasures.[33]

These fixed and established laws, which serve as a criterion to distinguish monarchy from despotism, are of two kinds: first, there are general rules that

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31 Bodin, *supra* note 25, bk. II, ch. II:

> Royal, or legitimate, monarchy is one in which the subject obeys the laws of the prince, the prince in his turn the prince the laws of God . . . . Tyrannical monarchy is one in which the laws of nature are set at naught, free subjects oppressed as if they were slaves, and their property treated as if it belonged to the tyrant.

See also id. bk. II, ch. IV ("The most notable distinction between the king and the tyrant is that the king conforms to the laws of nature and the tyrant tramples them underfoot.").

32 Montesquieu, The Spirit of the Laws bk. II, ch. I (1748), *available at* http://oll.libertyfund.org/titles/837:

> There are three species of government; *republican*, *monarchical*, and *despotic*. In order to discover their nature, it is sufficient to recollect the common notion, which supposes three definitions, or rather three facts: That a republican government is that in which the body or only a part of the people is possessed of the supreme power: monarchy, that in which a single person governs by fixed and established laws: a despotic government, that in which a single person directs everything by his own will and caprice.

33 *Id.* bk. XI, ch. V ("Of the End or View of different Governments. Though all governments have the same general end, which is that of preservation, yet each has another particular object. Increase of dominion was the object of Rome; war, that of Sparta; religion, that of the Jewish laws; commerce, that of Marseilles . . . .").

the king enacts, applies equally, and does not change according to particular circumstances or to the personalities of his subjects. He exercises his powers "*par des lois*," (by means of laws), by means of general rules. But there are also rules that the King does not enact and that moreover it is not in his power to derogate.[34] They are the fundamental laws of the realm, for example the laws that regulate succession to the throne or the laws that prohibit the alienation of the royal domain. And these laws were considered natural and divine.[35]

There is therefore no contradiction between the idea that the King's power is absolute and this other idea that his power is limited by law. Bodin himself wrote that if sovereignty meant that one was above the laws, then no prince is truly sovereign because every prince is bound by divine and natural law.[36] Being absolute is not exercising a power with no limits, but exercising a power limited only by natural or divine laws,[37] which does not necessarily mean an effective limitation, but, as we shall see, does not preclude it.

B. The Metajuridical Basis for the Power of the Sovereign

Why is the sovereign, sovereign? The reason cannot be that he has been empowered by a higher authority, since he himself is the highest authority. On the other hand, one could no longer justify the King's power by a personal and mystical quality that he alone possessed.

In the Middle Ages that quality came from the coronation in Reims. Following a rite similar to that used for the sacrament of bishops, the King was anointed with sacred oil from the "holy ampoule," a small glass bottle, which according to the legend had been brought by a dove for the sacre of

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34 Louis XV, Flagellation speech (Mar. 3, 1766) (declaring that sovereign power resided in him alone and that the courts' existence and authority only derived from him, but also that, happily, he was powerless ("*dans l'heureuse impuissance*") to change the fundamental laws of the realm).

35 Marie-France Renoux-Zagamé, Du droit de Dieu au droit de l'homme [From the Law of God to the Rights of Man] 317-19 (2003) (Fr.).

36 Kenneth Pennington, The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition 276-77 (1993).

37 Bodin, *supra* note 25, bk. I, ch. VIII ("This power is absolute and sovereign, because it has no other limit than what the law of God and of nature commands.") (translated by the author). This definition of absolute power, as that which has no other limit than natural or divine law, has been reproduced over and over. *See, e.g.*, Cardin Le Bret, De La Souveraineté Du Roy [On the King's Sovereignty] bk. I, ch. II ("Que c'est que la souveraineté et que sa première marque est de ne dépendre que de Dieu seul." ["On what is sovereignty and that its first mark is to depend on God alone."]).

Clovis in 496,[38] and it was that sacrament that gave him his charismatic quality. Only after having been anointed was he able to perform miracles and heal the sick suffering from *écrouelles*, a form of tuberculosis affecting the skin or scrofula, simply by touching them. His power was thus not unlike that of other authorities, which also held it not because of a delegation, but *suo jure*, because of their own specific nature.

However, when there is a hierarchy of norms and every single authority exercises powers delegated by a higher authority by means of rules, the King cannot derive his power from his specific nature. This is the reason why Bodin stresses that the prince is not sovereign because of the coronation, but by right, and that he is sovereign even before having been crowned.[39] On the other hand, however, this right cannot result from a delegation from a higher human authority, since there isn't one. Thus, the only possible basis for his power is divine and natural law.

Indeed, both historically and logically, the fundamental laws of the realm had to be considered as divine and natural law. In France, the most important of these laws was the Salic law, which prescribed that the eldest son became King after his father and that women could neither ascend to the throne nor transmit the right of succession. At the end of the sixteenth century, Henry of Navarra, who was a Protestant and had been excommunicated, was next in line to the throne according to the Salic law. There was thus a conflict between canon law and the Salic law. As Marie-France Renoux-Zagamé has convincingly shown, traditional natural and divine law was not an adequate basis for the King's power, because it was the basis for the institution of political power in the abstract, not for the power of one man in particular. As a consequence, in order to find an argument in favor of the latter, one was forced to argue that the Salic law was the direct expression of God's will. God must be considered the author of all the subsequent laws and subjects were therefore under an absolute obligation to obey the King.[40] Another important consequence was that the Salic law although divine, being specific to France

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38 Marc Bloch, The Royal Touch: Monarchy and Miracles in France and England (1990).

39 Bodin, *supra* note 25, bk. I, ch. 9 ("Combien que le Roi ne laisse pas d'être Roi sans le couronnement, ni consécration: qui ne sont point de l'essence de la souveraineté." ["The King is no less king for not having been crowned or consecrated, for coronation and consecration are not part of the essence of sovereignty."]).

40 Renoux-Zagamé, *supra* note 35, at 317-20; Marie-France Renoux-Zagamé, *Du juge prêtre au roi-idole. Droit divin et constitution de l'Etat dans la pensée juridique française à l'aube des Temps Modernes* [*From the Judge as Pries to the King as Idol, Divine Right and Constitution of the State in French Legal*

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and outside canon law, escaped interpretation by the Church. The divine right of Kings was thus a continuation of the dynamic hierarchy of norms. The law is not a natural quality of being and norms are only recognized as binding because they are the expression of the will of an individual who has been empowered by a superior will. Natural law must thus be considered only as God's will.

Power, then, is not an expression of a personal quality of its holder. Just as courts and officers were empowered by the expression of the King's will, the King was empowered by God's will. His power did not result from his own divine nature, but only from delegation. When King James famously said that "kings are justly called gods"[41] he did not refer to their personality or to some mystical quality, but to the nature of their power: "they exercise a manner or resemblance of Divine power." He only mentioned coronation because of the oath and not because of anointment. In reality, the basis for sovereign power had become secular.[42]

The change that had occurred became manifest when the King ceased to claim this charismatic quality in official circumstances. In the eighteenth century he still touched the sick to cure them of scrofula, but using completely different words: instead of saying, "the king touches you, God heals you," Louis XV said, "the king touches you, may God heal you."[43] He thus acknowledged the loss of his magical power. All he could do was pray to God.

However, although the sovereign finds in natural law a basis for his power, he does not encounter any limits. On the contrary, the divine right of Kings is just another manifestation of absolutism.[44] At least until the courts attempted to transform the virtual supremacy of natural law into a real supremacy by exercising judicial review.

C. The Basis for Judicial Review

There is a general tendency of courts in various legal systems to seek an extension of their own power and to justify the exercise of control over

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Thought at the Dawn of the Modern Times], *in* Le droit entre laïcisation et néo-sacralisation 143 (Jean-Louis Thireau ed., 1997).

41 James I, Speech Before Parliament (Mar. 21, 1609), *printed in* The Political Works of James I, at 307-08, 528-31 (1616).

42 Mairet, *supra* note 27.

43 Roland Mousnier, The Institutions of France Under the Absolute Monarchy, 1598-1789, at 655 (1979).

44 Fanny Cosandey & Robert Descimon, L'absolutisme En France: Histoire Et Historiographie [Absolutism in France: History and Historiography] (2002) (Fr.).

legal norms by claiming that they are merely applying higher norms, even when they have not been expressly authorized to do so and when there is no certainty about the existence and status of those higher norms. The most famous example of this tendency is the American Supreme Court's decision in *Marbury v. Madison*: the Chief Justice, John Marshall, wrote that since the Constitution was superior to ordinary laws, the courts ought to refuse to enforce laws contrary to the Constitution.[45]

However, the basis of the reasoning, the idea that the constitution is superior to ordinary laws, is far from self-evident. "Superiority of the constitution" can have several meanings. It can mean first that the constitution has empowered a legislative authority and established the form and procedures by which ordinary laws can be produced. Every constitution is of course superior in that sense. But it can also mean that in case of a conflict between the content of the constitution and that of an ordinary statute, the latter ought to be regarded as invalid and courts ought to refuse to enforce it. Thus, the power of the courts to disapply an unconstitutional statute does not follow logically from a general superiority of the constitution, but only from its superiority in the latter sense. Marshall's reasoning was perfectly circular, and he merely deduced the courts' power to refuse to enforce an unconstitutional law from the idea that the courts had that power, but not every constitution is superior in that second sense. In fact, if the American Constitution is indeed superior, this is because of *Marbury*. *Marbury* is not a consequence of the superiority of the Constitution. It is the superiority of the Constitution that is a consequence of *Marbury*. It is a creation of the court.[46]

Many other courts have used similar reasoning to justify the exercise of judicial review and have similarly established the superiority of some norms over others. In 1971, the French Constitutional Council, which has since become the Constitutional Court, decided that the Declaration of the Rights of Man and the Citizen of 1789 had constitutional value.[47] Similarly, in 1980, the Supreme Court of India ruled that it had the power to review constitutional amendments and invalidate those that conflicted with some

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45 Marbury v. Madison, 5 U.S. 137 (1803).

46 Michel Troper, *Marshall, Kelsen, Barak and the Constitutionalist Fallacy*, 3 Int'l J. Const. L. 24 (2005).

47 Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, July 16, 1971 (Fr.). An English translation of the Declaration of the Rights of Man and the Citizen of 1789 is available in *Declaration of human and Civic Rights of 26 August 1789*, Constitutional Council of the French Republic, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/declaration-of-human-and-civic-rights-of-26-august-1789.105305.html (last visited May 23, 2015).

unwritten superconstitutional principles.[48] In 1995, even though Israel does not have a written constitution, the Supreme Court decided that it could review statutes against some fundamental laws that, taken together, should be regarded as forming the constitution of Israel.[49] In all these cases, the courts have spontaneously created the supremacy of some norms over ordinary legislation, but some pretended to have discovered those norms in the written constitution, while others have discovered them — and their superiority — in unwritten principle.

This was precisely the kind of attitude of the *Parlements*, the supreme courts of the land before the French Revolution. The laws enacted by the King were sent to these courts to be registered. However, the *Parlements* claimed the right to refuse to register the King's laws when they conflicted with the fundamental laws of the realm. In their view, though, the fundamental laws extended far beyond the Salic law and included natural law, tradition and the principles of reason. In reality, they aimed at — and to a certain extent succeeded in — sharing the legislative power with the King.[50]

The *Parlements'* participation in the legislative power resulted from their decision to consider fundamental laws superior to the King. They had indeed created a new level in the hierarchy of norms above the King and they had complete discretion to decide which principles counted as fundamental norms and to interpret their content. They could thus avoid admitting that they exercised that power in resistance to the King's will, by claiming that they reviewed the King's laws not for policy reasons but only for their conformity with higher norms.[51]

They had to resort to natural law for several reasons. The first and most obvious was that there was no positive law above the King. Another and equally important reason was that the idea that the King's power could be checked was difficult to reconcile with the doctrine that the King was sovereign. Such reconciliation could be attempted by claiming that since the *Parlements'* power resulted from a delegation by the sovereign, when they exercised a check on the King, they still acted in the name of the sovereign.[52]

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48 Minerva Mills Ltd. v. Union of India, (1980) RD-SC 141 (India).

49 CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Village, 49(4) PD 221 [1995] (Isr.).

50 Sarah Hanley, The 'Lit de Justice' of the Kings of France: Constitutional Ideology in Legend, Ritual, and Discourse (1983).

51 Fransisco Di Donato, La rinascita dello Stato — Dal conflitto agistratura-politica alla civilizzazione istituzionale europea [The Revival of the State — From the Conflict Between the Judiciary and Politics to the Institutional Civilization of Europe] ch. V (2010) (It.).

52 Francesco Di Donato, L'ideologia dei robins nella francia dei lumi.

When they refused to register a law, they weren't opposing the King's will, because such a law only expressed the King's apparent will — the will of the individual who happened to be on the throne — and not the real will of the King as an institution. The real will was thus expressed by the *Parlement*, but imputed to the sovereign King.[53]

As mentioned above, it is submission to natural law that characterizes the sovereign and distinguishes monarchy from tyranny. In a monarchy, according to the *Parlements*, the King acts not according to his will, but according to what he ought to will, i.e., according to natural law. Thus, by correcting the laws and forcing the King to act according to natural law, the *Parlements* could claim to make monarchy true to its essence. Natural law was the tool that enabled them to review the King's law, to take part in the legislative power, and to complete the process of imputation.

Conclusion

What this story tells us is that sovereignty and natural law can be reconciled and indeed have been reconciled in the past. This happened because the hierarchy of norms was the main factor in the emergence of the notion of sovereignty and fueled the need to find both a basis for and limits to the power of the sovereign. But, although the limits found in natural law were not real and effective limits, the courts were always able to use the theory of sovereignty and the theory of natural law, taken together, in order to exercise some form of control over Kings.

Obviously, the reconciliation is not a logical one. It remains impossible to conceive the state's power as both absolute and limited. But the logical contradiction allows for a redefinition of absolute power as one that is subject only to natural law or to moral principles. Such a definition has several consequences. Not only does it provide a legitimacy to the state's power, but it also allows courts to claim that the limits they built against political power are not against the sovereign but in the name of the sovereign.

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costituzionalismo e assolutismo nell'esperienza politico-istotuzionale della magistratura di antico regime (1715-1788) [The Ideology of Judges in the France of the Enlightenment: Constitutionalism and Absolutism in the Political and Institutional Experience of the Judiciary in the 'Ancien Regime' (1715-1788)] (2003) (It.); Francesco Di Donato, *La hiérarchie des normes dans l'ordre juridique, social et institutionnel de l'Ancien Régime* [*The Hierarchy of Norms in the Juridical, Social and Institutional Order of the Ancient Régime*], 21 Revus J. Const. Theory & Phil. L. 237 (2013) (Fr.).

53 Di Donato, *supra* note 51.

We may imagine that it would not be impossible for courts in the twenty-first century to make similar attempts. This is precisely what contemporary constitutional courts do when they claim the power to review statutes or even constitutional amendments, by confronting them with some unwritten principles, borrowed from morality or natural law but presented as elements of the legal system. The French Constitutional Council, for example, reviews statutes,that, according to the constitution, are the expression of the general will, i.e. the will of the sovereign. It confronts them not only with the written text of the constitution, but also with some "fundamental principles recognized by the laws of the Republic." These principles are thus supposed not to have been laid down by positive law. They preexisted positive laws and can be identified by the Constitutional Council on the ground that they have been "recognized" in the past by the sovereign, so that they can prevail over the will of the current sovereign.

One might be tempted to draw a parallel between these constitutional courts and international courts, who also can impose on states some unwritten general principles derived from morality, for instance the principle that states are trustees of humanity. There are, however, two important differences.

First, constitutional courts do not acknowledge that they defy or limit the sovereign. On the contrary, they must pretend, just like the *Parlements* of prerevolutionary France, that they are imposing the will of the sovereign. That is because the constitution that binds the amending power has been willed by the sovereign and the sovereign is supposed to have also willed all the unwritten principles implied by the text, so the court can easily pretend to be applying the will of the sovereign as the author of the original constitution. An international court applying general principles of international law cannot pretend as easily that it is applying the will of the states expressed in unwritten rules of international law.

The second difference is that constitutional courts, even when they confront the constituent power, can always pretend to be the interpreter of the true sovereign. The sovereign who enacted the original constitution may have been dead for centuries, but everything must still be done in its name. A constitutional court decides "in the name of the people," which means that they are on this occasion the true representatives of the people. The logic is the same as that of the *Parlements*: a conflict between elected bodies and the court can always be interpreted as a conflict between the present people, composed of voters, and an eternal or transcendent people.[54]

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54 This theory was first presented in Marcel Gauchet, La Révolution des pouvoirs. La souveraineté, le peuple et la représentation, 1789-1799 [The Revolution

Such rhetoric would, of course, be much more difficult for an international court. It could obviously treat states as trustees for humanity, but it could not pretend to do so in the name of an international sovereign or even in the name of those same states who are bound by rules regarding international trust.

OF POWERS. SOVEREIGNTY, THE PEOPLE AND REPRESENTATION, 1789-1799] (1995) (Fr.).

Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought

*David Dyzenhaus**

Eyal Benvenisti has sought to provide an optimistic account of international law through reconceptualizing the idea of sovereignty as a kind of trusteeship for humanity. He thus sketches a welcome antidote to trends in recent work in public law including public international law that claim that international law is no more than a cloak for economic and political interests, so that all that matters is which powerful actor gets to decide. In this Article, I approach his position through a discussion of the debate in Weimar about sovereignty between Carl Schmitt, Hans Kelsen and Hermann Heller. I try to show that Heller's almost unknown legal theory might be helpful to Benvenisti's position. Heller shared with Schmitt the idea that sovereignty had to have a central role in legal theory and that its role includes a place for a final legal decision. Indeed, much more than Schmitt, Heller regarded all accounts of sovereignty as inherently political. However, in a manner closer to the spirit of Kelsen's enterprise than to Schmitt's, he wished to emphasize that the ultimate decider — the sovereign decision unit of the political order of liberal democracy — is entirely legally constituted. Moreover, Heller argued that fundamental principles of legality condition the exercise of a sovereign power in a way that explains the specific legitimacy of legality and which might supply the link between sovereignty and ideas such as trusteeship and humanity.

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Theoretical Inquiries in Law 16.2 (2015)

Introduction

In liberal democracies today, sovereignty in the sense of national sovereignty is often perceived as being under threat, or at least "in transition," as power devolves from nation states to international bodies. Some scholars conclude that we are living in a "post-sovereign order," though perhaps "disorder" would be more accurate, as the loss of control by individual states to bodies which do not have the characteristics of states — for example, a monopoly on the legitimate use of violence — leads to the fragmentation of political power.[1] This threat to national sovereignty is at the same time considered one to a rather different idea of sovereignty, popular sovereignty — the sovereignty of the people — as important decisions seem increasingly to be made by institutions outside of a country's political system.

However, these processes need not be perceived as threats. "Fragmentation," a kind of Hobbesian worry about anarchy in international affairs, in the eyes of one scholar may amount to a "pluralism" to be celebrated in the eyes of another. And just as liberals argue that there is no loss to the sovereignty of the people when a country entrenches a bill of rights, thus subjecting the decisions of the legislature to constitutional review by judges, so they can argue that an international constitution is emerging and that the subjection of states to the norms of that constitution enhances democracy. One can even combine the pluralist position with the constitutionalist position by arguing that the era of Westphalian sovereignty of individual states has been replaced by a kind of constitutional pluralism in which all states are bound together in a federal structure in which there is no sovereign or overarching state.[2]

The idea that there might be this kind of overarching legal order is often part of an optimistic outlook on the prospects for law's role in helping to serve the interests of all individuals in being treated justly and in a way that respects their human rights; in serving, we might say, their humanity. It informs Eyal Benvenisti's *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*.[3] Benvenisti argues that it is morally required that we reconceive sovereignty in such a way that states are understood to have obligations to strangers beyond their borders and also are required "to

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1 *See* Sovereignty in Fragments: The Past, Present and Future of a Contested Concept (Hent Kalmo & Quentin Skinner eds., 2010); Sovereignty in Transition (Neil Walker ed., 2003).

2 *See* Jean Cohen, Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism (2012).

3 Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295 (2013).

take foreigners' interests seriously into account even absent specific treaty obligations."[4] He recognizes that this argument might seem "utopian." But he hopes to convince his readers that the idea of sovereigns as trustees of humanity "already manifests itself in certain doctrines of international law and in specific judicial decisions."[5]

Benvenisti has suggested that an inquiry into this idea should proceed by asking three questions: The threshold question: can the idea of sovereignty be reconciled with obligations to others? Then, if it can, what are the reasons for trying to effect the reconciliation? Finally, what are these obligations and how are they to be operationalized? The first is the threshold question because there is, of course, no point to asking the second question if the answer to the first is that in practice there can be no reconciliation.[6] Benvenisti's answer to that question hinges on showing that there are already examples in international legal practice of sovereign states being made answerable to obligations to others, to non-nationals outside their borders. In turn, his answer to the second question is that this kind of practice is morally required, and to the third that states have to take foreigners' interests seriously into account even absent specific treaty obligations when the states make decisions that affect such interests. And he takes the metaphor of trusteeship to be the most apt way of understanding these other-regarding obligations of sovereigns and "humanity" as the most apt characterization of the nature of the obligations.

However, one could just as well claim that the practical examples show that states are no longer sovereign at the same time as supposing that some moral loss has been incurred, in which case the burden would fall on the second question. If, for example, one's conception of sovereignty requires that the sovereign be free of any legal or moral limits on its freedom of action, one would think that the examples are of actions by non-sovereign bodies, at most of erstwhile sovereigns. And if, as suggested, one thinks that it is morally important that sovereigns retain such freedom of action, one would also think that the loss of sovereign status is a moral problem.

There is, in my view, an important point to be made here both in regard to current debates about sovereignty and more generally. It is that any conception of sovereignty is in part a normative construction; hence, there can be no appeal to brute facts about practice to demonstrate that practice is reconcilable with the idea of sovereignty. Arguments in this domain, as elsewhere in the human sciences, are always complex mixes of normative and factual claims,

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4 *Id.* at 297.

5 *Id.*

6 Eyal Benvenisti, *The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks*, 16 Theoretical Inquiries L. 535 (2015).

and reconciliation for one paradigm of sovereignty might be the abdication of sovereignty for another. I shall explore the thought that the moral and the factual inquiries have to be fused in this way, so that there is no purely empirical threshold question, through a discussion of an older debate about sovereignty, the public law debate in Weimar.[7]

While the context for this debate was obviously different from that in which Benvenisti writes, the kinds of social pressures to which it responded were not. These pressures included the economic stranglehold imposed on Germany by the Allied powers after the First World War, foreign control over important aspects of domestic policy, and an increasingly globalized economy. Moreover, a large proportion of the population, including the elites, was not committed to the liberal democratic Weimar Constitution. Political and legal institutions were thus vulnerable to capture by groups from the right or the left that had no principled stake in maintaining them and capture had led to the internal fragmentation of the state.

At this time, legal scholars on the right regarded the Weimar Constitution as itself a threat to sovereignty, given that it diluted the power of the prewar sovereign — the Kaiser — by introducing some of the checks and balances of democratic constitutionalism. Their concern about sovereignty was, however, much more radical than that of contemporary opponents of judicial review, for example, Jeremy Waldron,[8] who claim that such review undermines parliamentary supremacy and thus the authority of the representatives of the people. These rightwing Weimar scholars, notably Carl Schmitt, opposed what they regarded as the pluralistic, party political system of parliamentary democracy, as they thought that that system, like the judicial system, was prey to capture by special interest groups and thus contributed to the problem of fragmentation. On their view, popular sovereignty is national sovereignty, with national sovereignty understood as the sovereignty of a substantively homogeneous people, a power which is outside of legal order and which cannot be constrained by the legal limits that liberals and democrats desire to impose on an authentic sovereign power capable of making the kinds of decisions necessary to solve the fundamental conflicts of a society.

Schmitt's position gave rise to one of the three leading paradigms of sovereignty in Weimar. He set out his conception of sovereignty in a customarily

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7 My account below draws heavily on my earlier work, especially David Dyzenhaus, Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar (1997).

8 *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006).

succinct and enigmatic way: "Sovereign is he who decides on the exception."[9] This formulation becomes clearer when paired with Schmitt's claim that the primary distinction of "the political" is the distinction between friend and enemy.[10] It follows, he supposes, that the political sovereign is the person who is able to make that distinction, is indeed revealed in the making of that distinction, and that he decides both that there is an exception and how best to respond to it. Schmitt thought that liberal democratic institutions with their commitment to the legal regulation of political power, that is, to the rule of law or the *Rechtsstaat*, are incapable of making the distinction, hence, incapable of being sovereign, hence, cannot be the guardian of the constitution. And he took this flaw to be expressed in Article 48 of the Weimar Constitution[11] since that section recognized the need for the presidential exercise of sovereign authority on existential questions, though it sought in a liberal-legalist fashion to set limits to an exercise of executive discretion that cannot in fact be legally circumscribed.

Hans Kelsen provided the second, legal positivist paradigm, one which opposed the classical idea that each state is sovereign in that it is subject to no externally imposed law. Indeed, Kelsen concludes his major work on sovereignty by advocating the radical suppression of the concept of sovereignty in legal thought if, as he thought desirable, states were to conceive of each other as equal actors within an international legal system.[12] According to Kelsen, a legal system is a hierarchy of norms, where the validity of each norm is traceable to a higher-order norm, until one reaches the *Grundnorm* or basic norm of the system. Such an order is free of contradictions since any apparent contradiction between two norms will be resolved by a higher-order norm, which gives an official the power to make a binding decision. The validity of the basic or constitutional norm cannot, however, be traced to any other norm and, Kelsen asserts, its validity has therefore to be assumed. Sovereignty is thus not a kind of freedom from law, as in the classical conception, since it is a legally constituted property, pertaining to the identity of a particular legal system. Thus Kelsen does not provide a paradigm for understanding

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9 Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 5 (George Schwab trans., MIT Press 1985) (1922) [hereinafter Schmitt, Political Theology].

10 Carl Schmitt, The Concept of the Political (George Schwab trans., Univ. of Chicago Press 1996) (1972) [hereinafter Schmitt, The Concept of the Political].

11 Verf Bay art. 48.

12 Hans Kelsen, Das Problem Der Souveränität Und Die Theorie Des Völkerrechts: Beitrag Zu Einer Reinen Rechtslehre [The Problem of Sovereignty and the Theory of International Law: Contribution to a Pure Theory of Law] 320 (1920).

sovereignty so much as a paradigm for understanding legal order in a way that does not regard sovereignty as an organizing concept for legal theory.

Schmitt and Kelsen remain important figures in the contemporary debate about sovereignty and, as I shall show below, their paradigms provide a useful perspective on the idea of sovereignty as a trusteeship for humanity. Schmitt sounds a productive, skeptical note about the idea of humanity (and by extension trusteeship) as a justification for state action, as he thinks that such justifications serve as ideological camouflage for power politics. Kelsen, in contrast, invites us to conceive sovereignty on its own terms, that is, legally. On that conception, sovereignty becomes an instrument for whatever ideological purposes those who occupy sovereign office choose. Such a conception permits one, Kelsen supposes, to distinguish clearly questions of what *is* from questions of what *ought* to be, the realm of legal science from the realm of ideology or of moral inquiry. And it is precisely such a distinction that Benvenisti relies on when he sets out his threshold empirical question to clear the way for asking his normative or moral question.

I shall also introduce a third paradigm — the almost completely forgotten legal theory of Hermann Heller, who died in 1933 aged forty-two.[13] Heller, as we shall see, shared with Schmitt the idea that sovereignty had to have a central role in legal theory and that its role includes a place for a final legal decision. Indeed, much more than Schmitt, who liked to claim that he was a dispassionate, scientific diagnostician of politics and law, Heller regarded all accounts of sovereignty as inherently political. However, in a manner closer to the spirit of Kelsen's enterprise than to Schmitt's, he wished to emphasize that the ultimate decider — the sovereign decision unit of the political order of liberal democracy — is entirely legally constituted. Finally, the claim that all accounts of sovereignty are inherently political is not, for Heller, a claim that reduces sovereignty to the play of power politics. As he emphasized, normative argument is an eliminable part of legal and political theory, so that it is in Heller that we get the fusion of the factual and the normative of the sort I suggested Benvenisti needs.

Part I introduces the problem all three thinkers tried to resolve: how is it that the sovereign is both the highest authority and yet subject to law (Section I.A.)? It then indicates how Schmitt and Heller both resorted to Hobbes, though in very different ways, to respond to the paradox of sovereignty

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13 His principal work is Hermann Heller, Die Souveränität: Ein Beitrag Zur Theorie Des Staats- Und Völkerrechts [Sovereignty: A Contribution Towards a Theory of The Law of the State and of International Law], *in* 2 Gesammelte Schriften [Collected Works] 31, 127 (Christoph Müller ed., 1992) [hereinafter Heller, Die Souveränität].

(Section I.B.). Lastly, it sets out the outlines of Heller's resolution of the paradox (Section I.C.). Part II begins the process of filling in that resolution by explaining how within the nation-state Heller thought that a particular democratic bond is forged between sovereign and those subject to his power in that the sovereign rules through law. Part III explains the role of normative principles in his theory in the construction of the bond between ruler and ruled and explores the implications of the theory for the relationship between sovereign and subject, where "subject" does not necessarily mean "citizen" since it includes all subject to sovereign power. Part IV takes the argument back to Benvenisti's central idea in order to show why both Schmitt's and Kelsen's paradigms illuminate some of its problematic aspects while Heller's paradigm might be able to take the idea forward, albeit on a rather different path. The last Part provides a brief conclusion.

I. The Paradox of Sovereignty

A. The Paradox

In the nineteenth century, leading theorists of public law were much preoccupied with what we may think of as the paradox of sovereignty: if the sovereign is the highest authority, and hence not answerable to any other authority, how can the sovereign be subject to law? In Germany, this reasoning is most famously to be found in the attempt to explain the relationship of power and law in Georg Jellinek's "two-sided" theory of state.[14] Jellinek belonged to the school of "statutory positivism" that built a theory of law around the idea of the primacy of statute law made by a legally unlimited and thus sovereign state. Statutory positivists argued that the state ruled comprehensively through primary legislation, faithfully implemented by the administration, with judicial review for constitutionality of statutes prohibited, and review for the legality of official action under the law confined to seeing whether the officials had kept within the letter of the law. The legal order was thus understood as a "closed positive system of laws deriving from a sovereign source (the state)."[15]

On this theory, it is impossible to explain international law, since the idea of the state as having unlimited power entails that there can be no law outside of the state to which the state is bound. But similarly the state is not bound by its own law. Since Georg Jellinek took as a given that the state is bound by its

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14 *See* Georg Jellinek, Allgemeine Staatslehre [General Theory of State] (1905).

15 *See* Peter C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism 34 (1997).

own law, he found himself confronting the paradox.[16] The two-sided theory responds to the paradox by taking the state to have two modes of being. It presents itself, on the one hand, as a matter of social facts about power, but on the other, as a legal person. In its social side, there are constraints on the state's power — the constraints set by the needs the state has to satisfy and by the other locations of social power in the society. In its legal side, the state may legislate as it pleases, but it is to be understood as legally constituted — as a system of legal norms.

The theory faced several problems. At a conceptual level, it does not so much respond to the paradox as evade the question of the relationship between law and power. For it consigns questions about the elements in the relationship to distinct fields of inquiry, on the one hand, social theory and political science, on the other, legal theory understood in a very particular way, as confined to the study not only of positive legal norms but also only those norms that are established by statute. In addition, the theory assumed that the *de facto* power of the state was also *de jure* or legitimate. But its methodological restriction on keeping its modes of analysis distinct meant that it barred itself from inquiry into the question of how *de facto* power might become *de jure*.

Kelsen and Schmitt each developed one side of the theory to the exclusion of the other. In both cases the results bore little resemblance to the original, most notably in the one small but significant feature their theories had in common — the fusion of the *de facto* state with the *de jure* state. However, in Kelsen legitimacy becomes a property of legality, more accurately, of the validity of positive law, whilst in Schmitt legality is reduced to legitimacy, with legitimacy conceived as the property of a particular kind of power, one that stands outside of legal order.

Heller, in contrast, took Jellinek seriously, in particular the idea that facticity — what is — has a normative force; in Jellinek's phrase: "the normative force of the factual."[17] Heller approved of this idea to the extent that it conveys correctly that tradition often has a hold on us that we do not fully bring to consciousness. But he insisted that the idea of the normative force of the factual has to be supplemented by the idea of the "normalizing force of the normative."[18] And in order for the normative ideas to become normal, for prescriptive ideas to become part of practice, they have to strive for legitimacy.

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16 *Id.* at 42-44.

17 Hermann Heller, Staatslehre [Theory of State], *in* 3 Gesammelte Schriften, *supra* note 13, at 181, 181, 379 [hereinafter Heller, Staatslehre].

18 *Id.* at 179-81.

Thus for Heller there is a gap between the *de facto* and the *de jure* dimensions of the state. In exploring this gap, Heller again took his cue from Jellinek, as he emphasized two aspects of the *Rechtsstaat*: on the one hand, the law-constitutive character of power — legal order secures and even increases the resources of the powerful; on the other, the power-constitutive aspect of law.[19] What connects these two aspects, establishing a dialectical relationship between law and power, is ethics, more precisely what Heller called "ethical fundamental principles" of law.[20] These principles provide a basis for a juridical assumption that legal order should be conceived as a dialectical unity of law, power, and ethics. That assumption in turn leads to a duty on the part of legal officials to attempt to close the gap between the *de facto* and the *de jure* in the direction of the *de jure*. The officials are under a duty to make law as it in fact is live up to what we might think of as law's inherent, ethical aspirations — the aspiration to be a *Rechtsstaat*.

In order to transcend Jellinek's binary reasoning, Heller reaches back beyond the nineteenth century through Spinoza via Hobbes to Bodin to confront the paradox of sovereignty. Indeed, the paradox of sovereignty was classically formulated by Thomas Hobbes in *Leviathan*. Hobbes's formulation is important to any discussion of Heller and Schmitt on sovereignty because they both took Hobbes's political theory to be a major, though rather different source of inspiration for their own. Kelsen, in contrast, did not consider Hobbes a significant point of reference.

B. Hobbes in Schmitt and Heller

In *Leviathan*, Hobbes is commonly taken to have responded to the paradox of sovereignty by pointing out that to suppose that the sovereign is subject to civil law leads one into an infinite regression of always looking for a further sovereign as ultimate decider; hence, one should conclude that the sovereign is not subject to law.[21] However, we need to note that Hobbes prefaces this claim by saying that "[i]t is true, that Soveraigns are all subject to the Lawes of Nature; because such laws be Divine, and cannot by any

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19 *Id.* at 354-55.

20 Hermann Heller, *Bemerkungen zur Staats- und Rechtstheoretischen Problematic der Gegenwart* [*Observations on the Problem of Contemporary Theory of State and of Law*], *in* 2 Gesammelte Schriften, *supra* note 13, at 249, 275 [hereinafter Heller, *Bemerkungen*].

21 Thomas Hobbes, Leviathan 224 (Richard Tuck ed., Cambridge Univ. Press 1997) (1651).

man, or Common-wealth be abrogated."[22] The prefatory remark opens up the possibility that the sovereign is subject to law, not to the civil law he has himself made, but to the laws of nature. This is just one of the many points in Hobbes's political and legal theory where he introduces an element that makes his account of law more complex, given his reputation as the founder of an absolutist, authoritarian conception of sovereignty. In addition, when Hobbes explains why the sovereign is legally unlimited by civil law, his point is that he who has ultimate lawmaking authority can always choose to free himself from subjection to law by enacting a new law. But since that choice has to be properly or legally enacted, it would seem that until that point, the sovereign is subject both to particular laws and the rules that apply to the making of particular laws.[23] Finally, Hobbes argues that the sovereign is an artificial not a natural person and that characteristic of his personality are several "rights of sovereignty,"[24] such that any attempt by the sovereign to give away one of these rights should be regarded as void. Here a constitutive element of sovereignty turns into something regulative, as it seems that even if the sovereign were to enact his decision in accordance with the relevant rules for making law, that enactment should be treated by legal officials (including judges) and legal subjects as void.[25]

One can seek to deflate this and other similar remarks by pointing out that Hobbes insisted that the sovereign's subjection to the laws of nature made him answerable only to God for his transgressions, not to any earthly institution or human individual, and that being bound by law at one's pleasure is not in fact to be bound. In his 1922 book on sovereignty, Schmitt adopted a view of Hobbes consistent with this deflationary strategy, as he found in Hobbes the source of his own decisionist understanding of law, in which all that matters is the answer to the question, "Who will ultimately decide?"[26]

Schmitt's definition of sovereign was at that time ambiguous between the claim that the one who as a matter of fact decides on the state of exception is sovereign and the claim that the sovereign, by virtue of his position as sovereign, is the one who gets to decide on the state of exception. On the first claim, we can never know who is sovereign in advance of a state of exception; on the second, we do know in advance who the sovereign is, only the content of his decision is unknown. This ambiguity plays itself out in Schmitt's discussion of

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22 *Id.*
23 *Id.* at 184.
24 *Id.* ch. 16.
25 *Id.* at 127.
26 Schmitt, Political Theology, *supra* note 9, at 33-35.

the role of decision. Is he who makes decisions in fact the sovereign authority, or is a decision valid only when made by the sovereign?

There is a polemical point to the ambiguity. I understand Schmitt's argument as one that seeks to show that the ambiguity is located not in his own argument but within liberal political and legal philosophy. Liberalism recognizes that the sovereign, because he decides on the state of exception or emergency, stands above the normally valid legal order. But liberalism tries to limit the exception by legally defining the jurisdiction of the sovereign: the conditions both for declaring a state of exception and for resolving it. Kelsen stands out for Schmitt as the logical culmination of the liberal tradition in his determination to resolve the ambiguity by eliminating the exception, and with it the idea of sovereignty, from any independent role in legal order.[27]

Schmitt took liberals to want to reduce as far as possible the necessity of politics by establishing the supremacy of impersonal law. His claim, by contrast, was that all legal orders are based on a political decision and not on a norm. It is therefore the nature of decision that has to be comprehended if one is to understand the concepts of law and of order, which are the two different, even antithetical, components of "legal order." Once one sees the foundational role of decision, one will also see that, in the state of the exception, while law (*Recht*) retreats the state stays.[28] It is the further liberal equation of state and positive law — the state is exhausted in official activity by virtue of positive law — which leads to the liberal claim that the state of exception is a state of lawlessness. For Schmitt, because the state remains whilst law retreats, the state of exception is still in a juristic sense an order.[29]

Schmitt also argued that the concept of decision is closely bound up with the concept of personality. He wanted to reinstate a personalized Hobbesian decisionism against Locke's attempt to show that authority is the authority of law. For law itself cannot answer the crucial question: "Who will decide?" With Hobbes, Schmitt said that "[a]uthority and not truth makes law." And he took Hobbes to have claimed correctly that authority cannot be reduced to legal authority — to authority that is exhaustively constituted by law. State sovereignty is not something that can be subsumed in an abstractly valid legal order, but is always something concrete: a subordination of subjects to the power of a particular person or persons.[30]

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27 *Id.* at 14.
28 *Id.* at 12.
29 *Id.* at 12-13.
30 *Id.* at 43-45.

C. A Sketch of a Resolution

What, then, is the concrete resolution of the paradox of sovereignty? According to Schmitt, the answer lies in seeing that "all fruitful concepts of modern theories of state are secularized theological concepts."[31] His aim is to expose the politics of theories of law against what he regarded as the depoliticizing or neutralizing trend of the Enlightenment. He also supposed that it is a sociological fact about modernity that claims to authority have to be democratic in the sense that such claims can appeal only to what strikes people — the people — as right. And to strike the people as right, such claims have to be existential in nature — they must aspire to constitute the concrete unity of the people.

Further, there is a political-theological element to such claims. Once we see that what is at stake in law is political decisions about different kinds of order, we will also see that it is our political-theological commitments that fundamentally divide us from each other. Political theology tells us that a set of commitments has an existential worth for those who hold them, a worth that transcends rational discussion. Sociology tells us that these commitments are the only justificatory basis available to us. The commitments, in sum, are constitutive of collective identity: they transcend the here and now and pose an absolute challenge to any rival set. Any decision for a particular type of order is thus an absolutist, dictatorial one, something which liberalism hopes both to avoid and disguise.[32]

Hence, Schmitt had an apocalyptic understanding of law and politics. He offered no legal answer to the paradox of sovereignty, since, on his account, the solution will take place in the realm of the political. More particularly, the resolution of fundamental problems of law is in the state of exception, which means by way of the sovereign acts that spring from a genuine political decision. And the struggle for sovereignty, the struggle to be the one who decides, is won not in the reasoned debates of parliamentary politics, but in the battle of the politics of identity.

Heller, in contrast, wanted to preserve what he took to be two intimately related elements of Bodin's and Hobbes's thought. The first is their commitment to the idea that whatever one's ultimate conception of legal authority, one must find some immanent and rational justification. The second is the idea that the sovereign is subject to some higher authority and his laws are therefore to be seen merely as the positivization of such authority.[33] As we shall see, Heller

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31 *Id.* at 49.

32 *Id.* at 55-84.

33 Heller, Die Souveränität, *supra* note 13, at 34-38.

argues that the practice of the democratic *Rechtsstaat* makes an immanent legal rationality constitutive of the state, so that the sovereign is legally bound to fundamental legal principles.

On Heller's view, the elements of Hobbes's thought outlined above have to be taken seriously: the role of the laws of nature and the idea of sovereign subjection to them; the fact that the sovereign rules thought positive law; and that the person of the state is an artificial not a natural person.[34] As I shall now show, Heller builds his conception of sovereignty on the basis of these elements. Moreover, he argues that one cannot have a conception of sovereignty appropriate for a democratic political order unless these elements are made into the building blocks of one's legal theory. It follows from this argument that Schmitt does not so much provide an alternative paradigm of sovereignty in Weimar as a critique of sovereignty, one which strips it of its legal elements by reducing it to the name for superior *de facto* power.

II. The Democratization of Reason

For Heller, the state is the organization equipped to make final and effective decisions on any matter that requires a resolution for the maintenance of social cooperation between all the inhabitants of the territory. In order to fulfil this role, the organization must be superior to any other, that is, sovereign.[35] But, in his view, state power can never be a mere projection of will from the powerful to those subject to them, from ruler to the ruled. The state organization consists of relations between the different groups whose activities constitute it, since it has to be brought into being and maintained in existence by the deliberate activity of individuals. These individuals include both the most and the least powerful among those subject to the state. Political power is never power over the state, since by definition it is power won and exercised within the state organization.[36] Heller thus said that even the most autocratic kind of ruler will find that not all power can be united in his person. He will have to exercise that power through the state, which means sharing it with his bureaucracy and all his other organs of rule. And he will also have to count on the willing support of a certain number of organizations and groups if he is to secure the obedience that makes his rule viable.[37]

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34 *Id.* at 36-37, 95-98.

35 Heller, Staatslehre, *supra* note 17, at 358.

36 *Id.* at 351.

37 *Id.* at 339-49.

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Heller also maintained that law is the means any ruler must adopt in order to publicly manifest his will. Since the autocratic ruler will, among other things, promulgate laws, it might seem that Heller could not withhold the title of *Rechtsstaat*, the state bound by the rule of law, from an autocratic state. Nevertheless, he poured scorn on Kelsen's claim that every state is a *Rechtsstaat*,[38] because for Heller the *Rechtsstaat* is a very particular form of legal and normative order, distinguished from absolutist forms of state in that it exhibits a division of powers between legislature, executive, and judiciary that equips the bond between ruler and ruled with legal sanctions.[39]

It is these sanctions that operationalize what Heller called the "polemical principle" of democracy, or of the sovereignty of the people. The principle is that power in a democracy should go from bottom to top — all power resides in the people. The democratic *Rechtsstaat* institutionalizes that principle by requiring that the law be made by elected representatives, whose accountability to the people is legally ensured. That same law must be implemented and interpreted by officials and judges who are similarly accountable to the law.[40] The principle is polemical in the sense that it is intended to provide a basis for a stance amidst political conflicts. It opposes directly the autocratic principle that seeks to unite all power in the hands of the ruler and it points to the inevitable and sometimes very large gap in any *Rechtsstaat* between ideal and reality. Once institutionalized, it requires a constant attempt to narrow the gap under the impulse of interpretations of the principle.

The precise juridical distinction between democracy and autocracy is that in autocracy the sovereign representatives are juristically unbound, whilst in the state of the sovereignty of the people there exists a magisterial representation that is without exception legally bound. In such a situation, rulers must be able to justify their actions by referring to some legal warrant. And that is the beginning of what one might think of as political, even democratic, accountability.

It makes sense to see this as the beginning of democratic accountability for two connected reasons. First, the subjection of rulers to the law is part of the historical development that includes the establishment of representative

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38 *See, e.g.*, Hans Kelsen, vom wesen und wert der demokratie [On the Nature and Value of Democracy] 252-53 (1981); Hermann Heller, *Der Begriff des Gesetzes in der Reichsverfassung* [*The Concept of Statute in the Constitution of the Reich*], *in* 2 Gesammelte Schriften, *supra* note 13, at 203.

39 Hermann Heller, *Politische Demokratie und Soziale Homogenität* [*Political Democracy and Social Homogeneity*], *in* 2 Gesammelte Schriften, *supra* note 13, at 421, 426 [hereinafter Heller, *Politische Demokratie*]; *see also* Heller, Staatslehre, *supra* note 17, at 359-61.

40 Heller, Staatslehre, *supra* note 17, at 360-61.

assemblies with some role to play in legislation. Second, once the idea is dislodged that the authority of rulers and their law is divine, rulers must find some other mode of justification, hence, the search for an immanent and rational justification for political authority. Even if, as in Hobbes, the rational justification is one for absolutist rule, what is important is its appeal to the reason of its audience. Such an appeal sets in motion a process that makes it difficult to resist what we might think of as the democratization of reason.[41]

This process is not just a matter of formally extending the franchise until it is universally held. The idea that political power must appeal to the reason of each individual is founded in some conception of the equality of each individual reasoner. And this foundation leads to social division rather than cooperation in the face of large discrepancies in social and substantive equality. If the process of the democratization of reason is to avoid self-destruction, it must turn the formal *Rechtsstaat* of liberalism into the substantive or social *Rechtsstaat*. This is a state that strives to attain a degree of social homogeneity, that is, of rough social equality, for all the citizens of a particular state.[42]

Thus far I have sketched two different aspects of the democratization of reason detected by Heller. The first culminates in universal franchise. The second requires attention to social inequality as an impediment to what can be taken as the rationale for the process of democratization — the vision of the citizen as author of his or her social and political order. These two aspects are given expression in the legal order of the *Rechtsstaat* in a way that provides much of the basis for Hellers's claim about the legitimacy of legal order. However, these two aspects, whilst necessary conditions of legitimacy, are not sufficient. What has to be added is the legal quality of *rechtsstaatlich* rule, the specific legitimacy of legality. In this regard, we have to take into account Heller's argument that the legitimacy of legality cannot be reduced to the certainty delivered by the rule of positive law, since underpinning positive law is not simply, as Kelsen once put it, the "Gorgon head of power,"[43] but the fundamental principles of law.

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41 *Id.* at 108-09.

42 Heller, *Politische Demokratie*, *supra* note 39.

43 Hans Kelsen, *Remarks*, 3 veröffentlichungen der vereinigung der deutschen staatsrechtslehrer [Proceedings of the Association of German Public Law Teachers] 54, 54-55 (1927).

III. The Legal Constitution of Sovereignty

Heller's definition of sovereignty is cumbersome, especially in contrast to Schmitt's one line quoted above[44]:

> The sovereign is thus the one who has decided on the normal situation in accordance with the written or the unwritten constitution, and because he willingly maintains its validity, he is able permanently to make further decisions. And only the one who decides in a constitutional manner about the normal situation is able also to decide juridically about the exceptional situation, even if he decides *contra legem*. Only he can be said plausibly to have the final decision on whether or not his law must yield to the necessities of the moment. If one were to accept that there are two independent decision making units, one deciding about the exceptional the other about the normal situation, so one would have to accept that there are two sovereigns in the same state.[45]

However, I shall now argue that its elements make sense within a theory that accords a central and politically significant place to sovereignty, but which insists that sovereignty is entirely legally constituted. Sovereignty is then both a political and a legal concept. The political aspect is in a sense Schmittean, whilst the legal aspect is in a sense Kelsenian. That the two are aspects of the same phenomenon makes Heller's contribution to our understanding of sovereignty both distinctive and valuable.

Heller distinguishes between logical and ethical fundamental principles of law. His view seems to be that the logical principles are essential to the form of law, whilst the ethical principles give law both its value and its substance.[46] The logical are the "constitutive principles of the pure legal form."[47] They are universal conditions of legal knowledge, in that they will play a role wherever there is law, in the same way as grammar is to be found wherever there is speech.[48] For example, the principle of equality before the law, whether of states in the international order, or of individuals in the state order, is in one sense a logical fundamental principle of law, since in order for there to be law that governs both you and me, we have to accord each other formal reciprocal recognition as bearers of rights and duties. But to give content to the idea of equality, one has to positivize an understanding

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44 *See* text accompanying *supra* note 9.

45 Heller, Die Souveränität, *supra* note 13, at 127 (translated by the author).

46 Heller, Staatslehre, *supra* note 17, at 369.

47 *Id.* at 69-71.

48 *Id.* at 69-71.

of substantive ethical fundamental principles of law.[49] Thus, while logical fundamental principles are formal, in the sense that all law must observe them, it is the ethical fundamental principles which the positive law must seek to express. The substantive *Rechtsstaat* — the substance of the rule of law — is derived from these ethical fundamental principles, by contrast with the formal *Rechtsstaat*, which will be in place wherever there is the commitment to government in accordance with law.

Heller found the indispensability of the ethical fundamental principles to be acknowledged by the legislator in that he will refer to such principles in two ways, either substantively, in their actual formulation, or formally. An example of substantive formulation is the second part of the Weimar Constitution in its catalogue of fundamental rights. An example of formal reference is when the legislator, without formulating the content of the law, refers to illegality, public morals, reasonableness, good faith and so on. Here the legislator gives the judge full authority to concretize the fundamental principles of law legitimated by the society into norms of decision.[50] In addition, these norms have to be relied on even when there is no explicit reference to them, just because the law is never wholly contained in the text of the positive law. Heller offered the classic example of equality before the law, whose content is largely determined by changing social understandings of the scope of equality.[51]

It is their very lack of determinate content that permits ethical fundamental principles of law to stabilize a constitution. They provide the doorway through which positively valued social reality makes its way into the normativity of the state.[52] The ethical aims of legal order are then expressed in the ethical fundamental principles of law. They are suprapositive in the sense of being beyond positive law. But they are not supracultural. They are principles that express the values embedded in the cultural practices that the *Rechtsstaat* institutionalizes. They are given content in the positive law by the process of democratic reason and reason is the criterion by which that content is elaborated and evaluated. There have to be moments of authoritative interpretation, debate stoppers where an exercise of political power is what ends the debate.[53] But each interpretation is authoritative only within the institutional structure of the democratic *Rechtsstaat*.

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49 *Id.* at 154-57.
50 *Id.* at 370.
51 *Id.* at 370-01.
52 *Id.* at 371.
53 *See, e.g.*, Heller, Die Souveränität, *supra* note 13, at 201-02.

What, then, are these principles? On Heller's view, this question is wrongly posed if it is meant to elicit a list of timeless ethical principles. The principles are those values that the culture regards as constitutional values, as the legal foundation of social cooperation. As such, they make up the stock of values that is the substantive constitution in the narrow sense. If there is a written constitution, it will try, insofar as is possible, to formulate the values of the substantive constitution in one document — a formal constitution. And this document may try to rank the values by putting some on a list of basic rights out of the reach of simple parliamentary majorities.[54] However, Heller also emphasizes that not all ethical fundamental principles of law are entirely relative with regard to time and place. They aspire to universality and the positive law can violate them.[55]

According to Heller, legal theory has to make sense of the idea of sovereignty just because the fundamental principles of law cannot be concretized in the absence of a decision unit capable of making effective decisions for all the inhabitants of a particular area. But for him the paradox of sovereignty — that the sovereign is both bound by and free of the law — is resolved by disambiguating "law" in the formulation, so that we see that the sovereign is free of positive law, but only in a very specific sense. He is free of positive law only in that he may use legal means to change the law, and, even more importantly, he is never free of fundamental principles of law. Heller thus retrieves for twentieth century legal thought all three of the central ideas of Hobbes's legal theory.

According to Heller, the paradox of sovereignty arises only insofar as the main task of sovereign power is to concretize the fundamental principles of law and not to guarantee the positive law; hence, a decision against the positive law might be the right one if the positive law contradicts fundamental principles.[56] But, unlike Schmitt and Kelsen who wanted to dissolve the paradox, Heller wished to maintain it because the tension of which it is the manifestation is part of the structure of the *Rechtsstaat*. For whilst it is a mark of sovereignty that the sovereign can decide against the positive law, it is equally a mark that sovereign decision is always the decision of a legal, artificial person, that is, the third main idea in Hobbes's legal theory.

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54 Heller, Staatslehre, *supra* note 17, at 385-95.

55 Heller, Die Souveränität, *supra* note 13, at 70. Moreover, Heller says that at least some of the ethical fundamental principles are universal, a priori and historically unchanging, although he leaves open the sense in which they can be said to be. *See* Heller, Staatslehre, *supra* note 17, at 334.

56 Heller, Die Souveränität, *supra* note 13, at 185.

Thus Heller argued in respect of Article 48 of the Weimar Constitution[57] that the discretionary powers granted to the President to respond to an emergency had to be understood as conditional on the parliament's power to confirm or strike down his measures, as well as on the electorate's power exercised through plebiscite.[58] On his view, and against Schmitt's, in a *Rechtsstaat* with its separation of powers, one cannot localize sovereignty in any particular state representative. But against Kelsen, he held that sovereignty is still something that transcends the positive law in that the state can decide to act legally against the law for the sake of law.[59] Sovereignty, in short, resides not in any particular organ of the state but in the organization of the state as a whole; and it cannot be reduced to an expression of the positive legal order.

In this analysis of Article 48, one can see all the elements at work in his definition above:

1. We find out who the sovereign is by seeing who in the normal situation makes decisions that both comply with and maintain the constitution.
2. That person is also the sovereign who responds to emergencies, which includes making decisions to act against the positive law (*contra legem*).
3. Even if decisions have to be taken against the positive law, they have to be in proper legal or juridical (*juristich*) form.
4. There can only be one sovereign person in a state.

The last element — there can only be one sovereign person in a state — is particularly significant in appreciating why Schmitt does not so much offer a paradigm for understanding sovereignty as a paradigm for getting rid of sovereignty, because his thought in its hostility to legality is perforce hostile to any quintessentially legal construct. As noted above, Schmitt is sometimes ambiguous about this issue. Recall, for example, his claim that in a state of exception law recedes but the state in a juristic sense remains, which suggests that sovereignty is located both in the person of the state and in the natural

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57 Verf Bay art. 48.

58 Heller's most elaborate analysis is to be found not in his academic writings but in his argument to the *Staatsgerichtshof* about the legal validity of the *Preußenschlag*, the federal government's coup against the Prussian government in 1932, under the pretext of Article 48. *See* Preussen contra Reich vor dem Staatsgerichtsthof: Stenogrammbericht der Verhandlungen vor dem Staatsgerichstshof in Leipzig vom 10. bis. 14 und vom 17. Oktober 1932 [Prussia v. Reich Before the State Court: Stenographic Report of the Trial Before the State Court in Leipzig from the 10th to the 14th of October and the 17th of October 1932] (1976). Schmitt both advised the federal cabinet throughout this process and appeared against Heller in the case. *See* David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 Am. Pol. Sci. Rev. 121 (1997).

59 Heller, Die Souveränität, *supra* note 13, at 127-31.

person who actually decides. However, as we have seen, for him the state is ultimately located in the natural person who is able to make the friend/enemy distinction in a way that appeals to a substantively homogeneous collectivity.

The idea of homogeneity here has nothing to do with Heller's egalitarian idea of social homogeneity and everything to do with nationalistic ideas of authenticity. There is an unbroken line of thought running from Schmitt's 1922 claim that law recedes in the state of exception, through to his suggestion in 1932 that the concept of the *Rechtsstaat* is a mere piece of rhetoric and his endorsement of the saying that "*Recht aber soll verzüglich heißen, was ich und meine Gevattern preisen*," a line from Goethe that Schmitt takes to mean that *Recht* amounts to nothing more than what me and my buddies happen to value.[60] And there is a direct line from this claim to the refrain of Nazi-era legal theory that the *Führer's* will is the source of all law.

Heller was well aware of this point. He argued in 1926 that a counterrevolution against the idea of rational legality would have to reach back beyond the absolutist period to seek a justification on the basis of a personalized deity. But this harkening back would be a revolution against Hobbes, since Hobbes, with others of his time, had replaced the idea of a personal god with the idea of human nature or reason. Such a reaction is against the Enlightenment and it can justify no stopping point for whatever forces it unleashes and whose driving vision it endows, whatever its content, with the romance of an aesthetics that is in awe of any absolute power.[61] And it is in this thought, said Heller in 1928, that one can find the true kernel of Schmitt's claim that the specific political distinction is the distinction between friend and enemy. Schmitt, in making the friend/enemy distinction the fundamental distinction of politics, sought to do away with the internal politics of a state.[62]

According to Heller, Kelsen and Schmitt are the flip sides of the same coin, as they both seek a kind of transcendental certainty. Kelsen's response eschews metaphysics and ethics, finding its transcendental foundation in a scientific starting point that hopes for the certainty that such a starting point seems able to deliver. But the security and certainty it delivers is entirely illusory, since its product is a "ghostly unreality of a theory of state without a state and a theory of law without law."[63] It must end in the final disillusionment of Schmitt's romantic theory, one that sets itself against all attempts to find

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60 Carl Schmitt, Legalität und Legitimität [Legality and Legitimacy] 19 (1988).

61 Hermann Heller, *Die politischen ideenkreise der gegenwart* [*Contemporary Political Ways of Thought*], *in* 1 Gesammelte Schriften, *supra* note 13, at 267, 287-89.

62 Heller, *Politische Demokratie*, *supra* note 39, at 425.

63 Heller, *Bemerkungen*, *supra* note 20, at 252.

a rational basis for authority, opting instead for the romance of potential war of one homogeneous unit against all rivals, so that security and certainty can be created out of a normative void.[64] I shall now turn to exploring the implications of each paradigm for Benevenisti's idea of sovereignty as a trusteeship for humanity.

IV. The Sovereign as Trustee

Recall my point from the beginning that Benvenisti cannot help himself to examples from practice in order to support his claim that his idea is already in fact instantiated as a prelude to arguing that sovereigns *should* be subject to other-regarding obligations. My reason was that arguments in this domain, as elsewhere in the human sciences, are always complex mixes of normative and factual claims, and reconciliation for one paradigm of sovereignty might be the abdication of sovereignty for another. I also suggested that Benvenisti's distinction between the factual, threshold question and the normative question relies on the Kelsenian paradigm in which questions of what *is* can be clearly distinguished from what *ought* to be.

Schmitt's critique of liberalism is helpful in understanding my point. While he often portrayed liberalism as politically impotent, unable to guard against its enemies because it lacks any real substance, at other times he seemed to regard liberal ideology as an effective cloak over a particularly vicious kind of power politics. Liberals, he argued, like to fight their battles in the name of universal ideals, associated with the idea of humanity. This idea, he said, "is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat."[65]

This "highly political" use of "a non-political term," Schmitt claimed, leads to viciousness because war waged in the name of humanity must deny what the friend/enemy distinction does not — the humanity of the enemy, their specific human "quality."[66] But Schmitt's objection goes deeper than the denial of other-regarding obligations of the sovereign in international law. For him, it is important to preserve the idea of the sovereign as absolute, i.e., unconstrained by law or by any sort of obligations, domestically as well as

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64 *Id.* at 264-65.

65 Schmitt, The Concept of the Political, *supra* note 10, at 54.

66 *Id.* at 54-55; *see also* Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 Eur. J. Int'l L. 113 (2005).

internationally. Indeed, his argument about why it is a mistake to think of the sovereign as subject to international law is entailed in his argument that in the domestic setting the sovereign is unconstrained by law.[67]

Schmitt thought that a similar kind of critique applied to Kelsen. Despite his claim that the concept of sovereignty should be radically suppressed, Kelsen did not deny the idea of sovereignty any role. If the norms of the international system and of a domestic system seem to conflict, one will have, he argued, to make a choice in favor of one or the other in order to avoid contradiction. One has, in other words, to be a monist when it comes to the relationship between domestic and international law. Either one considers only those international norms valid that have been explicitly incorporated into domestic law, or one understands all national legal systems as authorized by the basic norm of international law, in which case conflicts between the two have to be resolved in favor of the international system.[68]

Kelsen's claim that there is a choice here is rather strange. First, he clearly thought that the choice for international law was politically consequential and that the choice should be for the international system. Second, he argued that the very claim to sovereign equality presupposes an overarching legal order that accords each state equal legal standing. So there does seem to be a substantive concern that drives the Pure Theory. And while Schmitt generally argued that Kelsen's legal theory is the exemplar of the void at the heart of liberal legalism, he also claimed that Kelsen's desire to make international law into a hierarchy of authorizing norms that would make unauthorized acts of force criminal had the result of denying the equal moral status of friend and enemy.[69] In this way, Kelsen's legal theory can be seen as concealing, or at least serving as camouflage for, a substantive political agenda.

It is important to see that Schmitt's claims about liberal legalism are not in tension with each other. Indeed, one does not have to be a Schmittean to make the historical case for the claim that in international law and relations the idea of humanitarian trusteeship did in fact serve the economic interests of the imperial powers.[70] That case fits snugly with a normative critique of liberalism as presupposing an atomized conception of the individual — the

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67 *See* Lars Vinx, *Carl Schmitt and the Analogy Between Constitutional and International Law: Are Constitutional and International Law Inherently Political?*, 2 Global Constitutionalism 91 (2013).

68 *See* Lars Vinx, Hans Kelsen's Pure Theory of Law: Legality and Legitimacy 182-83 (2007).

69 Carl Schmitt, *The Turn to the Discriminating Concept of War*, *in* Schmitt, Writings on War 30 (2011).

70 *See* Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inquiries L. 447 (2015).

rational maximizer of self-interest — in place of a thicker conception of the common values that could give individuals in a political order a more valuable sense of identity.

This case poses a serious challenge to Benvenisti and others who wish to resurrect the idea of sovereignty as trusteeship for humanity.[71] It suggests that the idea is too laden with bad history to make it worth resurrecting. But Schmitt's point goes further because it is conceptual. It is that the bad history is no accident. Liberalism is driven by a political logic that requires it to claim that the other-regarding obligations of the state are requirements of some abstract idea, whether of humanity, as in Benvenisti, or as derivations of some ideologically neutral idea, as in Kelsen's *Pure Theory of Law*. That abstraction is supposed to permit the theorist to demarcate the domain of inquiry so that questions can be asked in one domain in an ideologically or value-neutral way. For example, Benvenisti's threshold question — Are sovereigns in fact already subject to other-regarding obligations? — allows him in his view to proceed to answer the normative question: Should they be so subject? According to Schmitt, however, the answer to both questions comes too easily because it has already been smuggled into the conception of sovereignty that informs inquiry into the first question.

A response to this powerful challenge should start by accepting, with Heller, that all arguments on this terrain are at bottom political. There is no value-free description of the facts of the matter, as is illustrated in that the claim that examples show that sovereigns in fact have other-regarding obligations can be answered by the counterclaim that the better conclusion is that we are living in some post-sovereign order, more likely disorder. But that all the arguments are at bottom political does not mean either that argument itself or appeals to practice are futile. It is just that theoretical inquiry has to be understood pragmatically, as responsive to experience but always with the aim of working out the normative commitments in the practices that make up that experience, so that the practices can be productively reformed.

Heller's legal theory is helpful here. He wrote only a few pages on international law, but in them he insisted against Kelsen on the factual and normative priority of the law of the sovereign state over that of the international

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71 *See* Evan Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 Theoretical Inquiries L. 473 (2015); Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 Theoretical Inquiries in L. 507 (2015). See also Evan Fox-Decent's pioneering book, Evan Fox-Decent, Sovereignty's Promise: The State as Fiduciary (2011).

order.[72] Heller pointed out that any theory of international law has to take into account that in the last instance, for the most part a state's legal decisions will, at least for subjects of that state, trump international law. However, while siding in this regard with Schmitt against Kelsen, Heller insisted, as we saw, that the sovereign is a legally constituted entity, even though he can decide against the positive law.[73] Unlike Kelsen, Heller did not think that the independent lawmaking capacity of the sovereign state was subsumed into the hierarchy of international legal norms of a *civitas maxima*. The tension within domestic law that arises when a sovereign decision is made against law has to be preserved in an account of the relationship between the domestic and the international legal order.[74]

It is not all that clear how much Kelsen disagreed. Writing in 1941, in the same journal in which Benvenisti's essay on trusteeship would appear, Kelsen argued that a community had to meet three conditions before it could achieve the legal status of statehood: it had to be "constituted by a coercive, relatively centralized legal order"; it had to be "effective for a given territory"; and it must not be subject to the "legal control of another community, equally qualified as a state."[75] Kelsen hastened to add that the third condition is not incompatible with the state being "under the legal control of an international community, in so far as it belongs to a union of states which has an international character, such as the League of Nations."[76] And, as we have seen, his actual view on this third condition is that equal qualification as a state is not possible in the absence of the international legal order.

This Kelsenian view is an important element in Benvenisti's argument, though in it the idea that the international legal order distributes space over which states are sovereign is reconceptualized so that what is redistributed is "responsibilities for promoting the rights of *all* human beings."[77] I think

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72 Heller, Die Souveränität, *supra* note 13, at 141-84. For an account of international law by his former assistant which owes much to Heller, see Gerhart Niemeyer, Law Without Force: The Function of Politics in International Law (2001).

73 Heller, Die Souveränität, *supra* note 13, at 88-89. Caldwell takes these remarks to indicate Heller's endorsement of Schmitt in a wholesale fashion. *See* Caldwell, *supra* note 15, at 128-29, 236 n.53. But Heller's endorsement is only of the thought that ultimately a sovereign entity can decide against positive law, and Heller follows that endorsement with a biting critique of Schmitt's general legal and political theory.

74 Heller, Die Souveränität, *supra* note 13, at 141-84.

75 Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 Am. J. Int'l L. 605, 606-08 (1941).

76 *Id.* at 608.

77 Benvenisti, *supra* note 3, at 308 (emphasis added).

that a more modest proposal, reformulated in line with Heller's paradigm of sovereignty, might better secure the aims of Benvenisti's argument.

In Heller's paradigm, there is something like a principle of humanity. But that principle is not about what justifies a state in intervening either in the lives of individuals beyond its borders or in the internal affairs of other states. Rather it is about the obligations that attend any exercise of sovereign power that affects important individual interests. A claim to exercise sovereign power is a claim to authority over the person affected by the exercise. It is a claim that the exercise is justified and justification in the modern era is justification to the individual affected by the exercise.[78]

Heller's legal theory lays the groundwork for showing how ideas from the early modern era to do with the public law form — the form given by fundamental principles of law — help to understand the way in which the exercise of public power through law conditions that exercise so that the exercise is legitimated. An alternative path, the one suggested by the idea of sovereignty as trusteeship for humanity, is to have recourse to another source of such ideas in that same era — private law ideas analogous to trusteeship in Roman law invoked by many early modern scholars.[79]

The common thread is that the sovereign, the ultimate legal authority, does not have dominium or absolute rights over his power, but rather exercises that power on behalf of another — "the people" — who are subject to that power. But it is unclear how the rules of a private law regime can be turned into principles of legality appropriate for conditioning the exercise of public power, not least because of the inherent libertarianism of such regimes.[80]

I have therefore suggested elsewhere that in Anglo-American legal theory we should rather take our cue from Lon L. Fuller's well-known argument that there are eight principles of legality that together make up an "inner morality of law."[81] Fuller said of this morality that it is better understood in terms of a morality of aspiration than a morality of duty and hence that its "primary

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78 *Cf.* Bernard Williams, *Realism and Moralism*, *in* In the Beginning Was the Deed: Realism and Moralism in Political Argument 1 (2005). According to Williams, a sovereign has to be able to satisfy "the Basic Legitimation Demand" if it is to show that it wields authority rather than sheer coercive power over those subject to its rule. In order to meet that demand, William argues, the state "has to be able to offer a justification of its power *to each subject*." *See id.* at 4.

79 For an exploration of these alternatives, see Benjamin Straumann, *Early Modern Sovereignty and Its Limits*, 16 Theoretical Inquiries L. 423 (2015) (opting for the private law path, but countenancing the possibility of the public law one).

80 As I argue in David Dyzenhaus, *Liberty and Legal Form*, *in* Private Law and the Rule of Law (Lisa Austin & Dennis Klimchuk eds., forthcoming 2015).

81 Lon L. Fuller, The Morality of Law (rev. ed. 1969).

appeal must be to a sense of trusteeship and to the pride of a craftsman."[82] The appeal here, note, is to a "sense" of trusteeship and not to the private law regime of trusteeship. Moreover, it is an appeal not to rules from which one can deduce answers but to an aspirational framework, one that conditions how we approach the legal questions at stake without providing determinate answers.

This kind of framework is utterly familiar to lawyers. It is the framework that has been developed in the administrative law regimes of common law countries in which judges have crafted principles to ensure that those who are vulnerable to the exercise of official power are entitled to a hearing at which their interests will be seriously considered, and which might require that any decision be backed by reasons that manifest such consideration. In addition, such judges have progressively extended the scope of such protections, including within it individuals who were previously considered "other" in that the state had no obligations to them — noncitizens, prisoners, and those outside national borders but still subject to state power. Indeed, just this kind of framework explicitly informs much of Benvenisti's analysis of actual examples.[83]

My claim is not that Heller himself thought that sovereigns are or should be subject to other-regarding obligations. Rather, it is that his paradigm of sovereignty entails that those who are in fact subject to acts of sovereign power are thereby placed in a normative relationship with the sovereign that imposes an onus of justification on the sovereign to them, that is, a justification that is attentive to their interests. The obligation here is a political and particular one. By "political," I mean that the obligation is not informed by some abstract moral ideal, for example, humanity. Rather, it comes about because the sovereign in claiming to act as a sovereign — as someone who wields authority and not merely superior power — accepts that there is a relationship of reciprocity with the individual or individuals subject to his power. And by "particular," I mean that the obligation is not to humanity as such, but the obligation of a particular sovereign to particular individuals.

Of course, this is vague, both as to institutional detail and because it says little about the content of the actual decisions other than that they must be part of a justificatory practice. But the point is to leave much of the detail to be filled in within particular contexts by the actual actors. This is not to say that we can do without determinate answers. And here there is in fact common ground between Schmitt, Kelsen, and Heller about the need for an institution that is capable of making a final decision. Even if this institution is not "the source of authority," as A.D. Lindsay said in a brilliant but little known essay

82 *Id.* at 43.

83 Benvenisti, *supra* note 3.

on sovereignty, "but the instrument of an authority that is not its own, it is still an indispensable instrument. Without such an instrument there could be no government."[84] In a nutshell, Kelsen differed from Schmitt in that he saw no incompatibility between this need and the requirement that the decision be in accordance with legality, while Heller differed from Kelsen in that he regarded that requirement as including an orientation towards fundamental principles of legality. But Heller also differed from Kelsen, and in this respect sided with Schmitt, in supposing that ultimately the legal questions had to be resolved by an institution capable of making an effective decision, which in practice meant an institution within the nation-state. However, this emphasis on the priority of the local over the international is conditioned by the orientation within the local to the values that inform what we might think of a general rule of law project. This is a project of seeking to understand and to give effect to the values that underpin what I termed earlier the specific legitimacy of legality. In this project, learning is a two-way street — the possibility has to be kept open that international law can learn from domestic law when a domestic institution decides in a way that advances the *ius* of the project against the *lex* of an international institution.[85]

Conclusion

At the end of his work on sovereignty, Heller returned to the paradox of sovereignty in order to evaluate its implications for the individual legal subject, the citizen.[86] He emphasized that the modern condition is one in which we have to make decisions in a deeply uncertain secularized world, where ethical certainty exists only in highly personal religious spheres. The only other source of certainty is that which law offers by providing a regular, predictable framework for common life. To have that certainty, we have to subject ourselves to the state, to the sovereign organization that is both constituted by law and that makes law possible, because it is law that makes a common life possible. In subjecting ourselves, we should keep in mind that all the organization does is positivize ethical prescriptions. It cannot pronounce on them finally, and so it is not the ultimate ethical authority and might even act in such a way that it violates the very ethical presuppositions

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84 A.D. Lindsay, *Sovereignty*, 24 Proceedings Aristotelian Soc'y 235, 240 (1923-1924).

85 For example, Heller's account of the relationship between sovereign states and the international legal order makes room for the decision in Case C–402/05 P, P. Kadi v. Council and Comm'n [2008] E.C.R I 6351.

86 Heller, Die Souveränität, *supra* note 13, at 201-02.

of its own existence. This would also amount to a violation of legality, since such prescriptions are also legal.

In many respects, these sentiments resonate with those to be found in the work of other Weimar-era social democrats or left liberals, who were committed to the success of Germany's first experiment in democratic constitutionalism. Most notably in the context of this discussion of sovereignty, the sentiments resonate with themes in Kelsen's work, in particular his account of the way in which a principle of legality plays a role in sustaining a commitment to democracy in an age in which citizens have to negotiate the torment of heteronomy. This is the tension that arises out of the fact that the individual who rightly knows that he is sovereign when it comes to judging the good has to find reasons to submit to the sovereign decisions of the collectivity, even when these decisions conflict with the individual's strongly held views about what is right. The stance recommended by such thinkers asked the citizen to recognize both the primacy he should give to his own judgments and that in a secular era those judgments have to be viewed as relative to the individual, with the consequence that the collective understanding of the common good must trump the individual's. Such an ethical stance will lead to a valuation of positive law, in particular to rule by the statutes enacted by a democratic parliament that are general in form and that apply for the most part prospectively, so that legal subjects may guide their conduct by the law.[87]

However, what distinguishes Heller from Kelsen is that Heller provides an argument that is barred to Kelsen by the value-freedom of the Pure Theory, one that seeks to show that the positive legal form is substantively valuable. The point of the democratic institutional structure of the *Rechtsstaat* is to make it possible for the values of social and political order to be positivized in a way that makes the powerful accountable to the subjects of their laws. Morality, in the sense of the values that the collectivity can legitimately require we live by, is just the set of values that are concretized through the positive law.

The subjects of the law become its authors, first, due to the fact that it is their representatives that enact legislation; hence the enhanced legal force of statutes. But their authorship does not end there, since authorship continues through an appropriate process of concretization of the legislation.[88] What makes that process appropriate is that the interpreters of the law must regard themselves as participating in a process of legislation which instantiates fundamental ethical principles of law. Most abstractly, these are the principles

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87 *See* Kelsen, *supra* note 38; Kelsen, *supra* note 43. For a cogent argument that Kelsen himself went much further than is generally thought towards providing an account of law nested in a theory of democracy, see Vinx, *supra* note 68.

88 Heller, Staatslehre, *supra* note 17, at 371-72.

that promise both freedom and equality to all citizens. The ultimate check on delivery of such promises can be nothing other than the individual legal conscience — the individual citizen's sense of whether the law is living up to its promise. However, before that limit case is reached, the case in which the individual feels compelled to deny the state's claim to be an authority over him, legal officials, including judges, have to understand that they are under a duty to concretize the law in ways that respects law's promise.

In Heller's account, the perspectives of the legal theorist, the legal official (including the judge), and the legal subject are inextricably linked. The task of the theorist is to bring to the surface the normative commitments that officials live up to when they make best sense of their practice, and which have to do with making sense of that practice to those whose lives it governs. When such sense cannot be made, criticism is not merely on the basis that the officials are failing to live up to their moral obligations. For the fundamental commitment of legal practice is to a structured process of justification of authority to those whose normative situation is affected by its directives.

Writing in 1968, the distinguished social theorist Wolfgang Schluchter concluded a book on Heller by saying that contemporary political and social theory should not decline Heller's legacy. Heller's account of progress from a skeptical, pragmatic perspective meant, Schluchter said, that hardly any other theorist had set out as clearly as Heller did the predicament that results from the necessity to make political decisions from a stance of internal uncertainty, whilst barring any retreat to a past world or to a future salvation, and without engaging in crude simplifications or one-sided treatments of important problems.[89]

If one surveys contemporary philosophy of law and legal theory in the English-speaking world today, Schluchter's observations have, in my opinion, even greater force. On the one hand, in philosophy of law, the dominance of legal positivism in many quarters means that we once again are faced with the "ghostly unreality of a theory of state without a state and a theory of law without law,"[90] as legal positivist philosophers deliberately construct a theory that has as little contact with legal practice and problems as possible. On the other hand, in legal theory that does attend to problems and practice, in particular in constitutional theory, there is not only a turn to Schmittean

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89 Wolfgang Schluchter, Entscheidung Für Den Sozialen Rechtsstaat: Hermann Heller Und Die Staatstheoretische Diskussion In Der Weimarer Republik [Decision for the Social, Rule of Law State: Hermann Heller and the Debate About Theory of State in the Weimar Republic] 290 (1983).

90 Heller, *Bemerkungen, supra* note 20, at 252.

accounts either in an allegedly scientific, diagnostic mode,[91] or in a mode of giving ultimate value to an existentially conceived politics of authenticity,[92] or as a way of debunking international law by showing how it is an elaborate disguise for national self-interest,[93] but also a turn to Schmitt himself as the direct source of inspiration.

Benvenisti's endeavor to provide a more optimistic account of international law through reconceptualizing the idea of sovereignty as a kind of trusteeship for humanity is a welcome antidote to these trends. It provokes simultaneous inquiry into legal theory, legal practice and the history of international law ideas. In my view, Benvenisti and others who are at the forefront of trying in this way to understand and to make more humane the puzzling world in which we live today could well learn from the approach of some of the foremost thinkers of the twentieth century to quite similar puzzles, albeit in the very different context of late Weimar. Moreover, attention to their ideas might also help to illuminate the more productive resources available in the increasingly arid and internecine debates in contemporary Anglo-American legal theory. My account of the debate in Weimar about how to understand sovereignty is of some assistance, I hope, in that endeavor.

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91 *See* Martin Loughlin, Foundations of Public Law (2010).

92 *See* Paul Kahn, Political Theology: Four New Chapters on the Concept of Sovereignty (2012).

93 *See* Jack L. Goldsmith & Eric S. Posner, The Limits of International Law (2005).

On Sovereignty, Legitimacy, and Solidarity
Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?

*Sergio Dellavalle**

The traditional concept of sovereignty is largely independent of democratic legitimacy and completely indifferent to any obligation towards non-national citizens. But can this traditional concept meet the normative expectations of a post-traditional understanding of political authority as well as the challenges of an ever more interconnected world? In order to respond to this question, the Article analyzes the conceptual presuppositions that lie at the basis of the notion of "sovereignty," first regarding its sources, and second regarding the ideas of rationality that are applied when sovereign actors operate. As far as the sources of sovereignty are concerned, it is argued that both of them — the "ascending" and the "descending" — although decisive for determining the quality of the legitimacy of political power, have little influence on a positive attitude of sovereigns towards aliens' interests. To clarify the conditions for an opening of sovereign powers to solidarity, an assessment of the rationalities which are implemented when a sovereign puts actions into effect is therefore required. Yet most rationality concepts — or uses of practical reason — prove to be negative or at least useless when it comes to the question of supporting solidarity: the gamut ranges from

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open hostility towards the idea of taking the interests of aliens into account, through substantial indifference, to a positive approach which presupposes, however, non-provable metaphysical assumptions or an individual mindset with no pretension of issuing norms of general validity. Only the communicative conception of reason meets the criteria for a convincing justification of solidarity towards aliens as an obligation. The author therefore concludes that only an "ascending" sovereignty based on a communicative understanding of rationality can be considered fully legitimate insofar as the sovereign power, in this case, first originates from the will of the citizens and, second, is morally, politically and legally obliged to a solidaristic attitude towards the justified interests of non-citizens.

Introduction

Sovereigns are generally thought to have obligations — mainly, if not exclusively — towards themselves. Indeed, the assumption that actors — in this case, states — do not accept any moral, political or juridical authority above and beyond themselves may imply that they reject any obligation of solidarity towards their fellow humans which could be drawn from such an authority. However, outlining the rejection of obligations that are not only external but can also be universal in their scope is just one way to define "sovereignty." In fact, we have at least one alternative definition according to which "sovereignty" consists of the legitimate exercise of public power over a particular population, regarding a certain kind of social interaction, and generally but not necessarily with reference to a specific territory. If we adopt this second definition, sovereignty would no longer be in contradiction to responsibility for others or solidarity with non-citizens. Rather, responsibility and solidarity could be seen as two of the conditions that concur to make the exercise of public power — and, therefore, also sovereignty — legitimate. The transition from the traditional concept of "sovereignty" to its alternative understanding corresponds, furthermore, to the passage from its exclusive, hierarchical and authority-based conception to a rather inclusive, network-oriented and dialogical view.

Given these premises, this Article will analyze the conceptual presuppositions that lie at the basis of both the traditional view of "sovereignty" and its alternative. In doing so, I will concentrate on two essential elements for the definition of "sovereignty": first, the question regarding its sources; and, second, the conceptions of rationality that are implemented when sovereign authority is put into effect. As regards the fundaments of sovereignty — which will be

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addressed in Part I of the Article — they are essentially of two kinds, depending primarily on the assumption about where the legitimation of public power is thought to come from. Following a first and more ancient understanding, the legitimation of public power has a "descending" character. Legitimate sovereignty is here "descending" in a twofold meaning: first, because the holder of the public power draws it from above, namely from natural or divine law; and second, because sovereign authority descends from the holder of public power to the governed. In any case, legitimate sovereignty is assumed to derive, as stated by the supporters of this conception, from an authority situated above the individuals, so that the holders of public power are vested with it without resorting to any investiture coming up from the governed. According to a second definition, to the contrary, legitimate sovereignty can only be established in an "ascending" way, namely — at least implicitly — by a free act of individuals willing to create a political community and the institutions that shall govern them. Here, then, the original basis for sovereignty lies in the autonomy of the free individuals. By building a political community and by establishing public power the individuals — now joined together to build a *societas civilis*, or a "commonwealth" — transfer a part or the whole of their autonomy to the hereby constituted public authority, conferring upon it sovereignty by this act.[1]

This distinction between different sources of sovereignty is essential in order to qualify a first and more usual dimension of its legitimacy; the question is whether sovereign authority meets the normative expectations of a post-traditional understanding of political power by rejecting metaphysical, religious or, in general, ontological assumptions — presently often reformulated in technocratic guise — and by relying only on the unavoidable epistemic fundament created by the will of the governed. Yet in an ever more interconnected

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1 We could add a possible third source of sovereignty, namely the brute fact of a power that does not resort to any reason to justify its existence. If we consider the question more closely, however, we cannot but notice that even Machiavelli, as the master of *Realpolitik*, tends to justify power with reasons that go beyond the brute exercise of force. Indeed, the *Discourses on Livy* are mainly dedicated to the reasons for a strong and free republic. And even *The Prince* ends with an appeal for the freedom of Italy that has little to do with a sheer exaltation of brute power. Unjustified sovereignty seems not to have — at least in political philosophy — many supporters. *See* Niccolò Machiavelli, Il Principe (Einaudi 1995) (1513) (translated to English in Niccolò Machiavelli, The Prince (Rufus Goodwin trans., The Modern Library 2007)); Niccolò Machiavelli, Discorsi sopra la prima deca di Tito Livio (Einaudi 1997) (1513-1519) (translated to English in Niccolò Machiavelli, Discourses on Livy (Harvey C. Mansfield & Nathan Tarcov trans., Penguin Books 1998)).

world, legitimacy cannot be accomplished by just this content: since sovereign powers can do harm — in particular to non-citizens — to a much broader extent, the legitimacy of sovereignty cannot be referred only to the exclusive involvement of the members of the single political community. Rather, the idea of legitimate sovereignty has to be updated and integrated with a further aspect, namely a solidaristic attitude towards aliens' interests.

The inquiry into the sources of sovereignty, however, does not shed much light on this second — more future-oriented — aspect of the legitimacy of sovereignty. Indeed, the preference for a legitimation of sovereignty either coming from "above" or, to the contrary, its "bottom-up" conception has few consequences, if any, with regard to the existence of an obligation, for the sovereign power, of solidarity towards non-citizens. A sovereign power with a "descending" legitimacy, in fact, can be open to the needs and arguments of aliens, or it can be exclusively self-referential — and an "ascending" public power can be either as well. Therefore, if we want to take into account the reasons for or against solidarity towards non-citizens, we have to shift the focus of the analysis from the sources of sovereign public power to the conceptions of rationality that are applied when sovereign authority is put into action. The starting point here is the assumption that exercising sovereignty always implies the use of practical reason and, as a consequence, the application of a certain kind of rationality.

In the second Part of the Article I will therefore analyze six different conceptions of rationality that stand behind the idea of sovereignty, always concentrating in particular on the question whether they can support solidarity towards non-citizens or rather reject it. Of the six approaches to the practical use of reason, only the last conception — namely communicative rationality — can provide a coherent rationale for justifying not just the traditional idea of legitimate sovereignty, implying the democratic consent of the citizens, but *also* its no less fundamental updating and semantic extension due to the challenges of the post-national constellation, i.e., the taking into account of the interests of non-citizens involved by national decisions.

In the third and last Part I will then try to bring together the results of both strands of analysis, drawing the outlines of a concept of "sovereignty" which is, at the same time, bottom-up, inclusive and open to the "others."

I. The Sources of Sovereignty

By considering the sources of sovereignty as the first theoretical presupposition of the concept, I address essentially four questions. First, where is sovereignty thought to derive from? Second, how does this derivation affect the legitimacy

of sovereign power? Third, which kind of source of sovereignty may be considered suitable for a society in which no given and uncontested authorities — be they based on religion, metaphysical assumptions or technocratic knowledge — can be accepted? And fourth, are the sources of sovereignty of any relevance to the opening of sovereign powers to the interests and arguments of non-citizens?

As anticipated in the Introduction, sovereignty originates in two different ways: through a "descending," or through an "ascending" movement. Starting from the history of Western political ideas, I will dedicate the following two Sections (A and B) to "setting the scene" by focusing on the first two abovementioned questions: the foundations from which sovereignty can be drawn, and their implications for the legitimation of sovereign power. On the basis of these considerations, I will then move on — in Section C — to the third and fourth questions and, therefore, to some provisional conclusions as regards the reshaping of the concept of sovereignty. Roughly summarized, only the "ascending" source of sovereignty will prove to be acceptable in a liberal and democratic society, which does not mean, however, that it should also lead, in principle, to more solidarity with aliens.

A. The "Descending" Concept of Sovereignty

The alleged higher truth, from which — following some strands of Western political thought — sovereignty is alleged to be derived, can be of two kinds: natural law, or divine law. The best example of the idea of sovereignty as derived from natural law is provided by Jean Bodin. In his *Six livres de la République* he asserts that "sovereignty is that absolute and perpetual power vested in a commonwealth."[2] Therefore, a sovereign prince is not bound by laws (*legibus solutus*), and the civil norms promulgated by him, "even when founded on truth and right reason, proceed simply from his own free will."[3] To justify sovereignty, Bodin resorts to the old Aristotelian theory of the familistic origin of the polity. Following this conception, the "commonwealth may be defined as the rightly ordered government of a number of families, and of those things which are their common concern, by a sovereign power."[4] The premises are thus twofold: first, according to natural law the absolute power within the family belongs — or, we should rather say, belonged in Bodin's

2 Jean Bodin, Six livres de la république 85 (Imprimerie de Jean de Tournes 1579) (translated to English in Jean Bodin, Six Books of the Commonwealth bk. I, ch. VIII (M.J. Tooley trans., 1955)).

3 *Id.* at 92 (English: bk. I, ch. VIII).

4 *Id.* at 1 (English: bk. I, ch. I).

time — to its head and should not be challenged by any family member; and, second, the political community is nothing but an enlarged family. The result is that the same power deriving from the order of natural law, when it comes to that big family that is the political community, is rightfully put in the hands of the holder of public power and should not be contested by the subjects.

In today's political thought and praxis, Bodin's idea may find its continuation — or revival — in the technocratic assumption of an allegedly superior knowledge and expertise, with which the holders of public authority are thought to be vested. An excellent example of the renewal of paternalism in technocratic guise has been recently provided by the measures taken by the European Union in order to meet the debt crisis.[5] Surely, technocratic paternalism is far from absolute, so that technocratic sovereignty — provided that we can apply the concept of "sovereignty" in these cases — is of a quite different kind than in Bodin's conception. Nevertheless, the idea that an authority should derive the legitimacy to take decisions from a supposed natural supremacy — be this rooted in tradition or in knowledge — shows the continuity and liveliness of the "descending" conception of public power.

For a second strand of political thought, the reference to natural law is just the first step on the way to an even higher truth, namely the law of God. In other words, sovereignty is here derived from God as the only true holder of sovereign power. The way in which sovereignty then descends from God to the temporal powers was articulated in different forms during the golden age of Christian — and then Christian-Catholic — political theology, between the Middle Ages and early Modern Ages. According to the earlier and most radical interpretation, sovereignty was transferred from God to the Church and then, only in a second step, to the secular rulers.[6] A later — already more secular — conception still derived the power of mundane sovereigns from God, but directly and not through papal mediation.[7] The most modern strand of Catholic theologians of the School of Salamanca went even a step further, asserting that the transition of legitimate power from God to the worldly rulers had to pass through popular sovereignty, although the people, after

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5 Jürgen Habermas, Im Sog der Technokratie [In the Riptide of Technocracy] 82 et seq. (2013); Fritz W. Scharpf, *Die Finanzkrise als Krise der ökonomischen und rechtlichen Überintegration* [*The Financial Crisis as Result of Economic and Legal Overintegration*], *in* Grenzen der europäischen Integration [The Limits of European Integration] 51 (Claudio Franzius, Franz C. Mayer & Jürgen Neyer eds., 2014).

6 Henry Hostiensis, Summa Aurea (Servanius 1556) (1250-1261).

7 Francisco de Vitoria, Relectio de potestate civili [On Civil Power] 58 (Akademie Verlag 1992) (1528) (translated to English in Francisco de Vitoria, Political Writings (Anthony Pagden & Jeremy Lawrance eds., 1991)).

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having transferred the power to the rulers, remained actually devoid of the real possibility of influencing the political outcomes.[8]

All these conceptions can be regarded as belonging to the past. Nevertheless, the idea that sovereign authority is only legitimate when it respects the higher laws of God has somehow survived up to the present time under the guise of the principle of dignity.[9] Indeed, if political power has to protect human dignity in order to obtain legitimacy, and the Catholic Church claims for itself the right to define what human dignity is, then the consequence cannot but be that the Church still maintains the pretension — albeit indirectly — of possessing the key to sovereign power and that the interpretation of the law of God should still influence the secular political and juridical order.

B. The "Ascending" Understanding of Sovereignty

The "ascending" idea of sovereignty arose as a consequence of the transition from the holistic to the individualistic paradigm of social order and was introduced by Thomas Hobbes in the middle of the seventeenth century. Hobbes overturned for the first time in history the traditional hierarchy between individual and community, collocating the individuals, as the holders of fundamental rights and the source of any legitimation of authority, at the center of political life. The starting point of his political philosophy was, therefore, no longer the society as a *factum brutum*, a "brute fact" based on the natural sociability of humans and organized in an organic hierarchical structure,[10] but the individual endowed with inherent rights, interests and reason.[11] In this original state of nature — a fictional condition, presented by Hobbes in order to focus attention not on the historic beginning of society, but on the ontological foundation as well as on the conceptual preconditions of a just

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8 Francisco Suarez, *De legibus, ac Deo legislatore* [*On Laws and God the Lawgiver*], *in* Selections from Three Works of Francisco Suarez 3, bk. III, chs. III, IV, at 377 (James Brown Scott ed., Clarendon Press 1944) (1612) [hereinafter Suarez, *De legibus*]; Francisco Suarez, *Defensio fidei catholicae et apostolicae adversus Anglicanae sectae errores* [*Defence of the Catholic and Apostolic Faith*], *in* Selections from Three Works of Francisco Suarez, *supra*, at 647, bk. VI, ch. IV, bk. III, chs. III, IV, at 718.

9 On the laical and religious definition of dignity, see Understanding Human Dignity (Christopher McCrudden ed., 2013); Pope Benedict XVI's Legal Thought: A Dialogue on the Foundation of Law (Marta Cartabia & Andrea Simoncini eds., 2015).

10 Thomas Hobbes, De Cive, bk. I, chs. I, II (Royston 1651) (1642) [hereinafter Hobbes, De Cive].

11 *Id.* bk. I, ch. I.

order — individuals are free and equal.[12] However, they are also constantly in danger of being assaulted and harmed by fellow humans in search — as every individual in the state of nature always is — of more resources in order to improve their life conditions.[13] Therefore, natural reason commands to leave the state of nature and build a society (*societas civilis*), in which life, security and property are safeguarded.[14]

In Hobbes's view the Commonwealth is thus not the original and axiologically highest entity in the ethical world, but rather a tool that humans give to themselves in order to achieve social stability. In Hobbes's understanding, sovereignty is ascending insofar as it is no longer seen as a feature that the given political authority draws from the laws of God or from its alleged natural superiority. Rather, it arises from the original freedom and self-reliance of the individuals who create a sovereign authority through an act of free will, by means of the transferal of rights to the public power, and in order to guarantee, on the basis of a legitimacy coming from the bottom up, an adequate protection of the subjective entitlements. Therefore, sovereignty is legitimate only if it aims at safeguarding fundamental rights and is grounded on a freely and explicitly expressed people's consent — in the strand of political thought initiated by Hobbes, in particular, by means of a contract (*pactum unionis*).

In contractualism, then, the sovereignty of public power is always rooted in the rights, interests and reason of the individuals. Yet differences emerge between scholars when it comes to the extent of competences that the sovereign public power is vested with. This depends on how many rights the individuals who are willing to create a polity are supposed to have transferred to the sovereign authority through the founding contract. In the cases in which these rights are just few — as in Locke's liberal theory of state[15] — the sovereign power has only the competence of making sure that the interactions between citizens can unfold peacefully by guaranteeing law and order. As a result, the citizens maintain all their original entitlements except for the right to take the law into their own hands, and the danger of an excessive concentration of competences is prevented by the separation of powers and by a strong parliament.

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12 *Id.* bk. I, ch. III.

13 *Id.* bk. I, chs. I, X; Thomas Hobbes, Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil ch. XIII (Crooke 1651) [hereinafter Hobbes, Leviathan].

14 Hobbes, Leviathan, *supra* note 13, ch. XIV; Hobbes, De Cive, *supra* note 10, bk. I, ch. II.

15 John Locke, Two Treatises of Government bk. II, ch. 7, § 90 (Awnsham-Churchill 1698) (1690); *id.* bk. II, ch. 11, § 134; *id.* bk. II, ch. 12, § 143; *id.* bk. II, ch. 13, § 150.

Contrarily, from Hobbes's pessimistic perspective social order can be safeguarded only if the individuals give up all their rights, excluding the right to life protection and — very partially — the right to negative liberty as the freedom to pursue economic activities in order to achieve "happiness," yet only insofar as this does not jeopardize the guarantee of social peace and order.[16] As a consequence, Hobbes's contractualism is characterized by the passage from the condition of free individuals to that of subjects almost devoid of any rights — a theoretically rather contradictory self-chosen annihilation of liberty that vests sovereign power with an almost unlimited amount of competences.

A further alternative is represented by Jean-Jacques Rousseau's radical-democratic theory of the "social contract." Here too sovereignty is created by means of an alienation of rights — an alienation which is, at least at first glance, even more intransigent than in Hobbes's view. Rousseau's social contract provides for an alienation of *all* natural rights, without exception.[17] The difference, which characterizes the more citizen-friendly attitude of the French philosopher, is made by the fact that, whereas in Hobbes's construction citizens alienate their rights to a monarch, turning their status into that of subjects, in Rousseau the citizens alienate their rights to themselves, now constituted as a sovereign political community, as a *volonté générale*, or a "general will."[18] This way, the preferences and interests of the concrete individuals are transubstantiated into a rather abstract, if not obscure, concept of an allegedly "true" will of the political community. The sovereign authority of the *volonté générale* is, in fact, so unrestrained that, also due to an insufficient internal articulation of powers,[19] it is not obliged to give any guarantee to its "subjects," who may even be "forced to be free."[20] As a consequence, Rousseau's idea of democracy always runs the risk of falling into authoritarianism.

C. Legitimacy and Solidarity

A first — rather usual — definition of legitimacy concerns primarily the question of how sovereign power can be justified before the members of the polity, i.e., before those who have to obey the norms issued by the sovereign.

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16 Hobbes, Leviathan, *supra* note 13, ch. XVII; Hobbes, De Cive, *supra* note 10, bk. II, chs. II, XIII.

17 Jean-Jacques Rousseau, Du contract social, ou principes du droit politique 51 (Garnier-Flammarion 1966) (1762) (translated to English in Jean-Jacques Rousseau, The Social Contract (Maurice Cranston trans., Penguin Books 1968)).

18 *Id.*

19 *Id.* at 52.

20 *Id.* at 54.

From this perspective, the distinction between the "descending" and the "ascending" understanding of sovereignty is clear-cut and the criterion for a normative evaluation of the two conceptions is unambiguous. Indeed, within a post-metaphysical ideological and political context, two assumptions have to be regarded as self-evident. First, no supposedly higher truth of natural or divine origin — and, we might add, of scientific or economic or, in a word, of technocratic origin either — can be legitimately imposed on the whole political community. Second, as a consequence of the first assumption, sovereign authority is legitimate and has the justifiable competence of issuing decisions that bind the whole society only if it is created from the bottom up. Therefore, only the "ascending" conception of sovereignty can found its legitimacy.

The question is much more complicated, however, as regards a second aspect, which is a necessary consequence of increased interconnections in the globalized world, namely the idea of legitimate sovereignty as implying openness of sovereign powers to solidarity towards aliens. In fact, both understandings of the sources of sovereignty are compatible with either option: egoism *and* unselfishness.[21] The ambiguity of the approach becomes already clear by analyzing the conception of Bodin, the first and probably most radical supporter of the absoluteness of sovereignty. Bodin concedes that the power of the sovereign should be limited by divine and natural law, and therefore by a law which — at least implicitly — binds beyond the borders of the single *république*.[22] Nonetheless, this limitation is marginal since the sovereign, being the secular *imago* of the almighty God, has the right to interpret the suprapositive norms freely, i.e., without any secular or ecclesiastic control. Eventually, in Bodin's work sovereign self-reliance thus gains the upper hand. Yet even from the perspective of one of the most uncompromising advocates of sovereignty in the history of political thought, the broader horizon of humanity is not radically ignored.

Although doomed in Bodin's conception to award priority to selfishness, the cosmopolitan perspective is, on the contrary, central to the idea of a sovereignty

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21 I use "egoism" and "unselfishness" with reference to the actions of both individual and collective agents. The non-distinction between individual and collective attitudes is based on the assumption of a continuity between the rationality displayed in individual actions and that applied by collective agents. In this sense, states cannot be regarded as "billiard balls," but represent in their actions the same approach to the interests of "others" that is prevalent in the society from which they emerge. As regards the critique of the "billiard balls" theory, see Anne-Marie Slaughter, International Law and International Relations 507 (2000); and Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 Int'l Org. 513 (1997).

22 Bodin, *supra* note 2, at 91.

based on the law of God. Although in the passage from the Middle Ages to the early Modern Ages Christian and Christian-Catholic political theology increasingly accepted the principle of the distinct identities of the political and juridical orders of the single states, nevertheless these orders were always regarded as legitimate only insofar as they respected the higher commands of divine law.[23] And when, as a result of the principles of the Reformation, the Protestant theologians dismissed the idea that reason can help to discover the divine law, the reference to the cosmopolitan community of humankind and to the *jus gentium* as its common law substituted for the commands of God in guaranteeing a universalistic horizon to sovereignty.[24]

As regards the technocratic variant of the idea of a sovereignty derived from above — in this case, from the assumption of a higher competence which leads eventually to an output-oriented legitimacy — it is precisely that kind of international authorities, in which legitimacy is identified with knowledge-based expertise, that fervently advocates overcoming the traditional, state-centered and selfish concept of sovereignty.[25] However, the way in which these international authorities go about overcoming traditional sovereignty can hardly be associated with inclusive solidarity.

Similar contradictions can be found also among the scholars who support the "ascending" interpretation of sovereignty. The political philosophy of contractualism, on which the "ascending" conception of sovereignty was initially based, was conceived as a theoretical way to re-found legitimacy within the scope of the single polity. For that reason, the most important exponents of contractualism, for one and a half centuries after its first formulation, showed little interest in the question of order beyond national borders. Insofar as the problem was addressed, the relations between states were considered not in terms of solidarity, but rather — as in the state of nature — of competition.[26]

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23 See the definition of the *leges civiles* in Suarez, *De legibus*, *supra* note 8, bk. III, at 361.

24 Hugo Grotius, De Jure Belli ac Pacis (William S. Hein & Co. 1995) (1646).

25 The Exercise of Public Authority by International Institutions (Armin von Bogdandy et al. eds., 2010).

26 Hobbes, Leviathan, *supra* note 13, ch. XXX; Locke, *supra* note 15, bk. II, ch. 2, § 14, bk. II, ch. 12, § 145, bk. II, ch. 16 § 183; Baruch de Spinoza, *Tractatus Politicus* [*Political Treatise*], *in* 3 Opera ch. III (Carl Gebhardt ed., Winters 1924) (1670) (translated to English in Baruch de Spinoza, Complete Works 676 (Michael L. Morgan ed., Samuel Shirley trans., Hackett 2002)); Baruch de Spinoza, *Tractatus Theologico-Politicus* [*Theological-Political Treatise*], *in* 3 Opera, *supra*, ch. XVI (translated to English in Spinoza, Complete Works, *supra*, at 383).

The turnabout — i.e., the formulation, for the first time, of a theory that bound "ascending" sovereignty with an explicitly universalistic understanding of humanity — came with Immanuel Kant. One of his most relevant merits consists, indeed, of the introduction of a three-level construction of public law — domestic, international and cosmopolitan law[27] — which explicitly comprehends, at its third level, a *corpus juris* addressed to the specification of rights belonging to all human beings beyond their affiliation as citizens and regardless of it. In other words, while the domestic public law defines the rules of interaction within the single polity and the international law gives order to the relations between states, the cosmopolitan law — which has to be, in Kant's view, *positive* and not only *natural* law — specifies entitlements of every human being *vis-à-vis* any state of which he is not a citizen, or *vis-à-vis* any other human who is not a citizen of the same polity. The novelty introduced by Kant did not, however, remain unchallenged. Indeed, the connection between the idea of a bottom-up legitimation and a solidaristic attitude towards "others" has always been — and still is[28] —opposed by those who believe that precisely those governments that are accountable to their citizens tend to refrain from taking into account the interests of aliens.

In conclusion, no direct relationship can be ascertained between the sources of sovereignty — "ascending" or "descending" — and the possible obligation of solidarity towards "others": solidarity can come with a bottom-up legitimation or with one from above, and the same goes for selfishness as well. Thus, if we consider sovereignty from the perspective of its origin, it seems that we cannot collect any evidence that may help us to understand whether sovereignty also implies duties towards non-citizens and why, if this is true, solidarity should be owed to them. If we want to ascertain the possible reasons for sovereignty to be opened to arguments and interests of the "others," we have to change the focus of analysis and concentrate on the forms of rationality implemented by sovereign acts.

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27 Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, *in* XI Werkausgabe 203 (Suhrkamp 1977) (1795) (translated to English in Immanuel Kant, Towards Perpetual Peace and Other Writings on Politics, Peace, and History 67 (Pauline Kleingeld ed., David L. Colclasure trans., Yale Univ. Press 2006)).

28 Examples range from nation-centered democracy theories, *see infra* Section II.A., to communitarianism, *see* Alasdair MacIntyre, Is Patriotism a Virtue?, Lecture at Univ. of Kansas, Dept. of Phil. (The Lindley Lecture) (Mar. 26, 1984), *available at* https://kuscholarworks.ku.edu/bitstream/handle/1808/12398/Is%20Patriotism%20a%20Virtue-1984.pdf, to rational choice approaches, *see* Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 212 (2005).

II. Rationality and Solidarity

When a sovereign actor carries out an action, it necessarily makes use of its practical reason, i.e., it employs a certain understanding of how it should reasonably act in the world. In other words, it applies justifiable criteria for its action, where the justification may be implicit or explicit and the criteria can take different forms, each of them characterizing a specific rationality of action. Insofar as the actor puts its action into full effect, the rationality that is here applied can be regarded as implemented. I assume here, furthermore, that collective actors — in particular states — employ in their actions in the international arena the same rationality that is predominant within the societies respectively represented by them.[29] In other words, the state is not seen as an autonomous "subject" with its own rationality; rather, its executive institutions operating in the international context are assumed to display the rationality of the society on which these institutions are based. Therefore, if an obligation of solidarity towards aliens should be rationally proved, this rational "ought" is regarded as binding, first, upon the individual human beings, and then, only derivatively, due to the fact that these individuals build a society, upon the institutions of this society as well. The mediation between individuals and states within the process of implementation of rationality is generally assumed by organizations of the civil society, such as political parties or NGOs.

Given these premises, I will examine in the following the most relevant kinds of rationality which are employed when sovereignty is put into effect. Before going into the detailed analysis, however, a clarification has yet to be made. Solidarity is understood, here, primarily as solidarity *towards "others,"* i.e., towards aliens or non-citizens. Therefore, the different uses of practical reason will be scrutinized mainly from the perspective of their capacity to justify solidaristic attitudes towards those who cannot be regarded as fellow citizens, i.e., as citizens of the same polity. Beyond this specification, however, it need be remarked that in most cases the application of a certain kind or rationality leads to the same results as regards solidarity towards citizens and aliens. When rationality is indifferent towards solidarity — as in its functional variant — indifference extends from citizens to aliens, and when it can be used to justify both egoism and solidarity, as in the case of strategic rationality, both results can be applied indifferently to fellow citizens or to the "others." Analogously, if rationality grounds solidarity — as proposed, albeit with quite different arguments, by the supporters of its holistic, deconstructed or communicative understanding — no substantial distinction, and certainly no exclusion, is made between "in" and "out." Just one conception of rationality

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29 *See supra* note 21.

represents an exception: here, solidarity can be supported, but just in favor of the members of the same polity. This is the case as regards the understanding of rationality with which I will begin the analysis.

A. Particularistic Rationality

The first conception of rationality that has to be taken into consideration is what we can call a *particularistic* understanding of reason. We can find its best expression in the idea of sovereignty realized in the tradition of national constitutionalism. According to this approach, developed in particular by prestigious German constitutionalists like Josef Isensee, Paul Kirchhof and Dieter Grimm, only the sovereign national state, based on the primacy of the national constitutions, can guarantee the rule of law and a high standard of legitimacy, both of which would be lost in the context of a cosmopolitan turn of constitutionalism.[30] More concretely, the unity of the law[31] is based on the unity of public power[32] — and this, for its part, cannot but be the result of the national unity of the people (*Volk*).[33] Isensee identifies the reasons for the constitutional unity of the people with "geographic and geopolitical situation, historic origin and experience, cultural specificity, economic necessities of the people, natural and political conditions."[34] None of these elements can be regarded as the consequence of free decisions taken by the members of the political community. To the contrary, all of them are expressions of a pre-political state of facts, of a quasi-natural condition of the *Volk*, on which political and legal institutions are built. They thus constitute the *Volk*, as a "community of destiny,"[35] before and beyond any individual decision or preference.[36]

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30 Dieter Grimm, *The Constitution in the Process of Denationalization*, 12 Constellations 447 (2005).

31 Josef Isensee, *Staat und Verfassung* [*State and Constitution*], *in* Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band I: Grundlagen von Staat und Verfassung [Handbook of the State Law of the Federal Republic of Germany, Vol. I: Fundamental Elements of State and Constitution] 591, 619 (Josef Isensee & Paul Kirchhof eds., 1987).

32 *Id.* at 620.

33 *Id.* at 634.

34 *Id.*

35 *Id.*

36 Paul Kirchhof, *Der deutsche Staat im Prozess der europäischen Integration* [*The German State Within the Process of European Integration*], *in* Handbuch des Staatsrechts der Bundesrepublik Deutschland, Band I, *supra* note 31, at 855, 869.

While in Isensee's and Kirchhof's interpretations the sovereign unity of the *Volk* has a generally ethnic character, where ethnic identity is understood as comprehending a large number of mostly pre-communicative elements, Dieter Grimm locates it rather in the common language spoken by all members of the people.[37] Only the existence of a shared language — following Grimm — enables the members of the political community to legitimate the institutions of public power as well as their decisions.[38] Here lies the key to a better understanding of the concept of rationality generally adopted by the supporters of the nation-based strand of constitutionalism. Correctly, law is identified as fundamentally linked to linguistic communication. Linguistic communication, however, is not defined on principles of transcendental pragmatics,[39] but rather depends on the specific identity of national languages. For that reason, language can never be universal; rather, we have — according to this approach — a plurality of languages, each of them specific to a particular cultural community, i.e., a nation. Moreover, if rationality is necessarily embedded in language, and language is no less necessarily the language of a nation, rationality itself will be deeply linked to the "spirit" of a nation. In other words, if we do not admit any universal language on which rationality is grounded, we will not have any universal rationality either.

According to the particularistic understanding of reason, then, rationality is never situated beyond the limits of a particular society, since it is essentially embedded in the language, history and traditions of a specific group of individuals, or of a "people." We thus have many rationalities, each of them specific to an individual society, but we do not have any "universalistic" reason that may lead the members of the single polity beyond the borders of their original belonging, transcending their selfishness and connecting them to every human being. Being exclusively and sometimes obsessively centered on the vital interests of the single political community, this conception of rationality may sustain a solidaristic attitude towards fellow citizens insofar as solidarity is regarded as an instrument for consolidating the cohesion of the particularistic social group. It is, however, completely inadequate to support solidarity towards non-citizens and represents, rather, one of the most frequent arguments brought by the counterpart into the debate.[40]

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37 Dieter Grimm, *Braucht Europa eine Verfasssung?* [*Does Europe Need a Constitution?*], 50 JuristenZeitung 581 (1995).

38 *Id.* at 588.

39 Karl-Otto Apel, Transformation der Philosophie [The Transformation of Philosophy] (1973).

40 This does not mean that particularistic rationality denies any kind of solidarity, but just that, if solidarity under certain circumstances should take place, it would

B. Functional Rationality

Systems theory reduces rationality to its *functional* dimension.[41] It does so by eschewing any reference to an overarching rationality that, starting from the transcendental capacities of individuals, encompasses all forms of social interaction. No universal reason — subjective or intersubjective — is here envisaged, at either the descriptive or prescriptive level. To the contrary, systems theory — in particular, Niklas Luhmann as one of its most important exponents — claims that many rationalities can be observed by the social scientist, each of them characterizing the way one specific social subsystem functions. In other words, while we cannot detect — according to Luhmann's systems theory — any extra-systemic rationality, we do observe the implementation of different rational processes. These guarantee that the manifold functional subsystems of society deliver the performances for which they have developed and that are necessary for the continuity and further improvement — in the sense of higher efficiency — of the whole society.

The rationality of systems theory is transnational in essence. Indeed, functional rationality does not stop at the borders of nation-states. In particular, it has two important features for the development of its transnational vocation. First, every social subsystem is characterized by self-referentiality[42] and "operative closeness."[43] Second, functional rationality has a tendency to enhance the efficiency of the social system.[44] The first feature stems from the fact that society as a whole differentiates itself into specialized social subsystems each with its own function and rationality already within every single nation-state — or at least in those where society is not oppressed by a ubiquitous public power. And, provided that social subsystems tend to develop according to the criterion of the highest efficiency by accomplishing their

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be in the form of arbitrary *compassion*, not of a moral or political *obligation*.

41 *See* Niklas Luhmann, Das Recht der Gesellschaft (1993) (translated to English in Niklas Luhmann, Law as a Social System (Fatima Kastner et al. eds., Klaus A. Zeigert trans., Oxford Univ. Press 2004)) [hereinafter Luhmann, Das Recht der Gesellschaft]; Niklas Luhmann, Die Gesellschaft der Gesellschaft (1997) (translated to English in Niklas Luhmann, Theory of Society (Rhodes Barrett trans., Stanford Univ. Press 2012)) [hereinafter Luhmann, Die Gesellschaft der Gesellschaft]; Niklas Luhmann, Soziale Systeme: Grundriss einer allgemeinen Theorie (1984) (translated to English in Niklas Luhmann, Social Systems (John Bednarz, Jr. trans., Stanford Univ. Press 1995)).

42 Luhmann, Die Gesellschaft der Gesellschaft, *supra* note 41, at 65, 92.

43 Luhmann, Das Recht der Gesellschaft, *supra* note 41, at 44.

44 Luhmann, Die Gesellschaft der Gesellschaft, *supra* note 41, at 145; Luhmann, Das Recht der Gesellschaft, *supra* note 41, at 572.

functional tasks — which is the second feature of systemic rationality — homologous subsystems from different countries have a propensity to merge, since larger social structures guarantee better operational conditions. The consequence is the establishment of transnational social and legal subsystems[45] — a phenomenon which has been analyzed in particular with reference to the contemporary *lex mercatoria*, i.e., the private law subsystem autonomously created by economic actors in order to regulate their transactions beyond the borders of the nation-states.[46]

However, transnationality does not mean solidarity — nor does it imply it.[47] Indeed, authors who interpret society using systems theory have tried to conceptualize the defense of human rights as a transnational political and legal subsystem itself, or in other words as a "universal law" (*Weltrecht*) or a "global-constitution" (*Globalverfassung*), formal expressions of a comprehensive *lex humana* centered around the protection of fundamental rights.[48] Others have addressed the question of justice with the instruments of the functional epistemology of systems theory by transferring social conflict from the contradiction between different forms of rationality — in particular between the communicative rationality of the lifeworld and the strategic rationality which dominates the individual approach to functional systems[49] — to the

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45 Andreas Fischer-Lescano & Gunther Teubner, *Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit* [*Fragmentation of the Global Legal System*], *in* Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung [World State and World State-hood] 37 (Mathias Albert & Rudolf Stichweh eds., 2007).

46 Gunther Teubner, *"Global Bukowina": Legal Pluralism in the World Society*, *in* Global Law Without a State 3 (Gunther Teubner ed., 1997).

47 From the private law perspective, however, it has been claimed that private interactions beyond the borders of the single polities can account precisely for that kind of cosmopolitan mutual recognition that is often missing in the public dimension. *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships* (Working Paper, 2014), *available at* http://ssrn.com/abstract=2463537. In my view, yet, solidarity should not be just left to personal priorities, but should be "constitutionalized" — and therefore be seen as a concern of public law — not only within the borders of the individual political communities but also in the legal context of the international community.

48 Andreas Fischer-Lescano, Globalverfassung: Die Geltungsbegründung der Menschenrechte [Global Constitution: On the Foundation of the Validity of Human Rights] (2005); Andreas Fischer-Lescano, *Globalverfassung: Verfassung der Weltgesellschaft* [*The Constitution of the World Society*], 88 Archiv für Rechts- und Sozialphilosophie [Archives Legal & Soc. Phil.] 349 (2002).

49 On strategic and communicative rationality see, respectively, *infra* Sections II.C, II.F.

interior of the single social subsystem.[50] Following this explanatory strategy, social conflict is reduced to a tension between different answers to the question regarding which policies should be applied in order to guarantee the best accomplishment of the subsystem's functional tasks. But solidarity with the powerless — and, among these, with aliens — may go far beyond the search for the best way to accomplish functions. And in some cases, it may even run against this principle. Therefore, why should we owe solidarity, nonetheless, to the excluded and neglected? Systemic rationality does not explicitly rule out this obligation; yet it does not give us any argument in favor of it either.

C. Strategic Rationality

A third conception conceives of rationality exclusively in its *strategic* dimension. In this sense, reason is the instrument that enables us to maximize our payoffs. Jack L. Goldsmith and Eric A. Posner have argued that this kind of perspective justifies the egoistic behavior of states.[51] Beginning with the assumption that every rational actor will prefer the choice that promises to obtain the highest immediate benefits, and arguing that states, in international relations, always face the possibility of being trapped in a situation comparable to that of the prisoner's dilemma, Goldsmith and Posner maintain that every rationally acting state, given the fact that the behavior of its counterparts will be unpredictable in most cases, cannot but pursue its own egoistic interest. Neither customary international law nor treaty law can build a reliable normative framework of shared and effective rules, which is really able to guarantee the stable proceduralization of conflict resolution as well as, in the most favorable cases, cooperation. States thus comply with international law only insofar as this compliance coincides with their immediate and egoistic interests, so that the legal framework of relations among political communities is left with a very modest normative consistency.

The concept of strategic rationality applied by Goldsmith and Posner is, however, affected by some deficits — even if we adopt the rational choice perspective. First, they presuppose that states interact exclusively *vis-à-vis* each other, while it is rather reasonable to assume that they are generally embedded in a broader and multipolar context, i.e., in so-called "international

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50 Gunther Teubner, *Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts*? [*Self-Overcoming Justice: Formula of Legal Contingency or of Transcendence?*], 29 Zeitschrift für Rechtssoziologie [Legal Soc.] 9 (2008).

51 Goldsmith & Posner, *supra* note 28.

regimes."[52] Second, according to the understanding of rationality proposed by Goldsmith and Posner, actors — in this case, states — have predefined preferences which do not change during interaction. Contrarily, evidence shows that preferences shift in the course of interactions.[53] Third, the definition of the elements the evaluation of which essentially contributes to making a choice rational may be considered shortsighted insofar as it excludes factors like "reputation" and "reciprocity."[54] Furthermore — and fourth — Goldsmith and Posner do not distinguish clearly between immediate payoffs and mid- as well as long-term interests.

Precisely the difference between *utilitas praesens* and *utilitas maxima* — i.e., between immediate or highest payoffs — is central to strategic rationality's approach to the question of the denial or support of solidarity. Indeed, while the strategic rationality of self-interest, regarded from the perspective of immediate payoffs, may be seen as a strong argument *against* solidarity, from a broader perspective, self-interest can also be considered as a claim *in favor* of it. Even if egoism is thought to bring immediate benefits, a more open attitude towards "others" may turn out to be of greater advantage in the long run. For example, taking into account the interests of the counterpart may reduce the risk of conflict, thereby also improving the chances of self-preservation and self-realization. In addition, the transfer of resources to "others" may induce secondary benefits for the solidaristic party - as, for instance, in the case of greater economic growth due to the increased economic and financial solidity of the counterpart, or of a reduction in environmental impact as a consequence of the introduction of environmental technologies or of easier access to financial resources. The strategic approach always maintains, however, that a rational

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52 Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 75, 85 (1984).

53 Nicole Deitelhoff, *Was vom Tage übrig blieb. Inseln der Überzeugung im vermachteten Alltagsgeschäft internationalen Regierens* [*Communicative Interaction in Power-Related International Governance*], *in* Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der Internationalen Politik [The Anarchy of Communicative Freedom: Jürgen Habermas and the Theory of International Politics] 26 (Peter Niesen & Benjamin Herborth eds., 2007); Harald Müller, *Internationale Verhandlungen, Argumente und Verständigungshandeln* [*International Negotiations, Arguments and Consensus-Oriented Action*], *in* Anarchie der kommunikativen Freiheit, *supra*, at 199; Thomas Risse, *Global Governance und kommunikatives Handeln* [*Global Governance and Communicative Action*], *in* Anarchie der kommunikativen Freiheit, *supra*, at 57.

54 Andrew T. Guzman, How International Law Works: A Rational Choice Theory 33 (2008).

action must aim at maximizing the gains of the individual actor, and that these gains, generally, must be clearly measurable in terms of concrete advantages.

On these terms, the question regarding how we should meet the attitude of the so-called "free-riders" remains unanswered. Free-riders comply with the rules of interaction — in our case, the rules which guarantee an essential level of recognition for the arguments of "others"—only as long as they see in this behavior a gain for themselves. Therefore, they are always prone to breaking the rules as soon as they see a greater advantage to them from such a breach: under the premises of the definition of rationality as the maximization of individual gains, there can be no doubt that the behavior of the free-rider appears to be, here, the most rational choice. Yet it is difficult to imagine how social interaction can be stabilized under these conditions. As regards the preconditions for a functioning democracy, it has been argued that instrumental rationality cannot build the dispositional foundation that is indispensable for a society of citizens committed to achieving freedom and justice.[55] The same can be said with reference to the dispositional framework of international relations that is aimed at concretizing peace, mutual recognition, the guarantee of fundamental rights and justice.

Therefore, even if we overcome the shortsighted point of view that privileges immediate advantages of the individual actors in order to adopt a position that pays more attention to long-term benefits, strategic reason cannot really explain why the strongest and the wealthiest should owe solidarity to the weakest and the poorest, namely to those from the enhancement of whose life conditions they will not draw any profit, either immediately or in the foreseeable future.

D. Holistic Rationality

A fourth approach considers rationality in a *holistic* sense. According to this, solidarity is owed to every human being for the simple fact that he/she is thought to be a member of universal humanity, considered to share fundamental values and interests. The "whole" of universal humanity is regarded as a fact,

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55 *See* Karl-Otto Apel, Diskurs und Verantwortung: Das Problem des Übergangs zur postkonventionellen Moral [Discourse and Responsibility: The Problem of the Transition to Post-Conventional Morals] 26, 55 (1990); Karl-Otto Apel, *Das Anliegen des anglo-amerikanischen "Kommunitarismus" in der Sicht der Diskursethik. Worin liegen die "kommunitären" Bedingungen der Möglichkeit einer post-konventionellen Identität der Vernunftperson?* [*The Concern of Anglo-American Communitarianism from the Perspective of Discourse Ethics*], *in* Gemeinschaft und Gerechtigkeit [Community and Society] 149, 152 (Micha Brumlik & Hauke Brunkhorst eds., 1993).

grounded on the essential ontological features of our species, in particular on the assumption of a natural sociability of humans.[56]

The idea of a universal community of humankind is a frequent *topos* of political and legal philosophy.[57] The common values enshrined in international law, in this understanding, are not essentially the result of deliberative and inclusive processes, but are rather already present *in re* as an objective fact of reason that the rational observer simply has to recognize, international law to take over and formalize, and international adjudication to bring into effectiveness. More precisely, international law — or, at least, the most general part of it — has to be interpreted, against this background, as the legal expression of the activity of the international community and the most striking evidence of its existence: as the "common law of mankind,"[58] it arises as the formalization of shared values as well as of the rules that guarantee the protection of common interests.[59]

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56 On the imperialistic use of the assumption of a universal human fellowship, see Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inquiries L. 447 (2015).

57 Johannes Althusius, Politica ch. IX, No. 22, at 92 (Harvard Univ. Press 1932) (1614); Viktor Cathrein, Die Grundlage des Völkerrechts [The Foundation of International Law] 45 (1918); 1 Viktor Cathrein, Moralphilosophie [Moral Philosophy] 111 (Vier Quellen Verlag, 6th ed. 1924); Alfred Verdross, Die Verfassung der Völkerrechtsgemeinschaft [The Constitution of the International Community] (1926); Alberico Gentili, De jure belli libri tres [On the Law of War] bk. I, ch. XV, at 107 (Clarendon Press 1933) (1588); Grotius, *supra* note 24, Prolegomena 6, 16, 17; Samuel Pufendorf, De jure naturae et gentium libriocto [On the Laws of Nature and Peoples] bk. II, chs. II, III, VII, XV, bk. VIII, ch. VI (Hein 1995) (1672); Samuel Pufendorf, De officio hominis et civis libri duo [On the Duty of Man and Citizen] bk. I, ch. VIII (Oxford Univ. Press 1927) (1673); Christian Wolff, Institutiones juris naturae et gentium [Institutions of the Law of Nature and Peoples] bk. IX, chs. I, V (Halle 1750); Suarez, *De legibus*, *supra* note 8, bk. II, ch. XIX, No. 9, at 348.

58 C. Wilfred Jenks, *The Common Law of Mankind*, 59 Colum. L. Rev. 533 (1959).

59 Hermann Mosler, The International Society as a Legal Community (1980); Andreas L. Paulus, Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung [The International Community in International Law] (2001); Mehrdad Payandeh, Internationales Gemeinschaftsrecht [The Law of the International Community] (2010); Bruno Simma, From Bilateralism to Community Interest in International Law 217 (1994); Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century (1999); Ronald St. John Macdonald, *The International Community*

The close relationship between the justification of solidarity by resorting to the community of all humans and the noble and longstanding intellectual tradition of natural law, from antiquity until the present time, does not guarantee, however, the epistemological quality of the claim. Indeed, the case for solidarity depends here on the epistemological status of the proposition that "a universal human community exists which shares fundamental interests and values." Trying to assess briefly the epistemological quality of this proposition, it has to be pointed out, first, that the expression cannot correspond to any kind of *analytic judgment*, since the assertions that such a community exists as well as that it shares values and interests are not originally contained in the subject of the proposition. Thus, the proposition must be a *synthetic judgment*, aiming at reaching some knowledge of the world. Furthermore, the judgment is *a priori* because it aims at building assertions which are necessary and universally valid. However, under a post-metaphysical approach a synthetic a priori judgment — i.e., a proposition that makes an assertion of necessary and universal validity and claims to improve our knowledge of the world — can only be acceptable if it is based on empirical evidence about the phenomenon. But, alas, the assertion that "a universal human community exists which shares fundamental interests and values" does not satisfy such a consistency condition, since empirical evidence of such a universal human community is rather controversial: indeed, there is no less evidence for the realistic assumption of a permanent struggle for survival between human communities.[60]

Therefore, the judgment claiming the existence of a universal human community turns out to be, rather, the result of the quasi-metaphysical ontologization of a transcendental capacity with which all humans are endowed, namely the faculty to interact and communicate with each other. In other words, the theory of the international community seems to draw upon the transcendental capacity to interact and to search for consensus in a communicative way, a presumed ontological matter of fact for which proper evidence is lacking. Yet, if the truth content of this claim were to prove to be uncertain, there would be no reason why we should regard our fellow humans as deserving our solidarity. Indeed, the content of the assertion — as any realistic analysis of the relations between states and individuals could easily demonstrate — is far

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as a Legal Community, *in* Towards World Constitutionalism: Issues in the Legal Ordering of the World Community 853 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

60 The long history of "realism" — from Thucydides to Kenneth Waltz and beyond, even if its assumptions are not fully shared — teaches us with some good reasons not to be too optimistic as regards the attitudes of fellow humans.

from self-evident: humans can be no less prone to selfishness than to altruism. Thus, the pre-reflexive assumption of an ontologically sociable humanity is no more than a circular argument — and, therefore, rather wishful thinking — when it comes to proving the duty of solidarity.

E. Deconstructed Rationality

If the theory of the universal human community grounds its claim for solidarity on an alleged ontological truth, an additional approach defends the case for solidarity following the contrary strategy: while the first resorts to ontology, this latter denies any basis *in re* or even in a universal conception of reason. Here, solidarity is not a deducible universal duty, simply because no ontological fundament for universal rationality is presumed to be given. This conclusion is reached by resorting to the postmodern critique of modern rationalism and subjectivity.

Translated into the language of legal theory — in particular, the theory of international law — postmodern criticism of unitary and universal subjectivism maintains that international law is not the legal expression of an ontological, moral or epistemological universal truth: swinging necessarily between apology and utopia, its norms and practices are lacking objectivity and, thus, universal validity.[61] Nonetheless, the critique of the universalistic claim of the international law discourse does not lead to sheer nihilism. Indeed, the international law theorists influenced by postmodern thinking accept the idea that some experiences may occur which are not characterized by mere contingency but take up, on the contrary, a kind of universal scope.[62] From the postmodern standpoint, however, this unassuming universality is not based on abstract ontological, moral or epistemological principles, but is derived from the concrete experience of vulnerability among all involved individuals. Artistic expression is probably the most suitable way to give a voice of universal reach to a humanity made of concrete human beings. But the law, too, due to its *formalism*,[63] can play a role in order to accomplish this task. Indeed, through the formal means of the law rights and duties are recognized with regard to all members of the community who hold the same position. As a consequence, the violation of my interests — which, without

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61 Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument, Reissue with a New Epilogue (2005).

62 Martti Koskenniemi, *International Law in Europe Between Tradition and Renewal*, 16 Eur. J. Int'l L. 113, 119 (2005).

63 Martti Koskenniemi, The Gentle Civilizer of Nation: The Rise and Fall of International Law 1870-1960, at 500 (2001).

the mediation of the law and without its formal character, would have a merely *private* character — is transformed "into a violation against *everyone in my position*" and, thus, into "a matter of concern for the political community itself."[64]

Following this interpretation, there is a non-ontological, non-moral and non-epistemological universalism that originates specifically from a *deconstructed* idea of rationality. Reason, according to this understanding, does not help us to recognize objective and universal values, nor is it necessarily the means for the achievement of egoistic payoffs. Rather, every concrete individual applies practical reason to achieve his or her priorities, some individuals pursuing selfish interests, others concretizing altruistic attitudes. As a result, solidarity is not an obligation, but a choice that some actors — individuals or states — make following a sentiment of *empathy* towards the suffering of fellow humans. Rationality thus becomes a vehicle for the realization of the context-related preferences of the single individuals: insofar as we — alone or acting together — feel empathic towards the "fellow sufferers,"[65] we may use the instruments that the deconstruction of rationality puts at our ethically unprejudiced disposal to ease their pain. Among these tools, a preeminent role should be played by the law, precisely because of its formal character that discharges it from the pretension of possessing an objective truth and makes it particularly suitable for different applications — in many cases, unfortunately, against the interests of the oppressed, but sometimes also in favor of them.

However, doubts arise as to whether this postmodern version of the universalism of the law can really justify the claim for solidarity as an *obligation*. Indeed, if no epistemological argument thought to substantiate the universality of international law is convincing, then neither is the universal dimension of legal formalism an assertion that every human being has to share. But the personal commitment based on empathy — regardless of how important empathy may be as a motivation of personal action — cannot offer a solid basis for a legal system necessarily related to the essential quality of the law as an "ought." Empathy is fundamental but personal; the law, on the contrary, specifies the compelling rules which guarantee order in the interactions of an entire society — in the case of international law, even of the world society.[66]

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64 Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 Cambridge Rev. Int'l Affairs 197, 214 (2004).

65 Richard Rorty, Contingency, Irony, and Solidarity, at xv (1989).

66 Herewith, I do not want to play down the role that emotions have within the legal discourse. See, on this topic, Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 Harv. C.R.-C.L. L. Rev. 551 (2011); and Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 Minn. L. Rev. 1997 (2009-

From the perspective of a deconstructed rationality, then, solidarity is merely optional, not a moral duty that, because of its universality, can and should be translated into legal norms. Moreover, it is almost impossible to justify the establishment of institutions with the task of fostering a better consideration of the interests of "others" by resorting to personal empathic attitudes. Solidarity may resort to empathy as regards the mindset of individuals, but it must rest on a psychologically neutral commandment of reason if it is to be seen as a general moral and legal duty and if it should be adequately substantiated by rules and practices.

F. Communicative Rationality

According to the communicative paradigm of social order, society is made up not only of functional systems, but also a *lifeworld of intersubjective relations*, which is characterized by *different forms of interaction*.[67] In order to be well-ordered, which means peaceful, cooperative and effective, *social interaction needs rules*. When rules are positive and compelling, they are defined as *laws*, while the *corpus juris* that regulates a frame of common concern is referred to as *public law*. Therefore, the task of the legal system, which consists of stabilizing the normative expectations, is not related only or even just primarily to the performances of the functional subsystems, but refers rather to intersubjective interactions, or to the tension- and conflict-filled relation between lifeworld and functional subsystems. Furthermore, each form of interaction is characterized by a specific aim that decisively influences its discursive contents.

Yet, although the aim of the social interaction is essential to determine the contents of the discourse, the rationality embodied in the communication — mainly, but not only, at the linguistic level — is, from the perspective of the communicative paradigm, not exclusively and even not primarily functional. Rather, the communicative rationality — as follows from the understanding of

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2010). However, saying that law regulates interactions in which not only rational considerations but also emotions are involved is not the same as asserting that legal instruments should be seen as being at the disposal of individual priorities which do not need or even allow intersubjective justification — be it rational or emotional.

67 Apel, *supra* note 39; Apel, *supra* note 55; Apel, *supra* note 55; Jürgen Habermas, Theorie des kommunikativen Handelns (1981) (translated to English in Jürgen Habermas, Theory of Communicative Action (Thomas A. McCarthy trans., Beacon press 1984/1987)).

communication here presupposed — always has a normative core.[68] Precisely this normative essence, based on the general principle of mutual recognition, is what makes communicative rationality universal — thus different from the purely systemic rationalities and connected, from its very theoretical conception, to the tenet of solidarity towards "others."

Jürgen Habermas — as the exponent of the communicative paradigm of order who transformed the epistemological premises of the communicative rationality into a comprehensive theory of public law[69] — resumes Kant's path-

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68 The normative core of communicative rationality consists of the assumption that discursive communication can achieve its goal only if all those involved mutually presuppose that: a) from an *objective* perspective, the assertions are *true* (in the sense that the propositions refer to real situations or facts); b) from a *subjective* perspective, the speakers act *truthfully* (in the sense that they are committed to fair-minded purposes and are sincerely persuaded that their assertions meet the conditions for truth); and c) from an *intersubjective* perspective, the speakers interact according to the principles of *rightness* (in the sense that they accept that their assertions have to meet the criteria for a general and mutual acknowledgement by all participants in the communication). *See* Jürgen Habermas, Nachmetaphysisches Denken 73, 105, 123 (1988) (translated to English in Jürgen Habermas, Postmetaphysical Thinking (William Mark Hohengarten trans., Polity Press 1992)); Jürgen Habermas, Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns 598 (1984) (translated to English in Jürgen Habermas, On the Pragmatics of Social Interaction (Barbara Fultner trans., MIT Press 2001)); Jürgen Habermas, Wahrheit und Rechtfertigung 110 (1999) (translated to English in Jürgen Habermas, Truth and Justification (Barbara Fultner trans., Polity Press 2003)).

69 Jürgen Habermas, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats (1992) (translated to English in Jürgen Habermas, Between Facts and Norms (William Rehg trans. MIT Press 1996)); Jürgen Habermas, Der gespaltene Westen (2001) (translated to English in Jürgen Habermas, The Divided West (Ciaran Cronin trans., Polity Press 2006)); Jürgen Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?* [*A Political Constitution for the Pluralistic World Society?*], 38 Kritische Justiz 222, 228 (2005); Jürgen Habermas, *Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik* [*Communicative Rationality and Transboundary Politics*], *in* Anarchie der kommunikativen Freiheit, *supra* note 53, at 439; Jürgen Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft* [*The Constitutionization of International Law and the Legitimacy Problems of a Constitutionalized World Society*], *in* Rechtsphilosophie im 21. Jahrhundert [Legal Philosophy in the 21st Century] 368 (Winfried Brugger, Ulfried Neumann & Stephan Kirste eds., 2008).

breaking tripartite division of public law.[70] From the intersubjective perspective of the communicative rationality, each level of public law corresponds to the legal regulation of a specific kind of social interaction. At the first level, domestic public law regulates the interactions between citizens of each single political community as well as between these citizens and the institutions of the same polity. The use of communicative reason and the application of its normative prerequisites guarantee, here, that decisions are taken through deliberative processes based on the reflexive involvement of the citizens. Thus, legitimate sovereignty — according to the communicative paradigm — cannot but be "bottom-up." At the second level, international public law addresses the relations between citizens of different states insofar as they are primarily regarded as citizens of the state; therefore, the relations between individuals which are here the object of regulation are processed through the form of relations between states. Lastly, at the third level, the cosmopolitan law is regarded as the public law that regulates the direct interactions between individuals from different states as well as between individuals and the states of which they are not citizens.

This third level is necessary given the fact that individuals meet and interact with each other, outside the borders of single states, regardless of their belonging to a specific political community. "Cosmopolitan law" consists, therefore, precisely of those principles and rules that guarantee a peaceful and cooperative interaction between humans within this most general context of interaction, namely beyond the condition of belonging to an individual state. Embedded in these rules is the fundamental recognition that we owe to every human being as the consequence of the universal capacity to communicate. In this sense, solidarity *is* an obligation and its essential principles and norms have necessarily to be laid down as a fundamental part of the most universal *corpus* of public law.

Summing up, the case for the obligation of solidarity is based, from the perspective of the communicative rationality, on the following considerations — which are regarded by its supporters as descriptive as well as prescriptive assertions.[71] First, we are — increasingly — exposed to interaction with

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70 *See* Kant, *supra* note 27.

71 Following a well-established tradition that runs, at least, from Plato to Hegel and beyond, the exponents of the communicative paradigm of rationality assume, in the analysis of social phenomena, that the descriptive dimension cannot be clearly distinguished from the prescriptive (or normative) level. This merging of the two dimensions is due to a twofold circumstance that characterizes social interaction: first, the fact that social communication, in order to work, always contains a normative nucleus, *see supra* note 68; and, second, the fact that social discourse constantly aims at a normative definition of the identity of the social

fellow humans, who do not belong to our individual social group. Second, we share with them the same rationality which contains a normative core of mutual recognition. Third, this interaction — like any other kind of human interaction — needs to be protected in order to guarantee its peaceful and, from the most favorable perspective, also cooperative unfolding. Fourth, from this necessity arise obligations which are moral (for the individual) as well as political and legal (for the whole society). Fifth, these obligations are "thinner" at the global than at the national or local level, due to the less intense interaction that occurs in the first case; as a result, the global obligations are limited to the guarantee of peace and of the most fundamental human rights. Sixth, insofar as actions by a sovereign power affect the most fundamental rights of aliens, the latter are entitled to demand that their justified rights be adequately taken into account; from the opposite point of view, i.e., from the standpoint of the sovereign power, this right corresponds to an obligation of solidarity. Seventh, the obligation of solidarity involves the taking into account, by the sovereign power, of the protection of all essential human rights of aliens — including civil, political, social and economic rights as well as even, to a certain extent, the third-generation rights — that are considered indispensable for a dignified human interaction and may be endangered by actions of the sovereign power.

Founding the case for solidarity on the communicative paradigm, i.e., interpreting it as part of the normative protection for that kind of communication which occurs when individuals interact within the most general horizon, the shortcomings can be avoided that affected the abovementioned kinds of rationality: namely, a) solidarity is not regarded as the result of a farsighted expediency, since communication is the expression of a non-strategic use of practical reason; b) the claim for a non-egoistic approach refrains from metaphysical assumptions insofar as the communicative capacity with which all humans are endowed has a merely transcendental — or better, linguistic-pragmatic — quality; and c) solidarity does not depend on individual preferences or personal commitment, but is a normative duty, necessary in order to guarantee the basic conditions for human interaction at the most general level, which has to be translated into an adequate ethical and legal framework.[72]

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group, thus going beyond the mere elaboration of empirical data. As regards this second aspect, see Jürgen Habermas, Erkenntnis und Interesse 221 (1973) (translated to English in Jürgen Habermas, Knowledge and Human Interests (Jeremy J. Shapiro trans., Polity Press 1987)).

72 From this perspective, the duties that we have towards our fellow humans are prima facie of a *moral* nature since they bind us as individuals who are capable of acting reasonably and are intersubjectively expected to give generally shareable

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III. Conclusion: Towards a New Concept of Sovereignty

In order to meet the challenges of the post-national constellation, which has been generated by ever deeper worldwide interconnections, the concept of sovereignty has to be reshaped. In particular, sovereignty should no longer be understood as the condition in which an authority does not recognize any higher power above itself, but rather as the situation in which public power is legitimately exercised. In other words, in the contemporary context only legitimate power should be seen as sovereign power.

The first implication of this tenet touches upon the sources of sovereignty. Given the centrality of legitimacy, on the one hand, and the assumption that, from a post-metaphysical standpoint, only the democratic process fulfils the criteria for at least the possibility of a reflexive legitimation of authority, the consequence is that the only acceptable source for sovereignty is the one that comes bottom-up, i.e., ascending from the free will of the governed.[73] However, if the legitimacy of sovereignty were limited just to this tenet, nothing would be achieved as regards solidarity towards "others," or openness to their needs and arguments: a public power may be legitimated from below, and nevertheless selfish.

Indeed, the idea of a solidaristic sovereignty needs more than just a bottom-up legitimacy: it requires also a specific concept of rationality, which should itself be better adapted to the conditions of an increasingly interconnected world. Different conceptions of rationality have been scrutinized in the

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justifications for their actions. But they are *political* duties too, insofar as they have to be implemented by an international community made up of political actors, such as states, structures of international governance and organizations of the cosmopolitan civil society.

73 The question here is what should be done with regard to states that are sovereign in the traditional meaning (in the sense that they exercise power over a population within a delimited territory), but are not democratically legitimate. Surely, my argument should not be interpreted as a plea for their exclusion from the international law discourse. International law is inclusive — and should remain so. Yet a two-level approach may be here useful to meet the problem. At a first level, democratic states should always include non-democratic — and therefore, in a normative sense, not properly sovereign — states in international law agreements. Nevertheless, at the second level, the final goal of democratic states in pursuing these agreements and complying with them has to be, without exception, the restoration of conditions of full democratic and popular sovereignty in all political communities. In other words, even if it is often necessary to talk with tyrants, the ultimate purpose of these talks should always be the overcoming of tyranny.

former Part, with attention paid specifically to their respective implications for the justification and the implementation of solidarity.[74] One of these conceptions — particularistic rationality — has proven to reject solidarity as a necessary consequence of its core theoretical assumptions. A second — functional rationality — albeit substantially indifferent to the question, does not deliver any argument in favor of a more-than-system-oriented approach to the interests of aliens. A third — strategic rationality — can be used for both purposes, in favor or against solidarity, but its case for the openness to needs and arguments of aliens proves to be actually rather shaky. The last three conceptions of rationality are altogether explicitly *for* solidarity; however, the holistic and the postmodern approaches are affected by argumentative deficits that make them to a certain extent unconvincing as well.

Thus, as a result of the analyses presented above, it can be maintained that sovereign actors have an *obligation* of solidarity only if they deploy, in their actions, a practical use of reason, i.e., a rationality that is *non-particularistic* (meaning *universalistic*), *non-functional* as well as *non-strategic* (or *consent-oriented*), *non-holistic* (i.e., it avoids any metaphysical or ontological presuppositions), and *non-deconstructed* (meaning *deontological*). In other words, universalism, consent-orientation, as well as a post-metaphysical and deontological attitude are the inescapable conditions under which the use of reason by a sovereign actor can lead to the determination of solidarity as an obligation and as a compelling legal norm. Communicative rationality meets these requisites, paving the way, therefore, for an understanding of sovereignty which is, at the same time, legitimated by the individuals who are subject to the sovereign power as well as open to "others."

From the communicative perspective, every individual is always involved in different forms of interactions: as a citizen with the other citizens of his/her political community, and as a human being with all other fellow humans inside as well as outside his/her community. As a result, the legitimacy of a sovereign public power is guaranteed only if it comes from the governed not only in their role as citizens of the polity, but also in their no less important

74 On this point, it should be briefly added that the different uses of reason transversally cross the sources of sovereignty. This means that each source of sovereignty can come along with more than one use of reason, as well as that some conceptions of rationality can combine with just one source of sovereignty, while other are compatible with both kinds. More concretely, particularistic rationality can sustain both a democratic and an autocratic sovereign. The same goes for the strategic and holistic rationalities, while systemic reason seems to be rather indifferent to democratic legitimacy. Only the deconstructed and the communicative rationalities are exclusively compatible with "bottom-up" legitimacy, although the results are eventually quite different.

position as citizens of the "cosmopolis," or simply as human beings.[75] If we take this point of view, the legitimacy of sovereignty has a two-level structure, domestic and cosmopolitan. Thus, a sovereign power will be legitimate only if it takes into account, along with the rights and interests of the citizens of its own polity, also the justified claims of the international community.

Seen this way, sovereignty takes a quite unusual form, maybe even disturbing for those who still think in traditional patterns of law and politics. However, even if we do not refrain from the conceptual challenge, there is still a long way to go: new ideas may show the direction, but the edifice then needs to be built with materials made of legal instruments and political agreements. In particular, it is essential to address the question of how the moral obligation of solidarity that decisively contributes to the redefinition of sovereignty can be translated into legal norms. So far, rather marginal anticipations of institutional ways of opening the internal fora to justified interests of non-citizens can be found in international, supranational and national legal instruments.[76] Furthermore, "solidarity" remains a highly contested concept in international law.[77] To highlight the uncertain status of solidarity within the international law discourse, two cases may be recalled. First, the debate on solidarity within the Human Rights Council has met strong skepticism from

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75 From this perspective, every single individual has to accomplish two different roles: on the one hand the role as a citizen of a particular polity with its specific interests, and on the other the role of a "citizen of the world" who is committed to the defense of universal values. Provided that the first belonging is much "thicker" than the second, in the sense that more duties are generated from it — in particular as regards the redistribution of resources — and that these duties may imply a much larger constraint on individual interests, the question arises on the dilemmas that can grow from the distinction between the two roles. In order to prevent that these inescapable dilemmas degenerate into unsolvable contradictions, a criterion may be regarded as essential: no action that may arise from the status as a citizen of a specific political community can violate the duties derived from the more general cosmopolitan condition. In other words, we are allowed to do for our fellow citizens (in a particularistic sense) more than what we would to for aliens, but nothing of this can run against the basic rights and interests of our fellow humans.

76 *See* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295, 314, 319 (2013).

77 *See* Sergio Dellavalle, *Opening the Forum to the "Others": Is There an Obligation to Take Non-National Interests into Account Within National Political and Juridical Decision-Making-Processes?*, 6 Göttinger J. Int'l L. (forthcoming 2014).

many, in particular Western, countries.[78] Second, although the recently issued *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* undoubtedly represent a significant step forward on the way to the recognition of a not only *moral* but also *legal* obligation of solidarity, it is quite unclear, to this day, what effect they will concretely have.[79]

In conclusion, the successful implementation of a new concept of sovereignty through legal instruments and political practices is anything but guaranteed. Yet in a context of inescapable existential uncertainty, it would be already a great accomplishment if we could reasonably believe that we know which future of sovereignty we are working toward.

78 Consider, for example, the controversial adoption of the Human Rights Council Res. 15/13 on Human Rights and Solidarity, U.N. Doc. A/HRC/RES/15/13 (Sept. 30, 2010).

79 *See* O. De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 Hum. Rts. Q. 4 (2012).

A Genealogy of State Sovereignty

*Lorenzo Zucca**

A genealogical account of state sovereignty explores the ways in which the concept has emerged, evolved, and is in decline today. Sovereignty has a theological foundation, and is deeply bound up with the idea of God, in particular a voluntarist God, presented as being capable of intervening directly in the world. Religious conflicts in the sixteenth and seventeenth centuries forced the separation between religion and politics, and opened the space for the emergence of a national state endowed with sovereignty which has dominated the world until now. Today's rise of international and transnational obligations challenges the conventional understanding of state sovereignty, which cannot account for the normative density of the global order and the corresponding decline of state-based political authority. In order to explain that, I contrast two competing understandings of state sovereignty: a static one and a dynamic one. The static understanding regards sovereignty as absolute within the state territory. The dynamic understanding regards sovereignty as evolutionary: according to this account, the state is just one possible form that sovereignty can take. I conclude by suggesting that the dynamic understanding of state sovereignty is better suited to explaining the decline of state sovereignty.

Introduction

In the beginning there was no national state. Perhaps we need not go so far back for the proposition to be true. In the middle ages, there was no national state. Instead, there was competition between the Empire and the Church, both vying for political authority. Needless to say, the protagonist of this conflict is God; what is at stake is not its existence, but its willingness to interfere in world matters. According to the Divine Command Theory — widespread in Medieval Europe — God is the source of all moral and legal obligations.[1]

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* King's College London.

1 Philip Quinn, Divine Commands and Moral Requirements (1978).

The God of the Hebrew Bible is a sovereign lawgiver, who punishes disobedience and rewards obedience. In the middle ages, sovereign authority took different *forms*: the universal ambition of Empire, the universal realm of the Catholic Church, or the narrow confines of city-states. These political authorities were competing to fill a political vacuum. It is in this vacuum that the modern state appeared, developed, and conquered the world.

Today's world faces a vacuum of political authority that sovereign states are increasingly at greater pains to address. To understand the crisis of political authority, I propose to engage in a genealogical explanation of state sovereignty. The goal is to understand the evolution of state sovereignty by exploring its roots and examining how the idea emerged and developed. This may give us a glimpse at why it is declining today and how that decline is coming about. There are two dimensions to state sovereignty here: a philosophical dimension that focuses on the *ground* of the concept of sovereign authority, and a political dimension that engages with the *form* that that authority takes, namely the state. At this point, I need to make a few cautionary points about the methodology. The narrative I am offering here is not exhaustive. Instead it begins with three ideal models of sovereign authority and tracks the way in which they have shaped the political space and ultimately crystallized into the state. There is a tension between ideal models and political practice that I want to explore here: is the state sovereign because it is blessed with moral or theological justification, or has it emerged as the ultimate authority because of historical and practical necessity? I will make a case for the latter hypothesis.

The first ideal model of sovereignty grounds authority on revelation — let us call it Jerusalem. Here the *ground* of sovereign authority is clear; however, this ideal model of sovereign authority is unclear as to which *form* should represent godly authority in the world. The second ideal model grounds authority on reason — let us call it Athens. Human beings are thought to be capable of understanding the world as it is through the use of natural reason. This changes the *ground* of political authority, since humans are no longer required to interpret the will of the sovereign religious authority, but instead they can rely on their natural reason to understand the order that was created and that rules our societies.

The third model is the expression of a purely political and purely secular mindset. Let us call it Rome. It is secular in opposition to Jerusalem in an obvious way. It is also secular in opposition to Athens in the sense that it rejects a quasi-religious belief in reason. It is political in the sense that it does not aim to provide a ground for authority. Instead, Rome dissociates the political form from the ground of authority and prioritizes the former above the latter: the political form of the sovereign state emerged as a practical solution and not as the embodiment of reason or revelation. However, Athens and Jerusalem

claimed the victory and shared the glory: the realm of reason is officially separated from the realm of revelation, but in practice one legitimizes the other and together they claim to ground the practice of politics. Rome rejects theology and freestanding normative thinking; instead, it attempts to build a realistic account of political authority that explains the emergence of the state as a political necessity.

This Article is divided into three parts: the emergence, consolidation and decline of state sovereignty. Part I examines the emergence of state sovereignty, where I contrast the theological concept of sovereignty with the political emergence of the state. In Part II, I suggest that the consolidation of state sovereignty depends on the separation between politics and religion: the modern state is a response to the religious conflicts. A dualism between Athens and Jerusalem is introduced, only to guarantee reciprocal legitimation. The triumph of state sovereignty in the seventeenth century is in reality a victory for Rome: power is the precondition of justice. However, it is possible to distinguish two competing accounts of Rome. On the one hand, we have the conventional Hobbesian account, which presents political authority as static: once sovereignty is posited, it is absolute and exclusive. Either the state is sovereign and there is no other authority beyond it, or it is not sovereign and therefore it is not a state. On the other hand, there is an evolutionary account of state sovereignty that understands political authority from a biological viewpoint: political authorities emerge, consolidate and decline on the basis of how well they do their job and secure the interests of the community in a way that is open to contestation. In Part III, I contrast the evolutionary understanding of sovereignty to the static one in order to explain the decline of the state and the rise of international institutions.

I. Two Views of Sovereignty and the Emergence of the State

A. Medieval Origins: Political Authorities and Political Vacuum in Medieval Europe

In the fourteenth century, there is a standoff between political authorities: neither the Church nor the Empire de facto exercises full political authority over the world; but they do so to a limited extent. There is a political vacuum that is perceived all over Europe, and it is part and parcel of a looming political crisis that will be transformed into an epochal change of the world order during the seventeenth century. In this vacuum, city-states exercise growing power. They are the paradigm of political authority even if the internal struggle between factions is often more a matter of private interests than a question

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of public good. An egregious example of a city-state that struggles between competing factions is Medieval Florence where pro-papist and pro-emperor factions cannot find ground of agreement.

In November 1301, Dante — the famous poet — goes to Rome as a diplomatic envoy of Florence to negotiate a peace deal with Pope Boniface. The peace talks fail miserably, since the Pope has little interest in a truce. A few months later, he marches into Florence with his troops in order to reinstate the pro-papal faction (*Guelfi Neri*). Dante is tried and convicted *in absentia* on January 27, 1302. He's condemned for graft and misuse of public funds. He will have to live in exile for the rest of his life. Dante is one of the most astute political commentators of this period. His writings and life experience testify to a deep interest in political authority and justice.[2]

During his life, Dante was scarred by unfair and ungrounded accusations. The trial in which he stood accused did not rely on factual evidence, but on the opinion of the people. Dante would be ever after an advocate of strong retributive justice — to every person it is due. Dante's *Divine Comedy*[3] is the journey of a living man through Inferno, Purgatory and Paradise where God's justice rules arithmetically and relies on objective evidence, as opposed to the ways in which justice works in the world. The afterworld of the *Divine Comedy* is based on that very principle. Each individual is sent to the correct emplacement that corresponds to the actual wrong committed on earth. Divine justice is imparted by God's judges that live at the gates of Inferno, Purgatory or Paradise.

In Dante's worldview, political authority has a theological ground: Jerusalem or revelation. God reveals to us the true goal of political societies: to be ordered according to the principles of divine justice. Of course, human beings are imperfect, so they frequently stray from the path of divine justice. But at the same time, human beings are endowed with natural reason and so they are capable of ascertaining the goal that has been set by God. In this way, reason becomes an ally of revelation; Athens comes in aid of Jerusalem. This is the gist of the Thomistic tradition embraced by Dante in his political treatise *De Monarchia*, which argues in favor of a new Emperor capable of bringing justice to the world through the enforcement of the law.[4] Dante has a preference for a political authority on earth that has universal aspirations. He wishes that a

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2 *See* Dante Alighieri, De Monarchia [The Monarchy] (Prue Shaw ed., Cambridge Univ. Press 1996) (1312).

3 Dante Alighieri, The Divine Comedy (David H. Higgins ed., C.H. Sisson trans., Oxford Univ. Press 2008).

4 *Id.*

new Emperor could appear and exercise the necessary universal authority to bring back order to a deeply fragmented Europe.

Dante bemoans the lack of a reliable system of legal enforcement in the real world. The law is there to be applied, but there is no authority that is strong enough for this job. Dante is committed to the *ius commune* — the system of law inherited from the Romans and reenacted in the *corpus juris*. The *ius commune* is regarded as the product of natural reason, reflecting the real order of the world. Dante's political faction (*White Guelphs*) is decided to wage a war against the *Black Guelphs* for not respecting the law (*ius commune*).

The *Black Guelphs*, who run city-states like Florence, do not want to be in charge of the application of the *ius commune*; rather, they want to have full jurisdictional autonomy to produce the norms they want and to apply them accordingly. In other words, cities like Florence are already claiming the superiority of *lex* over *ius*. Dante is opposed to such a view of law (*lex*), which he regards as particularistic and producing injustices, as it is merely the product of factional majority interests, rather than a well-established body of legal principles (*ius*), which has a clear universal appeal. Instead, Dante advocates a model in which local authorities are free to the extent that they apply the existing law (*ius commune*).

The relation between law and political authority is a very important issue in Medieval Europe. The problem is between bounded and unbounded political authority. The debate at that point in time is encapsulated in the legal concept of *arbitrium*. *Liberum Arbitrium* does not mean to exercise completely unfettered sovereign power. Instead, it means to exercise weak discretion in a legal sense. Legal principles (*ius*) are there to be applied, but the interpreter has weak discretion to decide how best to apply them. This excludes the idea of a political authority that creates standards *ex nihilo*. No political authority could do that according to the medieval understanding of law. For medieval lawyers, law could never be reduced to the legislation of a centralized sovereign power, since there was no such power. In other words, *ius* could never be reduced to *lex*. In fact, the deepest sense of law refers to universally binding norms that are superior to the political authority of the Pope and the Emperor. No sovereign power is purely unbounded at the normative level for Dante. Machiavelli would challenge precisely that medieval conjecture: what matters is not the normative justification of authority, but the actual exercise of authority.

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B. The Sovereign and the City-State

Two centuries later, it was Machiavelli's turn to be thrown out of the Florentine government.[5] In 1512, the Republic of Florence is overturned by the Medici's army aided by the Spaniards. Machiavelli is imprisoned and tortured. He then takes up residence outside the walls of Florence. His reaction is very different from Dante's: Machiavelli desperately tries to convince the ruling power that he is fit to work for the Prince of the city, Lorenzo de' Medici. Machiavelli's understanding of politics and political authority is informed by a deep realism: politics needs to be separated from ethics.[6] Rome is independent from Athens.

Machiavelli is an *ante litteram* empirical political scientist, who is concerned with experience and historical facts and rejects the centrality of freestanding normative thinking.[7] Machiavelli also rejects the influence of theology, in particular revelation as a ground of political authority. He is the first secular political thinker, who really believes that political authority should free itself from the shackles of religious and moralizing influences.[8] To continue the metaphor, Jerusalem has no place in the understanding of politics. Machiavelli focuses on how political authority really works, not how it should be justified.

Christianity is the object of various political critiques expressed by Machiavelli. In particular, the central problem connected with a Christian understanding of politics is its hopeless insistence on vague and lofty ideals that inevitably are flouted by political rulers. Christian values and Aristotelian teleology join forces to justify the increasing political role of the Catholic Church on the basis of imaginary ideals. This leaves the people the prey of Fortuna, or God's providence. Instead, Machiavelli advocates a naturalistic understanding of human abilities. People, and rulers in particular, have to rely on their natural inclinations to constantly maximize their control over the external world; being fettered by unnatural moral constraints only makes them weak. They should be strong and dominate their fortune, rather than be dominated by it.

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5 Quentin Skinner, Machiavelli: A Very Short Introduction (2001).

6 This is one way of introducing the normative-naturalist dichotomy.

7 But he does not deny altogether the force of normative standards; he simply insists that they are not crucial in determining the effectiveness of political authority.

8 To be precise, secular liberation can only happen at the level of the ruling class. The masses, on the other hand, are better controlled if they believe in religion, which instills in them the feeling of piety. *See* J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975).

Machiavelli is the first student of politics that conceives of the state in a modern way: it is neither the rule of god on earth (Jerusalem), nor the institutional embodiment of reason (Athens). Rather, it stands for an *impersonal* rule that has the monopoly of coercion over a boundary-defined territory. The idea of *Stato* captures the actual ability to rule of a political authority rather than its moral or theological fitness to do so. Any political institution that can acquire, enforce and maintain coercive authority deserves the name of state.[9] The political vacuum bemoaned by Dante can now be filled by the actual practice of politics. While Dante aspired to a universalist form of political authority, namely the Empire (backed by the Church), and despised the City for its parochial particularism, Machiavelli would have been very happy to see the city-state model flourish. Machiavelli's political preferences — just like Dante's — were doomed to fail in the attempt to secure a stable form of government. Both the universal aspirations of the Church and the particular ambition of the city-state are incapable of bringing order to the world. There is a space for a new entity to emerge: it is the rule of absolute monarchy with its state sovereignty.

The lesson of Machiavelli can be summarized as follows: Rome is superior because it exercises authority effectively, not because it is blessed by gods or justified by morals. The sovereign that mismanages the state runs a very high risk of losing its *status* as a coercive authority. The sovereign has to have a sharp understanding of, and should be ready to act upon, the interests of the state. If this is not the case, then political authority crumbles. This is a non-moralistic, non-theological account of the rise and fall of political authorities. The sovereign's ultimate goal is to maintain itself in power by whatever means and to preserve the territorial integrity of its state. This would also come to be a realistic account of political authority within and beyond the state that has in fact dominated most accounts of international relations.[10]

Rome's greatness, and the greatness of its laws, is to be explained by reference to an important distinction that we should not overlook. Machiavelli believes that to live safely (*vivere sicuro*) is one thing and to live freely (*vivere libero*) another.[11] To live safely implies the existence of a political authority that applies the laws robustly and instils fear and obedience in the citizens. An example of such a political authority is the French kingdom that applies the law swiftly through the hard work of the parliaments (regional institutions

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9 This goes against the grain of the etymology: status means something that preserves its own essence unchanged.

10 *See* Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (4th ed. 1967).

11 Niccolo Machiavelli, Discourses on Livy (Oxford Univ. Press 2003) (1531).

of law's implementation). At the same time, the French kingdom disarmed its citizens, preventing them from taking the protection of the country into their hands.

Vivere libero is an altogether different thing and it is the crux of the Roman Republic. Rome empowered its citizens by arming them and giving them the responsibility to actively protect the republic from external aggression and from internal mismanagement. Machiavelli goes against the grain: many have argued that the decline of Rome was to be explained by reference to its internecine conflicts. Instead, Machiavelli argues that class conflict within the republic is what maintains the polity alive and well and free from the accumulation of power in the hands of bad rulers. Conflict and pluralism are the source of a healthy republic that exercises political authority while maintaining a great degree of freedom. Rome is great because it refuses to embrace one religion or one set of moral values. Instead, it embraces social conflict as the source of its political vitality, as well as the check against arbitrary use of power.

Conflict is at the core of Machiavelli's political thinking.[12] A state is free when the ruler and the ruled are constantly checking each other. Machiavelli does not believe in high moral standards to guide the Prince. Not that this leaves the Prince standard-less. But there is something more important than moral standards: it is effective governance. Effective governance may even include actions that are in principle wrong, but are geared to achieving important goals for the sake of the state's interest.

Machiavelli rejects philosophical and theological moralism. He's nearly on his own on that. A plethora of philosophers have stepped in to defend theology and normative political thinking. Machiavelli's name is bound up with a vision of politics that is highly despised because of its association with wrongdoing.[13] However, the important insight that is often overlooked is that philosophers create an unrealistic image of human nature and would like to see political regimes reflect that image, only to despair when humanity exhibits all its faults in the realization of political order. Machiavelli is a realist and a naturalist in the sense that he wants to explain political authority beginning with how human society really works in practice, rather than by focusing on how it ought to work in theory.

Dante's conception of political authority was heavily reliant on the supremacy of divine revelation. The sovereign on earth, the Emperor, should aspire to be guided by divine light. The Emperor's authority is universal and knows

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12 Filippo del Lucchese, Conflict, Power and Multitude in Machiavelli and Spinoza (2010).

13 Leo Strauss, Thoughts on Machiavelli (1995).

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no bounds as long as its goal is to bring to earth the principles inscribed in divine justice. Jerusalem is the ultimate horizon of political authority. Contrast that picture with that of Machiavelli: Rome's political greatness has nothing to do with religious or moral standards. Its body politic is healthy because it allows for disagreement and conflict rather than rigidity and moralism. The sovereign authority is he who rules efficiently over the body politic. Machiavelli formulated for the first time the concept of the state as an impersonal form of rule that has authority over a bounded territory.[14]

II. The Consolidation of State Sovereignty

A. Religious Wars and the Rise of State Sovereignty

The last obstacle that needed to be overcome in order to seal the supremacy of the state over its territory was the secular power of the Catholic Church. In 1517, ten years prior to Machiavelli's death, Martin Luther published his *95 Theses* criticizing the terrestrial power of the Church.[15] His voice and aspiration are extraterritorial and his political aim is to influence politics globally, if not to exercise it directly. Through the Holy Roman Empire, and a myriad other political posts occupied by the clergy, the Church rules and attempts to maintain socio-cultural homogeneity. For centuries, the Church had levied taxes, administered cities and delivered justice, among many other things. This multiplied the opportunities for corruption and worsened the image of the Church. Martin Luther argued that the Church should be stripped of all its temporal and ecclesiastical powers. It should be brought back to an image of spiritual purity. Its involvement in the exercise of temporal power only tarnished the image of religion, which needed to revert to its original greatness. The devastating attack on the morality of the Church left an even bigger hole in the political landscape. Once the extraterritorial reach of the Church had been swept aside, the political vacuum could be more easily filled by local princes exercising territorial authority, with no extraterritorial mission.

Luther introduced a fundamental dualism between the duties of spiritual and temporal leaders. The dualism was sharp and clear: on one hand there is a spiritual domain, which involves specific spiritual duties, and on the other there is a temporal domain, with its own specific duties. The two domains foster the good of Christians in different non-overlapping ways. This dualism

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14 Quentin Skinner, The Foundations of Modern Political Thought, Volume I: The Renaissance (1978).

15 Erwin Iserloh, The Theses Were Not Posted: Luther Between Reform and Reformation (Jared Wicks, S.J., trans., 1968).

frees the rule of local princes from the interference of the Pope and the Catholic Church.[16] In theory, this is an attempt to moralize the political life of the whole of Europe. The idea was to separate the domain of Jerusalem from those of Athens and Rome. It is an attempt to define away the theological-political conflict by positing completely independent domains of action. In practice, it sets the stage for the most brutal religious conflict the world has ever witnessed. Protestants and Catholics waged war on one another for over a hundred years with a phenomenal degree of violence that peaked during the Thirty Years War (1618-1648).

Religious wars in Europe threatened the relative order of the world as organized in the name of God's decrees. God is no longer a source of order and union, but becomes a reason to fight and divide the political realm occupied by the Empire and the Church. In order to bring order to a divided world, legal and political thinkers attempt to argue for an alternative *ground* of authority, where the will of God is less central in dictating the moral and legal laws. Religious wars usher in the modern world where the divine command theory of authority is challenged on the basis of the understanding of human nature.

Grotius, for example, suggests that moral and legal obligations upon public and private actors would exist objectively even if we were to concede that God does not exist. This move introduces a distinction between voluntary and non-voluntary divine law. From this perspective, international law is the son of mutual consent between states. Mutual consent between states is the son of natural law. "But the mother of municipal law (and international law) is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the great-grandmother of municipal law (and international law)."[17] Binding obligations at the international level depend on non-voluntary divine law. In this way, Grotius attempts to reconcile Jerusalem and Athens in order to shape international relations; but reality is far removed from Grotius's aspirations: the world of international relations in the seventeenth century is ruled by brute power.

On February 25, 1603, a Dutch ship seized a Portuguese merchant boat in the Straits of Singapore. Grotius, then still a young Dutch lawyer, wrote a Memorandum for the defense. The Memorandum's central argument contained a radical argument: a *private* company could engage in lawful acts of war

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16 It is also important to stress that Luther's political theology makes no room for extra-territorial communities and paves the way for the fundamental unity and territoriality of the state.

17 Hugo Grotius, On the Law of War and Peace 5 (Cambridge Univ. Press 2012) (1625).

against other merchants with the aim of protecting the natural law that mandated freedom of trade and navigation. The central idea was that Dutch private companies had a natural right to resist the constant aggression of Portuguese and Spanish forces that wanted to prevent safe trade with Asian princes. In those cases, private actors would qualify as fully-fledged international actors. The Memorandum was put aside and forgotten: it was found many centuries later and published under the title *De Jure Praedae*.[18] The manuscript could not be published when it was written, as it would have fueled even more hatred between Catholic Portugal and Protestant Holland. It is a world not ruled by morality or religion, but by the sheer use of power. The United Provinces of Holland are a small actor on this global stage. They obviously have an interest in the existence of an overarching law of nations that is dependent on neither the will of God nor the will of nations, but merely on objective moral principles.

Grotius's project is not so much focused on human law, as it is interested in divine law of the non-voluntary type, otherwise known as natural law. He attempts to ground natural law's normativity on some objective aspects of human nature. He looked into human nature to discern an independent ability to determine one's behavior on the basis of right reason. In the preamble to the *Law of War and Peace*, he puts forward the thesis that became very famous: "*etiamsi daremus, quod sine summo scelere dari nequit, Deum non esse*."[19] Stephen Darwall has suggested that Grotius is the founder of modern moral philosophy because he models the moral law after central aspects of human law.[20] More precisely, moral law is explained by reference to "quasi juridical" features such as obligation and blame. Ancient moral philosophy does not put obligations at its center, but focuses instead on virtues and more generally on the appraisal of human beings.[21]

Modern moral philosophy, by contrast, focuses on the direction of behavior. The way it does so is by engaging the human capacity of self-determination.[22] This capacity is distinctively human, as it is to be found only in human animals and is what distinguishes them from other nonhuman animals. It seems correct

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18 Hugo Grotius, Commentary on the Law of Prize and Booty (Liberty Fund 2006) (1603).

19 Grotius, *supra* note 17 ("[E]ven if we should assume the impossible, that there is no God or that he does not care for human affairs.").

20 Stephen Darwall, *Grotius at the Creation of Modern Moral Philosophy*, *in* Honor, History and Relationship, Essays in Second Personal Ethics II 157 (2013).

21 Thomas Pink, *Law and the Normativity of Obligation*, 5 Jurisprudence 1 (2014).

22 G.E.M. Anscombe, *Modern Moral Philosophy*, *in* Virtue Ethics 26 (Roger Crisp & Michael Slote eds., 1998).

to say that Grotius is the forerunner of the moral law as modeled after "quasi juridical notions." But this leaves the door open to many vexing questions. First of all, it is unclear what makes a notion juridical or quasi-juridical. More importantly, this kind of project must address the challenge formulated by Gertrude Elizabeth Margaret Anscombe.[23] The challenge is the following: moral law, like any other law, requires a legislator that issues the directives to be followed. God is the legislator of the moral law. Once morality (the moral law) is thought to have force independently, it comes apart in our hands.

By trying to provide an alternative to the theory of divine command, Grotius and all those who followed him brought out the enormous question of normativity, along with the problem of political motivation: how can people be motivated to obey a set of rules if not out of fear of punishment? The divine command theory had an easy job in instilling obedience: God commanded and subjects obeyed; disobedience would be met with divine punishment, so subjects would obey out of fear of punishment: fear motivated obedience. The distinction between voluntary and non-voluntary divine law — between God's command and God's establishment of an objective order of principles — attempts to make room for both Jerusalem and Athens: revelation would play a part in understanding voluntary divine law, while reason would play a part in understanding the objective order of principles.

Human laws are themselves both voluntary and non-voluntary: the meeting of human wills produces some laws, while others track existing objective principles. To the extent that they rely on the meeting of human wills, human laws are locally produced and legitimized. But there is a set of human laws that are not produced by humans, but simply reflect objective moral principles. The same applies to international law. Some treaties depend on the will of nations, but more importantly some international laws encapsulate objective principles that are universally valid. Jerusalem and Athens each has its place. However, peace did not come from the recognition of an international political authority capable of imposing obligations on warring factions. Instead, peace came with the official recognition of the supreme authority of territorially bounded entities.

International law that grounds obligations for state and non-state actors is ultimately based on the non-voluntary law of nature, according to Grotius. *Ius* is superior to *lex*. Here *ius* is to be understood as objective right — it is the overarching moral standard that guides the action of states and individuals. Objective right is not dependent on the exercise of will — it is antecedent to human will and independent of divine will. To this extent, embryonic nation-states were under obligations ascertained by the pure use of natural reason.

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23 *Id.*

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The problem is that obligations imposed by natural reason on state and non-state actors are not backed up by coercive force. Religious wars eliminated any possibility of rational agreement between warring religions. Hence the pragmatic solution brought about by the Augsburg and the Westphalia peace treaties is to parcel out the European political space into discrete territories where religious homogeneity can be engineered through the application of the principle: one kingdom, one religion (*ejus regio et cujus religio*).

B. The Triumph of Territorially Bounded Sovereigns

Once God is demoted as the legislator of the global order, there is a rush to find alternative ways to ground the normativity of morality and law. The two come apart. Grotius proposes his idea of the moral law inscribed in the nature of human beings in the form of natural sociability.[24] This imposes only very thin obligations at the international level — essentially similar to what we now call *ius cogens*.

Hobbes instead brings back God to justify the exercise of absolute authority within the frame of the national state alone (and also explains the lack of authority behind the state): the Leviathan is a personified authority on earth that looks like the estranged God.[25] It is the sole authority that can really motivate people to obey human laws out of fear. The state is the only locus of legal obligation — outside the state there is no justice.[26] And anything goes. International law has remained since then a very thin window dressing for the exploitation of the earth. The road that runs from Grotius to Hobbes is the road that has characterized the Westphalian story of the world.[27] The lack of political authority of international law can be explained in terms of political motivation. There is very little that motivates states to comply with international legal norms. Fear of punishment is largely hypothetical.

For Hobbes, it is not possible to ascertain an objective moral standard (*ius*) above and beyond the state. *Lex*, the law that is produced by the sovereign body, is the only law that can be ascertained, understood and applied; *lex* is the only law that matters. *Ius* loses its importance in Hobbes's account because it

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24 Darwall, *supra* note 20.

25 *See* Thomas Hobbes, Leviathan 11 (BiblioBazaar 2008) (1651).

26 Thomas Nagel, *The Problem of Global Justice*, *in* Secular Philosophy and the Religious Temperament 61 (2012); Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 Phil. & Pub. Aff. 147 (2006).

27 Grotius's idea of *ius* is much broader than Hobbes's idea of *lex*. Following in the footsteps of Hobbes means to reduce the idea of law to a very bare minimum. The state also will be endowed with a sense of normativity.

cannot be ascertained nor does it come with an appropriate threat that would motivate people to obey it. So if we contrast Grotius and Hobbes in terms of state sovereignty, the former believes that there are objective principles (*ius*) that bind political authorities, whereas the latter believes that there is no law beyond the sovereign power of the state. For Hobbes, the international order is akin to the state of nature in which all states exercise bare power against one another. Stability can only be created by the constitution of sovereign authority over a defined territory. For Grotius, the world order's stability can be promoted through ascertaining a moral order that is distinguished from God's will.

Needless to say, the account that has turned out to be more popular is the Hobbesian one. We are still very much in the spell of that account of state sovereignty, which implies two ingredients. First, state sovereignty means full responsibility on the part of the ruler to run the internal business of the state by wielding its own normative powers. Second, state sovereignty means freedom from external interference in the way national business is run. It matters little if the sovereign power is acting rightly or wrongly from the viewpoint of international moral standards. State sovereignty creates a protective buffer that screens the sovereign authority from criticism and interference.

Hobbes's account certainly captured something important about political authority in the seventeenth century.[28] The national state is the main political framework capable of bringing stability and security. Other frameworks had proved incapable of doing so. The subsequent story of the global order tells us that the most important obligation for each national state is indeed to maintain stability and security internally. That is the chief legal and moral obligation that is tied in with the creation of the Westphalian international order. In fact, the international order depends on the respect of state sovereignty on the part of every player: respect of state sovereignty is by definition the highest — and the only — obligation of states. Hobbes presents national states as the necessary instrument to accomplish a number of desirable political goals.[29]

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28 But are they really necessary or purely contingent? To understand this, we have to observe that the world in which we live is no longer Hobbes's world. There is a web of political authorities beyond the state that create obligations on the state and question the fundamental nature of the national state's sovereign authority.

29 Hobbes's image of the Leviathan as the sovereign political authority provided a justification for a new form of political authority: the nation-state; and the preferred regime was absolute monarchy, where the sovereign king represented the ultimate and unbounded source of political authority. The will of the sovereign king is the ultimate source of law, above which there is nothing. Human law became the most important form of human regulation.

Let me summarize the journey so far: we moved from a conception of sovereignty that was transcendental, where God was the supreme sovereign whose command had ultimate authority, to Hobbes's conception of political authority which is immanent and rooted in the political reality, even if it merely transposes the idea of supreme commander to the state.

III. The Decline of State Sovereignty

Hobbes's understanding of state sovereignty is static and binary. Once posited, sovereignty cannot evolve. It is a given of the political system and it discriminates between the orderly modern state and the chaotic international sphere that resembles the state of nature where conflict with one another is the norm. With such a static and binary view of state sovereignty, it was possible to justify absolute monarchies in Europe. It is not as easy to explain the slow decline of modern nation-states today and their struggle to cope with the global crisis the world faces. In this Part, I want to contrast Hobbes's theory of political authority with Spinoza's. Both develop a secular and immanent explanation of politics. However, Spinoza's view is dynamic and unitary as opposed to Hobbes's.

Spinoza approves of Hobbes's naturalistic credentials only to a point. Spinoza points out that Hobbes abandons his commitment to naturalism when he grounds the political legitimacy of the sovereign on the transferability of the natural right of people.[30] Hobbes places on consent a normative force that has nothing to do with the reality of political power. Consent merely creates out of thin air the justification for the exercise of power: it vests power with legitimacy and respectability, but the cloak of consent is fictional and presupposes the existence of a normative power that has no real basis. Moreover, to conceive of natural rights as an entitlement — something that someone owns and can transfer, rather than something inherent to one's persona and not transferable — is further proof of a non-naturalistic viewpoint. The idea that we can transfer our natural rights makes them look artificial and detachable from human nature. It is this artificial device that Hobbes uses to distinguish between actual power and a legitimate right to rule. To this extent at least, Hobbes still represents the tradition of natural law theory that Spinoza is trying to overcome with a genuinely naturalistic approach that makes no space for theological notions. Spinoza is following in Machiavelli's footsteps, while at the same time offering a naturalistic ethical system that

30 Baruch Spinoza, *Letter 50*, *in* Complete Works 891 (Michael L. Morgan ed., 2002).

provides guidance to individuals and states. He is bringing Athens and Rome back together, while leaving aside Jerusalem.

More generally, Spinoza's account regards political communities as comparable to biological entities. Power evolves constantly and so does the relation between the ruler and the ruled. There is neither original nor ongoing consent, but rather a constant assessment of the political community's ability to protect and promote vital interests. If the political community ceases to deliver on its promise, then its decay begins, and can be more or less slow; more or less brutal. By contrast, Hobbes thinks like a physicist. Once state sovereignty is posited through the fiction of consent, then it is justified to do whatever it takes to protect the community from internal or external aggression. Consent works as an all or nothing device: as a result, it does not admit of decline and decay. Either it is there or it is not, but it does not evolve. By making consent so central to his theory, Hobbes subjects his views of political authority to an external moral standard, rather than providing a full-blown naturalistic explanation. Spinoza on the contrary provides a full-blown evolutionary theory of state sovereignty.

A. Spinoza's Naturalism

Spinoza's record must be set straight. One of the most promising students of the *Torah* in Amsterdam, Spinoza quickly becomes more knowledgeable than his masters, to the point of challenging their authority and that of the *Old Testament*. Spinoza is attempting to give a new meaning to divine law. He believes that what the Hebrew people regard as divine law is nothing other than human law, presented as divine to motivate people into obedience. Moses provided a people with a set of laws that they would regard as mirroring their identity and motivating regular behavior of obedience. These laws were not universal, but very much specific to the history of one given people. When Spinoza talks about divine law, he does not refer to those laws that have been handed down to men through revelation. Rather, divine laws are those laws that are part and parcel of the natural world and are universal for that reason.

Spinoza does not want to introduce an artificial dualism between God and Nature. Spinoza develops an immanent metaphysical monism (IMM) according to which reality can be explained by reference to a single principle from which everything flows. Spinoza calls it "*Deus sive Natura*," God or Nature.[31] There is no dualism between the two, no distinction to be drawn:

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31 Baruch Spinoza, *Ethics*, *in* Complete Works, *supra* note 30, at 213. Spinoza abandons altogether the Judeo-Christian image of God as an anthropomorphic God who is capable of willing good and bad. What has prevented ethics from

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the two are one and the same thing. One can contrast it with Grotius's motto: *Etiamsi Daremus* (*even if we were to concede that there is no God*).[32] Grotius upheld dualism between divine laws and human laws in order to create the false idea of a normativity springing from nature, in particular from the distinctive nature of human beings. There is no need to declare the godlike nature of men.[33] Spinoza's God or Nature is present in the world in which we live. Spinoza's IMM asks us to think of the world as the sole single reality that human beings can make sense of. The afterlife or a transcendent dimension do not belong to this world and cannot be explained, nor can they provide meaningful information as to what ethical or political standards should look like. To this extent at least, Hobbes and Spinoza have a similar starting point: their account is firmly rooted in this world and inspired by a scientific outlook.

Secondly, IMM is the background for Spinoza's immanent ethical monism (IEM): we live in a world ordered by virtue of natural laws; human beings, like any other living beings, are part of this world and subject to natural laws. So in order to make sense of ethical requirements, we have to know what are the natural laws that regulate the place of human beings in the world, rather than postulate an independent domain of moral values that exercises its gravitational pull on human beings independently of natural laws. The normative domain (the domain of values), if it exists at all, is subject to all the natural laws that apply to all living beings. Ultimately, in fact, all moral laws could be explained by reference to natural laws. The problem lies in the fact

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flourishing is not religion, but a very precise picture of deity that is monotheistic and anthropomorphic. Spinoza presents God instead not as a faraway, transcendental being who resembles man, but as an immanent presence on earth that inspires awe and admiration in the same way that nature inspires awe and admiration. God is Nature. Spinoza's position grounds the most ambitious and all-encompassing understanding of naturalism. Of course, Spinoza's claim is metaphysical — here again the first piece of secular metaphysics. His naturalism is hardly matched by contemporary naturalistic accounts that are scarcely convincing, and often simply ideological.

32 *Id.*

33 I hope the irony is clear: men create a God in their own image, only to say that they are the only divine creatures on earth because human beings alone resemble God — that is, they are divine because they resemble themselves. Spinoza does not suggest that human beings are unique or distinctive because of a special capacity for self-determination, as suggested by Grotius and the natural lawyers. Human beings are just another form of life on earth with finite motion and finite understanding. There is no dualism between mind and body: the two are of exactly the same matter and they are completely integrated.

that human beings have no easy way in which they can uncover the natural order (and causality) of the world because their cognitive faculties are limited.

Finally, Spinoza's account develops an immanent political monism (IPM). IPM explains the way in which people come together to organize a life in common and set up political institutions to maintain a certain degree of order and stability despite human irrationality. Human beings come together and form political communities as a matter of necessity: they instinctively know that to form bonds is much more likely to serve their interest in survival, and it is also likely to enhance one's own control over the external world. Political institutions are thus created to protect those basic human interests and as long as they are capable of serving those interests, they protect their existence. If political institutions start behaving in a way that undermines those basic human interests, then they become exposed to failure and ultimately to extinction.

Thus, to establish peace and stability, any political authority has to rely on a double account. On the one hand, one needs a metaphysical account of reality that frees human beings from a transcendental dimension. On the other, one needs a practical psychological account that is capable of motivating human beings. Spinoza's naturalism imagines a world of causal relations that are at bottom all ordered in a monistic immanent frame. Human beings can have glimpses of this order, but can never achieve a full picture that takes them back to the single original cause. This is what I call an evolutionary naturalism, because it opens a wide space for scientific explanations of the world and firmly resituates human beings within nature and not as endowed with special godly features. When Hobbes regards rights as being alienable, he is betraying his own naturalism and attributing normative properties to human beings that can only be explained by a theological account that regards human beings as being endowed by God with special moral powers. Spinoza resists that normative move and insists on a purely naturalistic ethics.

B. The Natural and the Normative

In Spinoza, the connection between the natural and the normative is made through his very peculiar conception of law, which is itself dual.[34] There are two types of laws: descriptive and prescriptive. Laws of nature are descriptive: they are the only true laws, because they are the only ones that depend on the real order of the world. They are metaphysically basic, since everything in this world happens in accordance with strict laws of nature. Divine laws, for example, are descriptive: they are the basic laws of nature, since God is

34 Baruch Spinoza, *Theological-Political Treatise*, *in* Complete Works, *supra* note 30, at 426.

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Nature. This allows Spinoza to offer a deep reinterpretation of *ius* and *lex*. For Spinoza, *lex* reflects primarily the understanding of an eternal order. *Ius*, on the contrary, is the expression of human will and forms the basis of the second type of laws — prescriptive laws — which is parasitic upon the first type. Human beings need prescriptive laws because they are limited by their own very nature, and have no cognitive ability to know the real order of the world. Thus, in order to orient themselves and find guidance, they have to impose rules on themselves to make sure that their existence gives at least the impression of order.

It is common to define human laws as quintessentially prescriptive, and ultimately independent of descriptive laws, the laws of nature, which include the laws of human psychology. Spinoza believes, on the contrary, that we should unveil the deep connection between descriptive and prescriptive laws.[35] Effective prescriptive human laws are those that grasp the existence of descriptive laws of nature: human beings are driven to form communities in order to strengthen their own position. Political institutions are responsive to the immediate needs of human communities: to the extent that they preserve stable human relations, they are successful. Human communities need prescriptive laws in order to make sure that they do not fall prey to their negative emotional reactions. Effective human laws have an important psychological component in motivating human beings to act together towards the preservation of stability and peace.

It is important to stress that the link between the natural and the normative is not straightforward. A few points are in order: First, the connection is not direct; human beings have no access to the knowledge of all the causes; they only have a very fragmentary knowledge of nature and its own causal laws. Second, the impossibility of knowledge of descriptive laws points to the inherent limits of human rationality, which can at best work under less-than-ideal conditions of limited knowledge. Third, limited rationality means that human beings reach practical decisions on the basis of emotional reactions to the natural world. Prescriptive human laws have to engage with psychological motivations and provide appropriate answers to them. Fourth, the success of a rule-maker will be measured by its ability to grasp the overarching interest of the community, while at the same time motivating people to strive together in that direction. When the sovereign authority gives to their community an appropriate set of rules, the community is likely to persevere in its existence and flourish. The ruler shows on this occasion that he understands both the

35 This is an insight present both in Spinoza's *Theological-Political Treatise*, *id.*, and later in Montesquieu, The Spirit of the Laws (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds., Cambridge Univ. Press 1989) (1748).

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real interest that lies in the exercise of power and the necessity to motivate the people to comply with the rules in order to further their own interest. Conversely, a sovereign authority that does not understand the higher interest of the commonwealth, or that is incapable of motivating people to pursue that interest, is bound to fail. Spinoza's understanding of sovereign authority is dynamic and evolutionary. Political authority is sovereign when it understands the interests of the community. It thrives when those interests are protected and promoted; it declines when it is no longer capable of efficiently maintaining those interests.

C. An Evolutionary Account of State Sovereignty

Human laws are there to secure the existence of the state. As long as the state is capable of understanding what it takes to motivate the people to obey, human laws will assist in making the state stronger and more stable. Spinoza must be contrasted with Hobbes on this crucial point. Hobbes insists that political stability depends on the subject; each individual is a potential source of endless conflicts and violence. If human beings want to live in a peaceful and secure environment, they have to give up their natural right through consent. The commonwealth will promote those goods in the name of the people. Spinoza disagrees: political stability depends on the commonwealth in the first place. When the people do not comply with the rules and obligations of the community, they are not to be blamed. It is the responsibility of the commonwealth to create a political community where compliance is possible and largely respected.[36] A sovereign state must govern wisely and promulgate wise norms, if it cares about peace and security, and if it wants to maintain its rule. If it is not capable of doing so, the sovereign will simply incur growing unrest and ultimately rebellion. To be sure, the responsibility for that has to be placed on the ruler and not on the subjects.[37]

The contrast between Spinoza and Hobbes is particularly interesting when it comes to understanding the place and role of the state today. The Hobbesian insists that the state is the basic framework of justice; outside of which there is no order.[38] But this assumes that no order can be achieved in any other

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36 Baruch Spinoza, *Political Treaty (5/3)*, *in* Complete Works, *supra* note 30, at 699.

37 This Spinozistic point is central in Montesquieu, *supra* note 35.

38 Nagel, *supra* note 26. For a critical reply showing the limits of the Hobbesian account, see Cohen & Sabel, *supra* note 26. Nagel now accepts the force of Cohen and Sabel's argument which shows that we no longer live in a Hobbesian world.

way.[39] Such a static account also fails to explain the fact that the state may not be capable of solving present global challenges. The problem begins when the state is no longer capable of providing the adequate responses to global problems of coordination. An evolutionary account points out the contingency of the state: it will last as long as it works. Perhaps, at one point, it will be supplanted, just as the nation-state supplanted the Church, the Empire and the cities as temporal authorities. The state itself has been, and remains, a highly malleable and variable form of association, so it is likely to evolve so as to cope with new challenges. Hitherto, it has been remarkably resilient. As Wolfgang Friedmann observed, "[f]rom the sixteenth to the early twentieth century, the national state, in many cases coalescing from the older and smaller entities of dukedoms, principalities, and city republics, became the sole source of legal power and the exclusive focus of political allegiance."[40]

D. Obligations Beyond the Sovereign State

Today, the emergence of international institutions and transnational forms of regulation is helping to solve problems that escape the state's centrality in the global arena. They also lead to rethinking the static character of sovereignty. The state still performs valuable functions in screening the people from unwanted internal and external forces. When the state works, it prevents the imposition of worldviews that are not shared by the people as a whole or as a minority. For example, it prevents the imposition of a religion over others. But when it does not work, its survival and flourishing are at stake, because people do not feel protected by the state and other forces exercise pressure on citizens. When the state is not capable of performing vital protective tasks through its municipal laws, then other interested groups push forward their agenda through forms of coordination that are not state-made. Today's global crisis cannot be met by the state alone; the state is also struggling to create international cooperation in order to tackle common problems. It is true that for the moment there is no alternative political framework to the nation-state; even supranational institutions such as the European Union are there to sustain rather than undermine the nation-state.[41] In order to explain the reality of actual obligations that states have at the global level, I have distinguished between the Hobbesian view, which I deem a static understanding of state sovereignty, and an evolutionary naturalistic account of state sovereignty that posits the

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39 Nagel, *supra* note 26.

40 Joel Trachtman, The Future of International Law 11 (2013).

41 Alan Milward, The European Rescue of the Nation State (2d ed. 2000).

contingency of the national state and its power. Its power is justified only to the extent that it fulfils its job better than any other political framework.

An evolutionary explanation of the state presents obligations towards other actors as being grounded not on moral concerns, but on the self-interest in the preservation and flourishing of the state itself. A state has power insofar that it is capable of surviving, but loses that power as soon as it is no longer capable of doing that. Its right to rule is co-extensive with its power. An evolutionary account also attempts to move away from an explanation of the obligations of the state grounded on respect for God's moral law, or on the abstract moral truths discovered through reason. However, to deny that there is any transcendental standard of justice is not to deny that there is any standard by which action can be evaluated. The actions of the state, in particular those actions that contribute to the promotion of global stability, can be evaluated in the light of whether the action preserves and promotes one's existence and power of action. In a world where global relations are increasingly more important, a state that is regarded as a strong collaborative player will increase its power of action. To this extent, the obligations of states can be grounded on the state's very interest rather than on more or less vague moral notions. For example, the obligations that European states have decided to impose on themselves through the creation of the European Union are there to strengthen the system of states rather than weaken it.

As far as obligations between states are concerned, an evolutionary approach will deny that there are any independent normative constraints on the actions of states. It suggests instead that the survival of states relies on their ability to provide answers to transnational problems. For example, the way in which Italy deals with the problem of immigration from North Africa will have an impact on the whole country. Italy has to make sure that immigration can be regulated so as to avoid the breakdown of its system of assistance. Other European states have an interest in the success of immigration policies. The existence of international obligations is not a matter of morality, but a matter of survival. This may in turn create new regional institutions with the actual authority to deal with immigration, since states on their own are struggling. In the end, whatever institutions which are capable of offering a stable solution to the problem will be vested with power that is independent from the state. This may happen in an increasing number of areas of life and state sovereignty will proportionately decrease, perhaps to the point of disappearing.

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Conclusion

Any genealogical study of state sovereignty attempts to uncover the origins of an idea in order to understand its trajectory. I have tried to show that sovereignty has a theological root, Jerusalem; the idea of the state came about as a practical and effective response to the vacuum of political authority in Europe. Philosophers have tended to engage with the theological issue, and dismissed Machiavelli's insights on the reality of power. Instead, they relied on reason — Athens — to advocate allegedly objective normative standards binding the state morally. But this naïve understanding of political authority and international obligations (Grotius) was quickly replaced by a more ruthless conception of state sovereignty as the guarantee for the safety and security of the community. In Hobbes's secular account, Jerusalem and Athens are both to be subjected to the sovereign authority of the state. However, Hobbes's position preserves fundamental elements of both Jerusalem and Athens, which end up corrupting his Roman understanding of state sovereignty. Even if Hobbes's view is still extremely appealing to all those who regard the international sphere as hopelessly devoid of order, the truth of the matter is that modern states are increasingly at greater pains to exercise their authority effectively to respond to global problems. At the same time, international and transnational obligations are flourishing despite the existence of the state, and this calls for an explanation of both the decline of the state and the emergence of new forms of regulation. To do so, I developed an evolutionary explanation of state sovereignty that departs from Hobbes's and claims to be true to the original Roman insight of Machiavelli, while being completely free of Jerusalem. In particular, I offered Spinoza's account of state sovereignty as being capable of explaining how and why political authorities appear, flourish and decline.

In times of political vacuum at the global level, what matters is not what best justifies the actions of political institutions; rather, what matters is how effective new political institutions are in delivering on their promises. The national state may be here to stay, and it is perhaps the main political framework to guarantee a relative degree of peace and stability. If that is the case, it is not because the state is morally better than other political frameworks, but because it can exercise its authority more expediently. In this picture, Rome has completely erased Jerusalem, and has put Athens in its place: as a separate source of criticism and observation of political authority, rather than the ultimate justification thereof. The practice of power provides the most fundamental reasons as to how to exercise power. A sovereign state that does not understand its interest in collaborating with other states to provide answers to pressing global problems is first and foremost undermining its chances of future survival.

There is something odd about believing that the state provides a necessary framework of justified ultimate political authority in a territorially bounded space. Other political frameworks existed before, and others will emerge and compete with the national state. Indeed, the fact that there is increasing competition means that the state is less than fully capable of exercising its own authority effectively; it points to an increasing political vacuum that needs to be filled somehow. However, we are unlikely to see a quick demise of the state because of three practical reasons singled out by Joel Trachtman[42]: (1) the state continues to provide solutions to many coordination problems that fit well within its borders; (2) path dependence makes it difficult to shift to another system; and (3) network externalities support isomorphism among states. The first is the most important force.

It may be early days to conclude that the political framework of the sovereign state is nearing its end. But it is high time to start explaining state sovereignty, and examining the nature and scope of obligations upon the state, from an evolutionary viewpoint rather than a moralistic or theological one. When Rome is interpreted in purely political and secular terms, it points to the strongest form of authority, one capable of responding to global challenges. Athens and Jerusalem will wait to see which authority emerges to cast their judgment on it.

42 Trachtman, *supra* note 40, at 10.

Early Modern Sovereignty and Its Limits

*Benjamin Straumann**

My Article seeks to explore a few antecedents of the idea that sovereignty may be encumbered with some obligations and duties vis-à-vis non-sovereigns and even strangers. Theories about limitations on sovereignty and obligations on the part of sovereigns often arose out of the fertile conceptual ground of Roman private law, in particular rules of property law governing usufruct and rules of contract law, such as those governing mandate. Early modern thinkers, especially Hugo Grotius (1583-1645), built on these ideas and, in addition, developed an account of moral and legal obligations arising, independently of God's will, from a universal human nature. Building on Cicero, Grotius was among the first early-modern thinkers to elaborate the distinction between "perfect" duties of justice and "imperfect" duties of beneficence, an important idea that had wide influence through the work of Emer de Vattel (1714-1767). The Article closes by offering a few observations on the trajectories within which Professor Benvenisti's concept of "sovereigns as trustees of humanity" could be situated.

Introduction

In his stimulating article, Professor Eyal Benvenisti urges us to adapt the international-law concept of sovereignty to the needs of our conceptions of democracy and justice and to what he calls, in a captivating metaphor, "our shrinking global high-rise." This will involve "outlining the responsibilities

* New York University. I would like to thank the organizers and participants of the conference on Sovereignty as Trusteeship for Humanity, held in Tel Aviv on June 16-17, 2014. I am grateful to Eyal Benvenisti and Doreen Lustig for inviting me and for interesting comments and conversations. I would also like to thank my commentator, Uri Yiftach-Firanko, as well as David Dyzenhaus and Evan Fox-Decent for their helpful suggestions and criticism. Some of the material that appears in this Article also appears in my Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law (2015).

that sovereigns are inherently bound by," Benvenisti writes, "regardless of their consent, and from which they cannot contract out." The idea is to conceive of sovereigns as "agents of humanity" at large with obligations that hold by virtue of a principal-agent relationship, "even absent specific treaty obligations."[1]

On the face of it, this involves a rather radical re-conceptualization of a more or less familiar concept. Sovereignty, as we have come to know it, was defined by Hugo Grotius as follows: "That power [*potestas*] is called sovereign [*summa potestas*] whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will."[2] On the international plane, the subject of this sovereignty according to Grotius is the state (*civitas*); the subject of domestic sovereignty, however, is a matter of the constitutional arrangements of each state. It can be "one or more persons, according to the laws and customs of each nation."[3] What is oftentimes (if inaccurately) called Westphalian sovereignty amounts to legal authority over territory to the exclusion of outside actors.[4] On Benvenisti's account, however, outsiders may very well have claims against sovereigns. These claims are generated by "externalities," which seem increasingly unavoidable as a consequence of the ever closer relationships between human beings worldwide. The right to exclude outsiders and strangers from, say, resources in a given territory should, according to Benvenisti, be mitigated by a set of other-regarding obligations beyond national boundaries, obligations that sovereign states are required to assume qua sovereigns. This, Benvenisti argues, is primarily a moral requirement.

The second point that deserves emphasis is that Benvenisti models the obligations that arise from properly re-conceptualized sovereignty on the duties as they accrue to sovereigns on the model of trusteeship. The law of trusts is part of private, rather than public, law. This is very much akin to the way early modern and even earlier European theorists conceptualized the idea of popular sovereignty: with the help of ideas taken from (private) Roman law such as property-law rules governing usufruct and servitudes, rules from contract law governing mandate, or fiduciary devices such as trusts (*fideicommissa*), writers

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1 Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295, 300 (2013).

2 Hugo Grotius, De Iure Belli ac Pacis [On the Law of War and Peace] 1.3.7.1 (Apud Nicolaum Buon 1625) [hereinafter Grotius, IBP]. The translation is taken from Hugo Grotius, De Jure Belli ac Pacis Libri Tres (Francis W. Kelsey trans., 1925).

3 *Id.*

4 On the Peace of Westphalia, see Benjamin Straumann, *The Peace of Westphalia as a Secular Constitution*, 15 Constellations 173 (2008).

such as Jean Bodin and Hugo Grotius formulated conceptions of sovereignty capable of retaining some rights *vis-à-vis* government, understood as the administration of sovereignty.[5] The Roman private-law tradition of constraints on sovereignty does not yield anything in the way of sovereignty saddled with fiduciary duties towards mankind as a whole — the beneficiaries in these discussions are always (originally) Roman citizens and then, by analogy, the subjects of the emerging territorial states of early modern Europe. There is nothing, then, in this strand of thinking that speaks to the second aspect of Benvenisti's article — that of a trusteeship exercised for the benefit of all of humanity. There are, however, other historical predecessors for this second aspect, such as Hugo Grotius's concept of humanitarian intervention as discussed by Evan Criddle.[6]

In this Article, I shall try to discuss Hugo Grotius (1583-1645) as an important predecessor of Professor Benvenisti's views. I will discuss, in the first Part of this Article, Grotius's influential doctrine of the sources of "international," or at least natural, law; that is to say, we will in the first Part be concerned with the "sources" of law, not in the sense of historical influence, but rather in the formal sense of criteria bestowing legal validity on norms. It will become apparent that Grotius's largest debt in his doctrine of the sources of law is to Roman treatments of "nature," especially Cicero's, which appears in his *De legibus* as a formal legal source of all types of norms. Grotius's is an important and influential theory showing a) how legal obligations can arise out of a concept of a pre-political humanity or "human society," and his doctrine has a further advantage for us in that it encompasses both b) the use of private (Roman) law concepts as well as c) a distinction between "perfect" and "imperfect" rights and duties of justice. As we shall see, at least some of Grotius's "perfect" duties of justice are, at least in principle, global and may therefore lend themselves to being rethought in the framework of a theory of sovereignty as trusteeship of humanity.[7]

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5 This usually depends on a distinction, made popular by Bodin, between sovereignty or the state on the one hand and government or the administration of sovereignty on the other. *See* Kinch Hoekstra, *A Lion in the House*, *in* Rethinking the Foundations of Modern Political Thought 198 (A. Brett et al. eds., 2006); *see also* Daniel Lee, '*Office Is a Thing Borrowed': Jean Bodin on Offices and Seigneurial Government*, 41 Pol. Theory 409 (2013).

6 Evan J. Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 Theoretical Inquiries L. 473 (2015).

7 A further reason why I focus on Grotius is that I believe him to have laid the conceptual foundations on which later influential theorists such as Emer de Vattel built.

However, there is reason for skepticism; while the very intriguing influence of private-law notions on public legal theory has traditionally provided arguments for constraints on sovereignty, these private-law notions seem at the same time to have an inbuilt tendency to limit the scope of these constraints. Whether sovereignty can be constrained and obligated *vis-à-vis* all of humanity remains therefore dubious, at least when viewed from the vantage point of intellectual history. If one is not satisfied with the language of trusteeship as mere metaphor — and I suspect Professor Benvenisti is not — and adheres closely to the private-law model, it will be difficult to conceptualize sovereigns as trustees of humanity beyond their own populations. But there is still the option of conceptualizing the sovereign's duties along the lines of Grotius's imperfect duties, and this is a strand of thought Vattel outlined with some success, as I shall briefly argue in the Conclusion. Grotius's views allow for some natural-law duties that bind even the sovereign, but they require a natural-law justification which goes far beyond private-law ideas of trusteeship.

In the first Part of this Article I will discuss antecedents to Professor Benvenisti's view of humanity as the source of legal obligations, focusing especially on how Grotius thought legal obligations could arise from a universal human nature in the first place. This addresses the "humanity" part of the idea of a "trusteeship for humanity." In Part II, I will try to exemplify some of these obligations in the context of Grotius's thought on the right of resistance, where private-law language and the idea of fiduciary duties figure prominently; this Part could thus be said to shed some light on the constraints on sovereignty effectuated by fiduciary and other private-law devices. Part II is thus pertinent to the "trusteeship" part of "trusteeship for humanity." A further important aspect of Grotius's thought that bears on Eyal Benvenisti's project lies in the distinction between perfect and imperfect duties of justice (or of international law), which will be discussed in the third Part of this Article. Part III will thus show the limits traditionally perceived with regard to extending the reach of "perfect" duties of justice to all of humanity. The Article closes with some observations on the most promising historical tradition for Professor Benvenisti to situate himself in.

I. Human Nature as a Source of Legal Obligations: Hugo Grotius's Naturalism

A. Grotius's General Concept of Natural Law

In the first chapter of his *De iure praedae* (*IPC*), Grotius discusses the legal sources upon which the law obtaining among various peoples is based.

Although neither the Praetorian edict of ancient Rome nor the Twelve Tables were relevant, in Grotius's view, to the issue at hand, it was the legal scholars of Roman antiquity who had developed a correct doctrine of the sources of law. Grotius quoted from Cicero's natural-law treatise *De legibus*, and, linking the law of war and peace with Stoic natural law, put forward his view of the formal sources of the relevant legal rules:

> The true way, then, has been prepared for us by those jurists of antiquity whose names we revere, and who repeatedly refer the art of civil government back to the very fount of nature [*naturae fontes*]. This is the course indicated also in the works of Cicero. For he declares that the science of law [*iuris disciplina*] must be derived, not from the Praetor's edict (the method adopted by the majority in Cicero's day), nor yet from the Twelve Tables (the method of his predecessors), but from the inmost heart of philosophy. Accordingly, we must concern ourselves primarily with the establishment of this natural derivation.[8]

The second chapter of *De iure praedae*, the Prolegomena, contains a list of various legal sources, formulated in a range of normative principles or rules (*regulae*), which present Grotius's doctrine of the formal pedigree of norms; the sources of natural law relevant to the present Article and the so-called primary law of nations (*ius gentium primarium*) are put forward in the first two normative principles. Considered from the formal point of view of the doctrine of sources, the will of God represents the original source of the "law of war and peace" at issue. The first principle reads "What God has shown to be His Will, that is law." The will of God reveals itself in his creation, which illuminates the intention of the Creator, and from which natural law is derived.[9] Such a derivation is possible because every individual creature is endowed with certain natural characteristics (*proprietates naturales*), which contribute to its self-preservation and lead each individual to his own good (*bonum*).[10] Therefore, although God's will is the original source of law, natural law must derive from the natural characteristics of individual creatures — talk of natural law would make no sense without these natural characteristics. This ultimately secular, naturalist starting point is made clear through a

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8 Hugo Grotius, De Iure Praedae Commentarius [Commentary on the Law of Prize and Booty] (1950) (1604-1606) [hereinafter Grotius, IPC]. Translations throughout the Article are taken from 2 The Classics of International Law (J.B. Scott ed., 1950). The quote is from Marcus Tullius Cicero, *Treatise on the Laws*, *in* 2 The Political Works of Marcus Tullius Cicero bk. 1, sec. 17 (Francis Barham trans., Edmund Spettigue 1841-1842).

9 Grotius, IPC, *supra* note 8, ch. 2, fols. 5f.

10 *Id.* ch. 2, fol. 5'.

reference to a passage in Cicero's *De finibus*, in which the anthropology of the Stoics is summarized[11] — the relevant formal source of natural law is thus found directly in some *universal human nature*. Human nature, according to Grotius, is therefore prior to divine will in terms of justification. God's will is a source of law only in the sense that the relevant body of law *originated* from the will of God.

This, of course, is not to say that Grotius, a devout Arminian himself, conceived of natural law in a theological vacuum; it is just to say that the *grounds of validity* of his natural law were established independently of God's will, following the scholastic rationalist mainstream in this regard. What set Grotius apart from this tradition, however, was that for Grotius, even the obligatory force of the precepts of the natural law were to be explained independently of God's will, deriving their capacity to oblige from their character as dictates of reason. Obligations to the authority of God are on this view *themselves* derived from the laws of nature, to which the basic obligations are owed.[12]

Grotius's natural law is justified and creates obligations by virtue of its being perceptible by reason and its suitability to human nature. This ties in with Grotius's later stance in the famous *etiamsi daremus* passage in his later magnum opus *De iure belli ac pacis*.[13] Knud Haakonssen offers the following succinct observation regarding the important difference between Grotius and his scholastic predecessors in this regard: while for Grotius, the obligatory aspect of the law of nature arises independently of God's will, "the scholastic point was that human beings have the ability to understand what is good and bad even without invoking God but have no obligation proper to act accordingly without God's command."[14] This goes hand in hand with Grotius's denial that natural law can be identified with either Old or New Testament, which contrasts with scholastics such as Suárez, for whom the Decalogue contained the natural law.[15]

The doctrine of legal sources from which Grotius developed his natural law in *De iure belli ac pacis* reveals strong similarities to the doctrine presented earlier in *De iure praedae*.[16] Although Grotius no longer found himself under pressure to develop a new doctrine of legal sources in order to undermine

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11 Cicero, De Finibus [On Moral Ends] bk. 4, sec. 25.

12 In this, Grotius's doctrine of obligation prefigures Hobbes's. *See* Thomas Nagel, *Hobbes's Concept of Obligation*, 68 Phil. Rev. 68 (1959).

13 Grotius, IBP, *supra* note 2, Prolegomena 11.

14 Knud Haakonssen, Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment 29 (1996).

15 *Id.*

16 Grotius, IPC, *supra* note 8.

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a concrete opponent's legal arguments, he in *De iure belli ac pacis* adhered to the same radical doctrine of sources. Grotius maintained the fundamental separation between unalterable natural law and the positive law of nations that he had introduced in his earlier work and that had formed the basis of his argument against Portuguese claims to a trade monopoly in East India.[17]

The main source of legal obligation for Grotius remains, as in *De iure praedae*, nature. This contrasted with the fluctuating norms arising from positive decrees, which resist a systematic approach. As in *De iure praedae*, the ultimate source of law in *De iure belli* is the will of God, in a genealogical sense, because God had willed the existence of human beings in the first place.[18] As in *De iure praedae*, however, this caveat does not extend very far. A voluntarist interpretation is ruled out by the limitation that natural law cannot be changed even by God. The grounds of validity as well as the obligatory force of the law of nature are here, as in the earlier work, based on the dictates of reason and sociability.

Thus natural law (*ius naturale*), in perfectly Stoic fashion, can be described as

> a command of right reason; it is the Rule and Dictate of Right Reason [*recta ratio*], shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature, and consequently, that such an Act is either forbid or commanded by God, the Author of Nature.[19]

This Stoic definition of natural law as the dictate of right reason is taken from Cicero. As Malcolm Schofield writes, "Cicero does not tell us that this is Stoic material he is producing . . ., although it is clearly a reworking of basically Stoic material." Most importantly, "the proposition that law is simply right reason employed in prescribing what should be done and forbidding what should not be done is a securely Stoic . . . thesis."[20]

The way Grotius identifies his natural law with the dictates of right reason is deeply indebted to Cicero's formulation of this Stoic doctrine. Grotius's rationalist conception of the relationship between God's free will and natural law, too, can be found prefigured in Cicero's rendering of right reason as the primary bond between humans and the divinity: "reason forms the first bond

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17 Benjamin Straumann, Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law 24-32, 40-41, 53-55 (2015).

18 *Id.* Prolegomena 12 (ascribing this view to the Stoic Chrysippus).

19 Grotius, IBP, *supra* note 2, at 1.1.10.1. Translations are taken from Hugo Grotius, The Rights of War and Peace 150 (Richard Tuck & Jean Barbeyrac eds., 2005) [hereinafter Grotius, RWP].

20 Malcolm Schofield, The Stoic Idea of the City 68-69 (1991).

between human and god."[21] In Cicero's Greek Stoic models, the argument about right reason being an attribute of the gods and of the Stoic sage was "probably originally framed with gods and sages in mind and then adapted to human beings generally."[22] It is noteworthy that Cicero, when talking about the dictates of right reason constituting natural law, goes on to apply this doctrine to human beings alone.[23] The view lends itself to Grotius's rationalist conception of natural law as a dictate of right reason curbing God's free will, and it is easy to see how it could later prove amenable to deism.[24]

For Cicero as for Grotius, everything now depended on the characteristics of human nature. Is human nature indeed, as Grotius suggested, typified by some "concern for society" (*societatis custodia*)?[25] Or is expediency or interest more basic, as ancient Skeptics like Carneades and Epicureans like Horace tended to claim? It seems reasonably clear that what Grotius seeks to advance, first and foremost, is an epistemological point of view; being rational, human beings are in a position to discover through reason the rules of natural law, what it is that natural law requires from them. So far, this seems consistent not only with Grotius's Stoic sources, but also with a Thomist framework. Furthermore, Grotius's natural law is also natural due to the fact that its content makes it suitable to humans by virtue of the kind of beings they happen to be; natural law is "the Rule and Dictate of Right Reason [*recta ratio*], shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature . . . ."[26]

B. The Novelty of Grotius's Approach

The nature in question is thus *human nature*, and certain objective facts about human nature provide standards for natural law. It can therefore be said that Grotius's conception of natural law seeks an answer both to the epistemological question of how to identify natural law — through right reason — as well

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21 Cic. *Leg.* 1.23.

22 Andrew R. Dyck, A Commentary on Cicero, De Legibus 109, 125 (2004).

23 Cic. *Leg.* 1.33.

24 *See* Dyck, *supra* note 22, at 7, 35. It was this affinity which would later lead to allegations of atheism by the Huguenot theologian Pierre Jurieu. *See* Pierre Jurieu, L'Esprit de Monsieur Arnauld [The Spirit of Mr. Arnauld] (Deventer: Les héritiers de J. Colombius 1684); Pierre Bayle, 2 Dictionnaire Historique et Critique [Historical and Critical Dictionary] 617 (Utrecht La Haye et al. eds., 5th ed. Leyde 1740).

25 Grotius, IBP, *supra* note 2, Prolegomena 8.

26 Grotius, RWP, *supra* note 19, at 150; Grotius, IBP, *supra* note 2, at 1.1.10.1.

as to doubts regarding the objectivity of the natural legal norms — through reference to natural facts which are independent of arbitrary conventions.[27]

However, there is a crucial departure from the Aristotelian tradition (as well as from the earlier Greek Stoic tradition) to be found in Grotius's work, in that the principles underlying Grotius's natural law are not, as they are in Aristotle and the Stoa, justified by an eudaimonist account of the final human good. Rather, Grotius's natural law is a practical ethics couched in legal terminology that is (to deploy anachronistic language) not of a teleological, but of a deontological nature. Although the norms of Grotius's natural law do "suit" or "fit" human nature, they *oblige* us by their *moral necessity* rather than simply motivating us through reference to the final end that is wellbeing (*eudaimonia*). A further essential feature of Grotius's naturalism lies in his rules having validity in a pre-political or extra-political state of nature. Grotius's is thus a natural law in the sense that it holds outside of established polities; in the sense that we can discover it by virtue of having right reason qua human beings (*recta ratio* — notice the built-in normative tendency); and in the sense that we can plausibly be motivated to follow it by our antecedently given natural social instinct, our *appetitus societatis*.

In an illuminating and characteristically fine-grained and balanced discussion, Terence Irwin has pondered whether or not Grotius deserves to be called, with Barbeyrac, a pioneer. Irwin draws on Henry Sidgwick's fruitful distinction between "a more ancient view of Ethics"[28] as an "inquiry into the nature of the Good, the intrinsically preferable and desirable, the true end of action," on the one hand, and the more modern view of ethics as "an investigation of the Right, the true rules of conduct, Duty, the Moral Law, &c.,"[29] on the other. Irwin concludes that Grotius's is a natural law doctrine still very closely related to Scholastic naturalism, albeit with some non-Scholastic features.[30] These features, in Irwin's view, are that Grotius's exposition of natural law is "not embedded in the moral and metaphysical context of Aquinas' Treatise on Law."[31] Irwin cautions that this does not amount to a pioneering role, since Grotius holds on to a Scholastic naturalism in that "he takes morality to consist in observance of what is naturally right" and in that Grotius, in his

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27 *See* Gisela Striker, *Origins of the Concept of Natural Law*, *in* Essays on Hellenistic Epistemology and Ethics 209, 211 (1996) (discussing objectivity as a crucial motivation for the development of a concept of natural justice and, eventually, natural law).

28 Henry Sidgwick, The Methods of Ethics 93 (Macmillan and Co. 1874).

29 *Id.* at 7, fol. 2f.

30 2 Terence Irwin, Development of Ethics 70-99 (2008).

31 *Id.* at 98.

reply to Carneades's skepticism, "does not reduce justice to utility, but sticks to a Stoic and Peripatetic naturalist conception."[32] This, according to Irwin, amounts to a rejection of what Sidgwick had called the "jural" or "quasi-jural" outlook of the "modern view of ethics" and seems thus to refute Barbeyrac's claim that Grotius was a pioneer.

However, my sense is that Sidgwick, whose interpretation of the history of ethics is indeed very helpful in this context, would have agreed with Barbeyrac. It seems to me that Sidgwick's view of the modern, "jural" or rather "quasi-jural" conception of ethics does not imply, against Irwin, a view of moral principles as legislated, prescriptive laws which derive their validity from their source. Rather, a quasi-jural conception of moral rules is also consistent with a view of moral principles as indicative laws independent of will, deriving their validity from their content rather than their source. The distinction *vis-à-vis* the "non-jural," ancient Greek view lies rather in the fact that the jural conception formulates moral principles as rules rather than virtues; rules that have to be followed by virtue of their inherent (natural) rightness, not by virtue of their fulfilling human nature and being the final good for human beings. It is in this sense, then, that Grotius, albeit indeed a naturalist, seems to part company with Aquinas and Suárez — and it is these features of his doctrine which would have made it rather difficult for him to embed his exposition of natural law in a Thomist metaphysical framework. Grotius should thus indeed be seen as one of the thinkers who provoked the "great separation" between natural law and Aristotelian metaphysics.[33]

C. Human Nature as a Source of Corrective Obligations

It is therefore important to note that the thoroughgoing rationality of the natural law norms guarantees Grotius's confidence in their content, but that the content of these norms does not tell us anything about the highest good for humans, or about the ends they should pursue — Grotius's natural law is thus stripped of its Aristotelian and Thomist metaphysical framework and may, from a systematical point of view, best be described as a protoliberal theory, where the right is prior to the good and where the requirements of

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32 *Id.*

33 To borrow Mark Lilla's term from another context. For the view that Grotius was novel in clearly separating scholastic theology and ethics from moral philosophy, compare Gershom Carmichael, Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gershom Carmichael (James Moore & Michael Silverthorne eds., Michael Silverthorne trans., Liberty Fund 2002) (1707).

natural law do not ultimately depend on a teleological account of human nature. This might be so, I suggest, because Grotius lacks the confidence of both his immediate Stoic sources and his Aristotelian predecessors to extend rational evaluation from the sphere of justice and natural law to the sphere of ethics broadly understood, to the *summum bonum*. His is thus not an eudaimonist doctrine,[34] and he seems agnostic when it comes to choices made in this regard. His natural law does not provide criteria to give content to the ultimate end or happiness, any more than it seeks to differentiate between constitutional arrangements[35] — it is all subject to freedom of contract:

> But as there are several Ways of Living, some better than others, and every one may chuse which he pleases of all those Sorts; so a People may choose what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will of those who conferred it upon him.[36]

The necessary fit between justice and nature, then, does not intrude into the sphere of ethics understood as the discipline to do with our final or ultimate end. It only extends to rules to do with justice, narrowly understood as corrective justice, and does not aim at the sort of Aristotelian virtue education which is the true aim of Peripatetic political science. The reason for Grotius's appeal to a natural social instinct, the (Stoic) *appetitus societatis*, lies in his attempt to show that there is a natural motivational basis for cooperation and adherence to a pre-political set of norms in the state of nature — that is to say, that it is possible for human beings to be motivated to follow the natural legal norms accessible to them through their reason. This does not mean that humans necessarily are so motivated, but simply that it is not implausible, given their rational, social nature, that they can be. Conversely, it is apt to shed doubt on a Hobbesian account of motivation framed exclusively in terms of self-interest narrowly understood.

For our purposes, Grotius's arguments concerning human nature as a source of moral and legal obligation provide a framework for imputing some obligations on sovereigns; Grotius himself famously required sovereigns to refrain from "occupying" the high seas and from encroaching on the freedom of commerce.[37] As we shall see in the following Part, his views entailed some

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34 At least not in his natural law treatises.

35 *See* J.B. Schneewind, The Invention of Autonomy 175 (1998).

36 Grotius, RWP, *supra* note 19, at 262; Grotius, IBP, *supra* note 2, at 1.3.8.2.

37 Hugo Grotius, The Free Sea ch. 5 (David Armitage ed., Richard Hakluyt trans., Liberty Fund 2004) [hereinafter Grotius, The Free Sea].

important consequences for internal sovereignty as well, consequences he spelled out by resorting to concepts from Roman private law.

II. Private Roman Law Constraints on Sovereignty: The Example of the Right to Resistance

Grotius was widely criticized for his conservative attitude toward resistance to established authority. In *De iure praedae*,[38] the question of a right to resistance played no major role, which can easily be explained by the international, or rather extra-state, context of the work: its main concern was the behavior of the subjects of natural law on the high seas, understood as the state of nature. In *De iure belli ac pacis*, Grotius devoted an entire chapter, *De bello subditorum in superiores*, to the question whether, after the creation of a state authority, there remains a natural right to resistance. The right of resistance was interpreted by Grotius as a right to private war against the authorities.

> Indeed all Men have naturally a Right to secure themselves from Injuries by Resistance [*ius resistendi*], as we said before. But civil Society [*civilis societas*] being instituted for the Preservation of Peace [*tranquillitas*], there immediately arises a superior Right [*ius maius*] in the State over us and ours, so far as is necessary for that End.[39]

At first it seems as though according to Grotius the natural right of resistance was the first right to fall victim to the creation of the polity and the superordinate rights of the state authorities. So far, so Hobbesian. However, Grotius permitted some exceptions to this rule — cases in which the natural right to resist had not disappeared even in the context of the established polity. In contrast to the Calvinist monarchomachs of the sixteenth century, who had rejected a right of resistance on the part of private individuals against state authority, Grotius did fall back in exceptional cases on a natural-law right to resistance on the part of the private individual (*privatus*).[40]

For Grotius, the right of resistance arose either from a breach of contract or from an unlawful act by the ruler. Grotius distinguished between resistance to legal holders of power and resistance to those who had unlawfully acquired power. In the first case, Grotius thought of the right to resistance in Roman law terms, as the result of a breach of the ruler's contractual obligations. A

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38 Grotius, IPC, *supra* note 8.

39 Grotius, IBP, *supra* note 2, at 1.4.2.1; Grotius, RWP, *supra* note 19, at 338.

40 Grotius explicitly denies lower-level magistrates a right to resist. *See* Grotius, IBP, *supra* note 2, at 1.4.6.

possible right to resistance against legal holders of the sovereign power was based on the original contract or promise in which the form of authority was determined. Because Grotius saw the sovereign contract as a promise by the person holding the highest sovereign power to his subjects, subjective rights could arise from such a promise. The Roman emperors Trajan and Hadrian had made such promises,[41] Grotius writes, in order to explain the consequences that arose from it:

> Yet I must confess, where such Promises are made, Sovereignty [*imperium*] is thereby somewhat confined, whether the Obligation only concerns the Exercise of the Power, or falls directly on the Power itself. In the former Case, whatever is done contrary to Promise, is unjust; because, as we shall show elsewhere, every true Promise gives a Right [*ius*] to him to whom it is made. In the latter, the Act is unjust, and void at the same Time, through the Defect of Power.[42]

Sovereignty (*summum imperium*) could, according to Grotius, be divided at the time of the original establishment of the form of government: "So also it may happen, that the People in chusing a King, may reserve certain Acts of Sovereignty to themselves, and confer others on the King absolutely and without Restriction."[43] A free people can "require certain Things of the King, whom they are chusing, by way of a perpetual Ordinance" or can add something to the contract "whereby it is implied, that the King may be compelled or punished."[44]

Grotius also conceded a right to resistance in the case of a ruler who had gained his authority by election or heredity and then alienated his power. Such a ruler enjoyed sovereignty only by usufruct (*usufructuarius*), and it was therefore not transferable.[45] A ruler who, in opposition to the provisions of the Roman law on *ususfructus*, transferred his power could thus be lawfully resisted, according to Grotius.[46] In this context, the right to resistance apparently did not arise primarily from a breach of contract by the ruler; there was, instead, a violation of the norms of Roman property law on usufruct, which in Grotius's view formed the basis for certain forms of political power and

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41 *Id.* at 1.3.16.1 n.15.

42 Grotius, RWP, *supra* note 19, at fol. 301f; Grotius, IBP, *supra* note 2, at 1.3.16.2.

43 Grotius, RWP, *supra* note 19, at 306; Grotius, IBP, *supra* note 2, at 1.3.17.1.

44 Grotius, RWP, *supra* note 19, at 306; Grotius, IBP, *supra* note 2, at 1.3.17.1

45 For a lucid discussion of Grotius's use of the idea of usufruct, with due attention to the importance of Roman law, see Daniel Lee, *Popular Liberty, Princely Government, and the Roman Law in Hugo Grotius's* De Jure Belli Ac Pacis, 72 J. Hist. Ideas 371 (2011).

46 Grotius, IBP, *supra* note 2, at 1.4.10.

were conceived of as natural law norms that preceded any sovereign contract. This is obviously akin to Professor Benvenisti's use of the private-law device of trusteeship to constrain sovereigns.

Finally, the natural right to resistance could, according to Grotius, be reserved by contract:

> If in the conferring of the Crown [*delatio imperii*], it be expressly stipulated, *that in some* certain *Cases* the King may be resisted; even though that Clause [*pactum*] does not imply any Division of the Sovereignty, yet certainly some Part of natural Liberty is reserved to the People, and exempted from the Power of the King.[47]

While the right to resist a lawful ruler arose, as a rule, from a breach of the contractual agreement (*pactum*) upon which his authority was based, the right to resist an unlawful holder of authority arose from the absence of a legal basis for that authority. Such an "invader of authority" (*invasor imperii*[48]) could, under certain circumstances, be resisted; any private person could use force against someone who had gained his power through an unjust war. Finally, a general right of resistance had to be supposed for polities in which laws were in force that permitted tyrannicide. Anyone who usurped power over such a polity could, under the positive law of the state in question, be killed by any citizen without legal process.[49]

According to Grotius, therefore, the natural right of resistance was revived in cases of breach of contract or violation of natural-law norms by a ruler. Failure to observe the norms of *ususfructus* on the part of princes, as discussed above, which could give cause for lawful resistance, represented such a violation of natural law. Such violations were seen as analogous to violations of Roman property law, in which usurpation was viewed as unlawful expropriation of others' property or as violation of the provisions for usufruct.[50] Grotius, analyzing constitutional arrangements in Roman law terms, is not willing to make any substantive normative commitment to a particular kind of constitutional setup

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47 Grotius, RWP, *supra* note 19, at 377; Grotius, IBP, *supra* note 2, at 1.4.14.

48 Grotius, IBP, *supra* note 2, at 1.4.15 (translated by the author).

49 Grotius, RWP, *supra* note 19, at 379-80.

50 Incidentally, it seems to me that Professor Benvenisti is not quite right to say that for Grotius ownership "must be limited to 'supreme necessity.'" Benvenisti, *supra* note 1, at 309. Rather, extreme necessity may allow for use-rights by the suffering non-owner, without however changing existing property-relations; granting such use-rights merely allays the hardship of private property (*rigor dominii*). In the case of equal need, the possessor wins out.

— he cannot be described as an author in the civic tradition of republicanism in this regard, let alone as a proponent of "exclusive republicanism."[51]

What he does put forward, as Daniel Lee has lucidly observed, is a view according to which "a people may remain free even while under the government of a prince."[52] This is so because if the prince holds sovereignty by usufruct, this will be perfectly compatible with popular liberty; surely a "significant departure from one of the longstanding assumptions of early modern republicanism, that popular liberty requires popular government."[53] It also follows that — as in the case of Professor Benvenisti's trusteeship — certain private-law rules seem, if only by way of analogy, to become hierarchically superior to other lawmaking and thus immune to the essential sovereign power, legislation.[54]

Of course, the question arises as to the status of these private Roman-law rules — why should they be privileged? In Grotius's case, they are privileged qua natural-law rules. But for both Grotius and Benvenisti, the use of notions taken from private law invites a further question — are these private-law devices used merely as metaphors? Or do their fine-grained legal specifics carry any weight? For Grotius, the inbuilt legal precision was an important reason to reach for concepts from private Roman law, and it seems to me that the legal concept of trusteeship is no mere metaphor for Benvenisti either. But why should these private-law ideas have any validity in the realm of public law? Grotius's answer was that at least some Roman-law rules have the status of natural law,[55] and it seems that this, at least in part, should be Benvenisti's answer as to the status of his own fiduciary device, trusteeship, as well.[56] But it may not carry us far enough to show why trusteeship should be in a position to encumber sovereigns with duties *vis-à-vis all* of humankind.

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51 James Hankins, *Exclusivist Republicanism and the Non-Monarchical Republic*, 38 Pol. Theory 452 (2010).

52 Lee, *supra* note 45, at 373.

53 *Id.* at 391.

54 Jean Bodin, who is most often associated with legislation as the essential "mark of sovereignty," acknowledges natural-law limits on sovereign legislation as well; some of the limits he accepts are also modeled on ideas from private Roman law, especially from rules concerning fiduciary devices. *See* Lee, *supra* note 5.

55 This, as I argue elsewhere, was also Alberico Gentili's argument in favor of (private) Roman-law rules that bind sovereigns. *See* Benjamin Straumann, *The* Corpus iuris *as a Source of Law Between Sovereigns in Alberico Gentili's Thought*, *in* The Roman Foundations of the Law of Nations 101 (Benedict Kingsbury & Benjamin Straumann eds., 2010).

56 Benvenisti, *supra* note 1, at 301. Of course, the other part of the answer is supplied by what Benvenisti intriguingly argues is already implicitly contained in the international-law concept of sovereignty.

As we will see in Part III, Grotius *did* offer an account of legal obligations, based on the Roman law of property and obligations, which were supposed to hold outside of established polities and across sovereign states. However, this account provides only a very narrow normative basis for constraints on sovereigns, precisely because of the limited nature of the underlying private-law foundations. By adhering too closely to ideas taken from private law, Professor Benvenisti may run the danger of limiting the scope of the sovereign duties he proposes in a similar fashion.

III. "Perfect" and "Imperfect" Rights and Duties of Justice

A. Grotius's Theory of Justice vs. Aristotle's

Let us consider Grotius's account of duties outside established polities. Grotius relies on a distinction between "perfect" and "imperfect" justice. This was to become an influential dichotomy, especially in (and via) eighteenth century Scottish thought. It allowed Grotius to conceptualize (perfect) rights that hold in the state of nature, potentially across sovereign states, and certainly between private individuals and sovereigns when interacting on the high seas (which Grotius perceived as an actually existing state of nature).[57] These rights could be claimed and, if necessary, *enforced* by means of a natural right to punish (not unlike the right to punish acknowledged by John Locke[58] — who most likely took it from Grotius). In the absence of such a natural right to punish, perfect duties of justice in the state of nature are more difficult to conceive.[59]

Grotius's lack of interest in the kind of justice that presupposes a context of established political communities is shown in the use he made of Aristotle's theory of justice in the *Nicomachean Ethics*. In *De iure praedae*, Grotius adopted the Aristotelian dichotomy between distributive and corrective justice;[60] but

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57 *See* Grotius, The Free Sea, *supra* note 37, ch. 5.

58 John Locke, Two Treatises of Government 272-73 (Peter Laslett ed., 1967) (1689).

59 *See* Alexis Blane & Benedict Kingsbury, *Punishment and the* ius post bellum, *in* The Roman Foundations of the Law of Nations, *supra* note 55, at 241; Benjamin Straumann, *The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law*, 2 Stud. Hist. Ethics 1 (2006). Grotius's argument for humanitarian intervention is closely linked to the right to punish. *See* Grotius, IBP, *supra* note 2, at 2.25.8.4.

60 Aristotle, Nicomachean Ethics bk. 5, at 1130b30ff. Both types are, in Aristotle, parts of particular justice, which is contrasted with universal justice. The latter,

unlike Aristotle himself, he devoted his main attention to corrective justice,[61] which alone he identified with natural law.[62] Grotius referred to Aristotle's *Politics*, and quoted the characterization of justice there as virtues affecting the social sphere, which must be understood in Aristotle as an essential element of the polity and of the good life of the city-state (*polis*).[63] The distinction made in the *Nicomachean Ethics* between proportional and arithmetic justice[64] is also adapted by Grotius.[65] However, in Grotius, Aristotle's proportional or distributive justice is reinterpreted, in an anti-Aristotelian way, to be limited in effect to the household.[66] In Aristotle, both types of justice are connected to the state and have no applicability to the household, which knows no justice in the actual sense and is structured as a monarchy: actual justice on the other hand is political and belongs to the sphere of the sovereign state.[67] In contrast to Aristotle, Grotius applies only corrective justice to the sphere of the free, equal subject of law. This follows from the purpose of the theory of justice in *De iure praedae*: to be of use to Grotius, this theory of justice had to be first of all transferable to a *theory of law*.[68]

This one-sided concentration on Aristotle's corrective justice is thus determined by a number of factors. Apart from the fact that the state of nature for Grotius presupposes the absence of a distributive authority and thus simply rules out distributive justice,[69] the concentration on corrective justice allows

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broad sense of justice is identical with the whole of virtue, when virtue is expressed towards other people. *See* Aristotle, *supra*, bk. 5, at 1130a10ff. On Aristotle's concept of justice, see Terence Irwin, Aristotle's First Principles 424-38 (1988); Richard Kraut, Aristotle: Political Philosophy 98-177 (2002); and Fred D. Miller, Nature, Justice, and Rights in Aristotle's Politics 66-86 (1995).

61 The status of reciprocal or commercial justice, Aristotle, *supra* note 60, bk. 5, at 1232b21, as a further kind of particular justice in Aristotle is unclear; Grotius clearly thought of it as a part of corrective justice. *See infra* footnotes 89, 90.

62 If not yet with law in general, as he later would in *De iure belli ac pacis*. *See* Peter Haggenmacher, *Droits subjectifs et système juridique chez Grotius* [*Subjective Rights and Juridical System in Grotius*], *in* Politique, droit et théologie chez Bodin, Grotius et Hobbes [Politics, Law and Theology in Bodin, Grotius and Hobbes] 73, 89 (Luc Foisneau ed., 1997).

63 Grotius, IPC, *supra* note 8, fol. 8; Aristotle, Politics bk. 3, at 1283a37ff.

64 Aristotle, *supra* note 60, bk. 5, at 1131a29ff., 1132a1ff.

65 Grotius, IPC, *supra* note 8, fol. 8.

66 *Id.*

67 Aristotle, *supra* note 60, bk. 1, at 1253a38.

68 Apart from the historical eleventh chapter and chapters 14 and 15, all the chapters of Grotius, IPC, *supra* note 8, have a specifically legal character.

69 *See* Haggenmacher, *supra* note 62, at 122.

the formulation of a rule-based ethics. Such a "legalized," juridical ethics need not depend on an ethics of virtue.

The identification of Aristotle's corrective justice with the doctrine of obligations in the Roman law of the *Digest* constitutes the crucial move to gear the Aristotelian framework of justice towards a theory of justice ultimately inspired by Cicero and the Roman jurists that has nothing in common with Aristotle's eudaimonistic concerns. Grotius uses the elements of Aristotelian ethics suited to adaptation to the obligation and property-law categories of Roman private law, neglecting the doctrine of distributive justice that plays an incomparably greater role than corrective justice does for Aristotle, both in the *Nicomachean Ethics* and very much so in the *Politics*.[70] Grotius thus foists the theory of justice developed by Aristotle for the context of the sovereign city-state onto a property-oriented theory of justice of Roman provenance, which he then transfers to the sphere of the high seas, understood as the state of nature, and has them develop their full legal effect there.[71]

As opposed to the Aristotelians, Grotius was attracted to a conception of justice that could be transposed from Artistotle's *polis* context to the pre-political and interstate sphere, a conception that did not necessarily presuppose a legally constituted polity. In *De iure belli ac pacis* he thoroughly criticized Aristotle's conception of justice.[72] Grotius found it plausible to contrast the virtue of justice with *pleonexia*, the desire to have too much, or greed, especially as justice to him "consists wholly in abstaining from that which is another Man's."[73] In Grotius's view, the "very Nature of Injustice" consisted exclusively of "the Violation of another's Rights."[74]

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70 This neglect of distributive justice seems ultimately to be the reason for Michel Villey's criticism that Aristotle's legal philosophy was "deformed" in legal humanism, especially in Grotius. *See* Michel Villey, *Déformations de la philosophie du droit d'Aristote entre Vitoria et Grotius* [*Deformations of Aristotle's Philosophy of Law Between Vitoria and Grotius*], *in* Platon et Aristote à la Renaissance [From Plato and Aristotle to the Renaissance] 201, 212 (1976). Villey fails to note, however, that this "deformation" is ultimately based upon the reception of Roman private law.

71 *See* Richard Tuck, Natural Rights Theories: Their Origin and Development 63 (1979) (emphasizing the "unAristotelian character of all this").

72 Rejecting in particular the idea of embedding justice in Aristotle's *mesotes*-structure of the virtues. *See* Grotius, IBP, *supra* note 2, Prolegomena 43-45; Aristotle, *supra* note 60, at 5.1132a29f.

73 Grotius, RWP, *supra* note 19, at 120; Grotius, IBP, *supra* note 2, Prolegomena 44.

74 Grotius, RWP, *supra* note 19, at 121; Grotius, IBP, *supra* note 2, Prolegomena 44.

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In *De iure belli ac pacis*, Grotius explicitly narrowed corrective justice down to natural, subjective *rights*. Only *ius* in the sense of a subjective right was viewed by Grotius as "Right properly, and strictly taken" (*ius proprie aut stricte dictum*).[75] Such subjective rights fulfilled the conditions of precisely that justice defined as "justice in the actual or narrow sense," that is, Aristotle's corrective justice, which Grotius termed *iustitia Expletrix* and contrasted with distributive justice:

> 'Tis expletive Justice, Justice properly and strictly taken, which respects the *Faculty* [*facultas*] or *perfect Right*, and is called by *Aristotle* συναλλακτικὴ, *Justice of Contracts*, but this does not give us an adequate Idea of that Sort of Justice. For, if I have a Right to demand Restitution of my Goods, which are in the Possession of another, it is not by vertue of any *Contract*, and yet it is the Justice in question that gives me such a Right. Wherefore he also calls it more properly ἐπανορθωτικὴν, *corrective* Justice. *Attributive Justice*, stiled by *Aristotle* διανεμητικὴ *Distributive*, respects Aptitude or *imperfect Right*, the attendant of those Virtues that are beneficial to others, as Liberality, Mercy, and prudent Administration of Government.[76]

Grotius's conception deviates in some minor ways from Aristotle's corrective justice, as defined in the *Nicomachean Ethics*. Thus Grotius wrongly alleged that corrective justice for Aristotle had meant merely voluntary contractual relations. Aristotle's corrective justice no longer referred, as in *De iure praedae*, merely to matters affecting individuals,[77] but was interpreted as capable of being applied to the behavior of governments: "when the State repays out of the publick Funds what some of the Citizens had advanced for the Service of the Publick, it only performs an Act of *Expletive Justice*."[78] This opens up the possibility of certain natural rights of citizens *vis-à-vis* the state, and therefore represents a potential limitation on sovereignty and state power. The question of the relationship between natural justice and the state can thus be raised, at least in principle.

B. Perfect or Imperfect Duties?

The most important and subsequently influential result of Grotius's discussion is that *only* corrective justice can be called justice or natural law in the

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75 Grotius, RWP, *supra* note 19, at 138; Grotius, IBP, *supra* note 2, at 1.1.5.
76 Grotius, RWP, *supra* note 19, at 142; Grotius, IBP, *supra* note 2, at 1.1.8.1.
77 *See* Grotius, IPC, *supra* note 8, at 2, fol. 8.
78 Grotius, RWP, *supra* note 19, at 146; Grotius, IBP, *supra* note 2, at 1.1.8.3.

narrow and proper sense. Distributive justice, the object of which is imperfect right or aptitude (*aptitudo*), has no part in this. The virtue that accompanies distributive justice is accordingly not justice in the narrow sense (*iustitia*), but beneficence (*liberalitas*). This type of justice is at best "by the wrong Use of the Word . . . said to belong to this Natural Law."[79] It becomes clear here that, in *De iure belli ac pacis*, Grotius adapted the distinction between corrective and distributive justice to a distinction undertaken in Cicero in the first book of *De officiis*. Cicero had differentiated between justice in the broader sense (*beneficentia*) and actual justice (*iustitia*), which deals with private property and obligatory rights *in personam*: "There are two parts of this: justice [*iustitia*], the most illustrious of the virtues, on account of which men are called 'good'; and the beneficence [*beneficentia*] connected with it, which may be called either kindness or liberality."[80]

For Cicero, justice in the narrow sense (*iustitia*) concentrated on property and contractual rights.[81] *Liberalitas*, in contrast, "is bestowed upon each person according to his standing."[82] It becomes clear that Grotius was indeed following Cicero's *De officiis* not only from the terminology, but from a reference added to the editions after 1642. To explain the object of distributive justice (*aptitudo*), Grotius used a quote from *De officiis* in which Cicero created a hierarchy of various addressees of liberties (*liberalitas*) and completed his portrayal of beneficence.[83] Grotius's postulates of distributive justice resemble Cicero's *beneficentia* — they are not part of natural law, *iustitia* in the actual sense, and are not really owed. In contrast, as for Cicero, the subjective rights, or *facultates*, which make up the actual object of natural law, are those rights protected by private (Roman) property law and the law of obligations.[84] What Julia Annas has observed with regard to Cicero holds for Grotius as well: "[I]t can be shown that justice proper is concerned with what we could call matters of legal obligation and rights, while benevolence is concerned with moral duties which we have towards others as fellow human beings."[85]

It is important to emphasize that Grotius adopted and made explicit Cicero's implied distinction between essentially *legal* claims, arising from property, contracts, and wrongdoing (delicts), and moral duties, which were not legally

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79 Grotius, RWP, *supra* note 19, at 154; Grotius, IBP, *supra* note 2, at 1.1.10.3.

80 Cicero, De Officiis [On Duties] bk. 1, sec. 20.

81 *Id.* bk. 1, secs. 21-41.

82 *Id.* bk. 1, sec. 42.

83 *Id.* bk. 1, sec. 58.

84 Julia Annas, *Cicero on Stoic Moral Philosophy and Private Property*, *in* Philosophia Togata: Essays on Philosophy and Roman Society 151 (Miriam T. Griffin & Jonathan Barnes eds., 1989).

85 *Id.* at 168 (discussing the difference between *iustitia* and *liberalitas*).

sanctioned. Applied to the Aristotelian theory of justice, this means that for Grotius, only corrective justice enjoyed moral and legal protection outside of sovereign states, while Aristotle's distributive justice was denied any specifically legal character. Thus in Grotius's *De iure belli*, corrective justice gained a very prominent position indeed and, as in *De iure praedae*, was expressed in the terminology of private Roman law.

Corrective justice, as opposed to the virtue of distributive justice, lends itself to being expressed, with a high degree of precision, as rules. Adam Smith, an important follower of Grotius in this regard, explained this as follows. As opposed to generosity of prudence, the rules of justice are "accurate in the highest degree," Smith writes. "If I owe a man ten pounds, justice requires that I should precisely pay him ten pounds," and in this the "rules of justice" resemble "the rules of grammar," being equally "precise, accurate, and indispensable."[86] Smith's view of the history of this outlook is instructive: "In none of the ancient moralists, do we find any attempt towards a particular enumeration of the rules of justice." By contrast, "Grotius seems to have been the first who attempted to give the world any thing like a system of those principles which ought to run through, and be the foundation for the laws of all nations."[87]

The same distinction between the perfect claims from corrective justice and the imperfect claims from distributive justice can be found in some of Grotius's successors, especially and most influentially in Emer de Vattel, as I will try to sketch briefly in the Conclusion. While Grotius's perfect duties seem too narrow to underwrite the kinds of duties Benvenisti has in mind, Vattel's imperfect duties may offer a more congenial model for the notion of sovereignty as trusteeship. Vattel's elaboration of imperfect duties offers a broader, if weaker, basis for such a notion. As Vattel knew, such a basis would, however, still need to be argued for on a natural-law basis.

Conclusion

> One state owes to another state whatever it owes to itself, so far as that other stands in real need of its assistance, and the former can grant it without neglecting the duties it owes to itself. Such is the eternal and immutable law of nature.[88]

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86 Adam Smith, The Theory of Moral Sentiments 175 secs. 3.6.10-11 (D.D. Raphael & A.L. Macfie eds., 1976).

87 *Id.* at 341 sec. 7.4.37. This stance Smith probably owes to Barbeyrac.

88 Emer de Vattel, The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three

Professor Benvenisti's aim to impose a more taxing set of duties on sovereigns may indeed require, as he himself points out, more sovereignty rather than less, or at least the recognition of its "crucial role"[89] in the model of sovereignty as trusteeship. For sovereigns to be able to discharge these further-reaching duties, and to assume a certain amount of accountability *vis-à-vis* the principal — a principal Cicero, Seneca and Grotius would have called the "society of mankind" — these sovereigns' *own* agency may stand in need, paradoxically, of a certain amount of Hobbesian strengthening. It need not be in tension with the spirit of Hobbes if this is achieved by endowing certain rules from private (Roman) law with the dignity of hierarchically superior natural law.[90]

Misgivings about sovereigns relying on principles of a shared human nature as mere pretexts for expansion and domination have already been voiced by Vattel, who argued against Grotius's doctrine of humanitarian intervention in a chapter on "the Common Duties of a Nation towards others, or of the Offices of Humanity between Nations." Vattel wrote that it

> is strange to hear the learned and judicious Grotius assert, that a sovereign may justly take up arms to chastise nations which are guilty of enormous transgressions of the law of nature . . . . Could it escape Grotius, that, notwithstanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts?[91]

Grotius himself had been perfectly aware of this line of argument, and pointed out that

> Antient and modern History indeed informs us, that Avarice and Ambition do frequently lay hold on such Excuses; but the Use that wicked Men make of a Thing, does not always hinder it from being just in itself. *Pirates too sail on the Seas, and Thieves wear Swords, as well as others*."[92]

Early Essays on the Origin and Nature of Natural Law and on Luxury 262 bk. 2, ch. 1, sec.3 (Liberty Fund 2008) (1797).

89 Benvenisti, *supra* note 1, at 301.

90 *See* Daniel Lee, *Hobbes and the Civil Law*, *in* Hobbes and the Law 210 (David Dyzenhaus & Thomas Poole eds., 2013); *cf. also* M. Brito Vieira, The Elements of Representation in Hobbes 163 (2009); Kinch Hoekstra, *A Lion in the House*, *in* Rethinking the Foundations of Modern Political Thought 191, 205 n.74 (James Tully & Annabel Brett eds., 2006).

91 Vattel, *supra* note 88, at 265, bk. 2, ch. 1, sec. 7.

92 Grotius, RWP, *supra* note 19, at 1162; Grotius, IBP, *supra* note 2, at 1.1.10.3, at 2.25.8.4.

The same argument could be made against those who point to the susceptibility of Vattel's own arguments to being put to imperialist uses. Vattel would indeed seem to be the most fruitful predecessor to Professor Benvenisti's sovereignty as trusteeship. In Vattel's vein, one can plausibly attribute "imperfect" duties to sovereigns, relying on a concept of international commercial society arising out of the mutual assistance required by the natural society of mankind.[93] This is what Professor Benvenisti seems to have in mind when he alludes to Christian Wolff's conception of imperfect obligations,[94] and it is clear that something like Vitoria's first just title, the duty to allow trade ("communication"), is too "perfect" a duty to be accepted.[95] But the idea of an (imperfect) duty of mutual assistance realized in commerce in conjunction with a robust duty to loosen sovereignty's grip on natural resources in the face of scarcity does have a distinctly Vattelian flavor to it. For Wolff and Kant, occupation, very broadly understood (i.e., not only effective occupation), was sufficient for sovereign claims. For Vattel, effective occupation and use were needed to establish exclusive sovereign claims, and for Benvenisti, the cosmopolitan purpose of Vattel's concept of sovereignty

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93 While the idea of this as a perfect duty can be seen in Vitoria, Gentili and Grotius, there is a general, if not quite as pronounced, appreciation of trade even in the theorist who is usually seen as the strongest advocate of sovereignty, Bodin. *See* Jean Bodin, The Six Bookes of a Commonweale 660, 708 (Kenneth Douglas McRae ed., Richard Knolles trans., 1962) (1606); Response to the Paradoxes of Malestroit 85-93 (Henry Tudor & R.W. Dyson eds., Henry Tudor trans., 1997) (displaying a consistently favorable attitude to trade).

94 Benvenisti, *supra* note 1, at 317. Stopping short of a Wolffian *civitas maxima*, 2 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum 15, para. 9 (Joseph H. Drake trans., 1934) (1749), he could join Vattel in his two broad qualifications of the duty to practice mutual aid:

> 1. Social bodies or sovereign states are much more capable of supplying all their wants than individual men are; and mutual assistance is not so necessary among them, nor so frequently required. Now, in those particulars which a nation can itself perform, no succour is due to it from others. 2. The duties of a nation towards itself, and chiefly the care of its own safety, require much more circumspection and reserve, than need be observed by an individual in giving assistance to others.

Vattel, *supra* note 88, at 262 bk. 2, ch.1, sec.3.

95 Francisco de Vitoria, *On the American Indians*, *in* Vitoria, Political Writings 231, 278 (Anthony Pagden & Jeremy Lawrance eds., 1991). Vattel, too, rejected Vitoria's first just title, which does not in his view give equal sovereign rights their due; rights to engage in commerce are imperfect and can be rendered perfect only by treaty. *See* Vattel, *supra* note 88, at 132-35 bk. 1, ch. 8, secs. 87-94.

is further strengthened by "deliberative obligations."[96] Sovereigns who are trustees of humanity do seem modeled in broad analogy with Vattel's moral obligation to use natural resources efficiently,[97] but at the same time there is an understandable reluctance to press the analogy too hard — the specter of the justification of colonialism looms.[98] However, as Béla Kapossy and Richard Whatmore correctly point out, for Vattel,

> the perfect right of preservation of a potential donor nation was bound to clash with the equally perfect right of preservation of a state on the brink of starvation. It is in this context that one needs to read Vattel's often-cited justification of the appropriation of uncultivated land by European settlers in America.[99]

There is, in other words, a real conflict that cannot simply be assumed away by referring to the potentially dangerous ends Vattel's reasoning may be put in service for. Vattel's principle may still contain some normative pull.

In addition to these moral considerations, enlightened self-interest and prudence in the form of self-serving utility calculations as recommended to sovereigns by Vattel may complement and additionally strengthen the concept of sovereignty as trusteeship usefully. As Isaac Nakhimovsky in an elucidating article reminds us, "Vattel sought to formalize the notion of an enlightened self-interest, which held that justice was the best policy." This "entailed defining the role of commerce in the state in order to impose boundaries on appeals to reason of state with respect to trade," and amounted to a theory of obligation that was based on utility and enlightened self-interest.[100] Sovereigns — even if conceived merely as mandataries of their own peoples — may thus be convinced under Vattelian premises that they are well advised to give some consideration to interstate externalities in the global condominium and to noncitizens and people beyond their borders.

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96 Benvenisti, *supra* note 1, at 318.

97 *Id.* at 309.

98 *Id.* at 328 n.183.

99 Béla Kapossy & Richard Whatmore, *Introduction* to Vattel, *supra* note 88, at xv.

100 Issac Nakhimovsky, *Vattel's Theory of the International Order: Commerce and the Balance of Power in the Law of Nations*, 33 Hist. Eur. Ideas 157, 162 & n.17 (2007).

Sovereign Trusteeship and Empire

*Andrew Fitzmaurice**

This Article examines the concept of sovereign trusteeship in the context of the history of empire. Many accounts of sovereign trusteeship and the responsibility to protect explain the development of those concepts in terms of seventeenth century natural law theories, which argued that the origins of the social contract were in subjects seeking self-preservation. The state, accordingly, was based upon its duty to protect its subjects, while also having a secondary responsibility for subjects beyond its borders arising from human interdependence. I shall show that the concepts underlying sovereign trusteeship — human fellowship, self-preservation and the protection of others' interests — were as entangled with the expansion of early modern states as they were with the justification of those states themselves. The legacy of that history is that arguments employed to justify sovereign trusteeship and the responsibility to protect remain highly ambiguous and subject to rhetorical manipulation. On the one hand, they can be represented as underpinning a new liberal international order in which states and international organizations are accountable to the human community, not only to their own subjects. On the other, these same terms can be deployed to justify expansionism in the name of humanitarianism, as they have done for hundreds of years. Only by paying careful attention to the contexts in which these claims are made can we discriminate the intentions behind the rhetoric.

Introduction

Scholars of international relations and law are paying increasing attention to questions of sovereign trusteeship and the Responsibility to Protect (or R2P),

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which they perceive to be new perspectives on international relations arising from the post-Cold War order.[1] Certainly, since at least the Balkan wars of the 1990s, a number of conflicts have been marked by interventions by the international community to protect civilian populations. Those interventions are justified by appeal to the principle that states are established by a contract to preserve their citizens, as well as by appealing to the responsibilities of global organizations and the cosmopolitan responsibilities of the member states of the global community. The notion that sovereigns have responsibilities beyond their own boundaries has received further support in recent decades in response to the challenges of climate change, environmental crises, including pollution, and resource issues such as water-sharing.[2] There certainly does, therefore, appear to be a sense in which states' extraterritorial responsibilities are more topical than ever before.

Those responsibilities, however, are based upon a set of principles that, as I will argue, have been part of the international order for at least five hundred years.[3] The principles that underpin the doctrines of responsibility to protect and sovereignty as trusteeship are: (1) human fellowship, or the

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1 On state recognition of the R2P, see Int'l Coalition for the Responsibility to Protect, http://www.responsibilitytoprotect.org/ (last visited Jan. 9, 2015); and *Office of the Special Adviser on the Prevention of Genocide*, United Nations, http://www.un.org/en/preventgenocide/adviser/responsibility.shtml (last visited Jan. 9, 2015). For legal scholars' reaction to R2P, see, for example, Luke Glanville, Sovereignty and the Responsibility to Protect (2014); Anne Orford, International Authority and the Responsibility to Protect (2011); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295 (2013); and Ryan Goodman, *Humanitarian Intervention and the Pretexts for War*, 100 Am. J. Int'l L. 107 (2006). For a skeptical perspective on humanitarian intervention, see Jean Bricmont, Humanitarian Imperialism: Using Human Rights to Sell War (2006); David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism (2006); and Jean Richard Drayton, *Beyond Humanitarian Imperialism: The Dubious Origins of "Humanitarian Intervention" and Some Rules for Its Future*, *in* The History and Practice of Humanitarian Intervention and Aid in Africa 217 (Bronwen Everill & Josiah Kaplan eds., 2013). For further debate in an online symposium held by the *American Journal of International Law* on the article by Benvenisti and the question of sovereign trusteeship in international law, see Chris Borgen, *American Journal of International Law Symposium Starts Today*, Opinio Juris (July 22, 2013), http://opiniojuris.org/2013/07/22/american-journal-of-international-law-on-line-symposium-starts-today/.

2 Eyal Benvenisti, Sharing Transboundary Resources: International Law and Optimal Resource Use (2002).

3 A similar point is made by Glanville, *supra* note 1.

notion of the equal moral worth of all individuals; (2) need, the efficient use of resources, and the necessity of self-preservation; and (3) the protection of others' interests.[4] These principles were used to justify modern European empires and they were partly developed for that purpose. A number of studies have placed the development of the responsibility to protect and sovereign trusteeship in the context of seventeenth century natural law arguments regarding self-preservation. The focus of those accounts has been upon how the R2P arose from contracts between early modern states and their subjects, rather than from the expansionist policies of those states.[5] They have accordingly underestimated the degree to which claims of human fellowship, self-preservation and protection were used to justify territorial expansion beyond the state, just as much as they were used to think about the responsibilities of states to their subjects.

Indeed, the use of rights arguments in this expansionist context reminds us that the creation of states and empires was, from one perspective, a connected, or even a single, process. Both states and empires required the establishment of *imperium*, or authority, over territory. To create a state in medieval and early-modern Europe meant establishing authority over peoples previously outside the *imperium* of the sovereign, so that the early-modern English state, for example, was itself understood to be an empire.[6] Similarly, those entities in the sixteenth and seventeenth centuries that we now, somewhat anachronistically, call empires required extensions of sovereignty over peoples previously outside the sovereign's *imperium*. Thus the process of establishing many early-modern European states was the first step in a further extension of sovereignty beyond the borders of the state. It should, therefore, come as no surprise that the language of rights — including concepts of human fellowship, self-preservation, and the obligation to consider others' interests — was drawn into justifying the broader extensions of *imperium*, those entities that were increasingly called empires by the eighteenth century, just as it was employed to understand the relationships between states and their subjects.

While the sovereigns of modern European states haven't always respected the obligations implied by this language of rights, modern European history can be understood, in part, in terms of a struggle to establish that respect. The language of rights was also used to understand the relations between sovereigns and subjects in the projections of sovereignty beyond the boundaries of European states. In those broader contexts, however, the struggle to have

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4 The central role of these three assumptions with regard to sovereign trusteeship are outlined in Benvenisti, *supra* note 1.

5 *See, e.g.*, Orford, *supra* note 1 (focusing in particular on Hobbes).

6 David Armitage, The Ideological Origins of the British Empire (2000).

rights respected proved less successful and the language of rights — of fellowship, self-preservation, and protection — was often manipulated to justify expansionist goals. Indeed, the relative failure of rights discourses in these broader contexts has given rise to the postcolonial understanding of the term "empire," implying political authority without a social contract. In this Article, I will examine the entanglement of the arguments of human fellowship (Part I), self-preservation (Part II) and the obligation to take others' interests into account (Part III) in the extensions of European sovereignty, considering each of the principles in that order. In the Conclusion, I will turn to the question whether the current revival of sovereign trusteeship and the responsibility to protect is inextricable from the history of empire.

I. Human Fellowship

One of the most fundamental premises underlying the notion of sovereign trusteeship is the existence of an international community, a common human fellowship, which recognizes "the equal moral worth of all individuals."[7] Such ideas of global community were also one of the most important justifications for extensions of European sovereignty from the sixteenth century through to the twentieth. Human fellowship, and human sociability, was a fundamental assumption of natural law theories from Aristotle through to the twentieth century, although the understanding of the characteristics that made humans sociable changed greatly, with pre-seventeenth century accounts claiming bonds of mutual affection and love, while many post-seventeenth century accounts emphasized selfish reasons for sociability and even mutual fear.

If all humans belonged to a common community, then certain common rights must exist. In the first half of the sixteenth century, the Thomist theologian Francisco de Vitoria explored such ideas in the context of examining the justice of the Spanish conquests in the Americas.[8] Vitoria dismissed a series of justifications for conquest, including the ungodliness of the peoples conquered, but he notoriously argued that the Spaniards could claim a right to travel and mix with the Americans. For Vitoria, human fellowship included both a right of communication and the right of sanctuary. Communication was the means by which sociability would be achieved. Language was a distinguishing feature of humans, which fitted them for sociability. The granting of sanctuary was necessitated by the mutual bonds of affection and, as we shall see, self-preservation.

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7 Benvenisti, *supra* note 1, at 301-02.

8 Francisco de Vitoria, *On the American Indians*, *in* Vitoria: Political Writings 231 (Anthony Pagden & Jeremy Lawrence eds., 1991).

For many modern scholars, Vitoria's concession on the right of communication was a cynical manipulation of the law of nations in order to provide a sanitized justification for the conquests.[9] Such readings diminish the seriousness with which Vitoria, a Thomist, took the idea of sociability and the instruments of fellowship, including communication, that were necessary to it. Recent scholars' readings of Vitoria, however, are shaped by the fact that human fellowship and the right of communication were, as I shall show, subsequently used by European conquerors to justify their appropriations. Thus Vitoria has been read from the perspective of what later generations did with his writings.

The English promoters of the Virginia Company were amongst the first European colonizers to transform Vitoria's arguments from a defense of the rights of non-Europeans into a case for conquest. In 1612, approximately five years after the foundation of the first permanent English colony in North America, William Strachey, the Virginia Company's secretary in the colony who had been resident two years in the Chesapeake, asked "What Iniury can yt be to people of any Nation for *Christians* to come unto their Portes, Havens, or Territoryes, when the Law of Nations (which is the law of god and man) doth priveledge all men to doe so?"[10] He expanded upon this theme by declaring that "the Salvages themselves may not impugne, or forbid the same [i.e., trade] in respect of Common fellowship and Community betwixt man and man."[11] Here Strachey bases the rights of travel and communication upon human sociability and the consequent universal human community, or "common fellowship." He explained that this right of community extended to the right of commerce and trade, which were important expressions of fellowship, and that such relations would continue in

> all love and friendship, until . . . we shall fynd them practize vyolence, or treason against us (as they have done to our other colony at Roanoke) when then I would gladly knowe (of such who presume to know all thinges) whether we may stand upon our owne Innoncency or no, or hold

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9 *See, e.g.*, Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005); Robert A. Williams, The American Indian in Western Legal Thought (1990); *cf.* Annabel S. Brett, Changes of State: Nature and the Limits of the City in Early Modern Natural Law 14-15 n.19 (2011); Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. Toronto L.J. 1 (2011).

10 William Strachey, The Historie of Travell into Virginia Britannia 22 (Louis B. Wright & Virginia Freund eds., 1953) (1612).

11 *Id.*

> it a scruple in humanity, or make it any breach of Charity (to prevent our throats from the cutting), to drawe our swordes, *et vim vi repellere*.[12]

Here he draws the conclusion that a failure to respect the rights based upon universal community can be sanctioned by the resort to force and he specifically cites the Roman law regarding the right to repel violence with violence — *et vim vi repellere* — reflecting the close accord that many medieval and early modern authors assumed between Roman law and natural law.

Strachey was following a carefully prepared script. In a private meeting of the Virginia Company sometime between 1607 and 1609, its members debated whether or not they should publish "some forme of writinge in way of Iustification of our plantation."[13] In this debate, it was noted that such public discussions of the justice of colonizing by the "Casuists and Confessors" of Salamanca had won for the Spanish king "no title of Dominion or property, but only a Magistracy and Empire." The meeting concluded, therefore, that it was better to "abstain" from producing a similarly weak title and "reserve ourselves to ye defensive part, when they shall offer anything against us: wch will more easyly and satisfactoryly be donne, and we are like enough to be too soone putt to yt by them, when they see the proportion and forwardness of this present supply."[14] The meaning here is not immediately apparent, but it becomes clearer with Strachey's retrospective contribution on the right to repel violence with violence. What the Virginia Company minutes reveal is a decision to avoid a public discussion of the justice of colonizing until such a moment as the Powhatans, the Native Americans of the Chesapeake region, "offer anything against us." Such violence, the minutes note, was likely to be provoked by the "proportion" of the "present supply": that is, by the fleet of resupply ships the Virginia Company sent to the Chesapeake in 1609.[15]

By 1609, the Virginia Company had decided to embark upon the campaign justifying its colony from which it had earlier abstained. It may have done so because by this time it was hoping to provoke war with the Powhatans. What is clear, however, is that the company expected that their provocation of the Powhatans would enable them to undertake a "defensive" war of conquest, while appealing to a breach of the rights of fellowship and communication derived from the law of nations. English colonizers repeated this argumentative

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12 *Id.* at 26.

13 *A Justification for Planting in Virginia*, *in* 1 The Records of the Virginia Company of London vol. 3 (Susan Myra Kingsbury ed., 1933).

14 *Id.* at 3.

15 *Id.*

strategy throughout the seventeenth and eighteenth centuries in order to legitimize their appropriations of Native Americans' lands.[16]

Sanctuary, including the rights of refugees and hospitality to strangers, is another species of the rights of human fellowship that underpin human sociability. At the time the Virginia Company was establishing its colony, Grotius wrote on the "sacred law of hospitality," reprising a passage from Vitoria in which Vitoria, in turn, cited Virgil's *Aeneid*, asking "What men, what monsters, what inhuman race . . . . Shut up a desert shore to drowning men,/ And drive us to the cruel seas again?"[17] "It is a law of nature to welcome strangers," Vitoria argued, and this right of harbor was "decreed amongst all men."[18] The "Indians" could not, therefore, deny harbor to the Spanish if they came to their shores, no more than the Spanish or French could deny the same rights to each other.[19] The denial of such rights was a violation of the laws of nature and nations and a just cause for war. Grotius declared: "We know also that wars began for this cause, as with the Magarensians against the Athenians, and the Bonians against the Venetians, and that these also were just causes of war to the Castilians against the Americans."[20] Again, for recent scholars, Vitoria provided a sanitized justification for conquest in his discussion of the rights of refuge. According to Vitoria, though, the "Indians" had not denied these rights to the Spanish, and it was the Spanish who violated laws of hospitality.[21] The probable reason why scholars have come to read Vitoria in this way, however, is because subsequent European colonizers exploited the ideas of harbor, the rights of strangers and refuge in order to justify their appropriations of others' lands.

Seventeenth and eighteenth century English colonizers again exemplified this effort. One of the tracts commissioned as part of the Virginia Company's decision to justify its venture, the anonymous *A True Declaration of the Estate of Virginia*, posed a series of questions on the justice of the colony, including: "Is it unlawfull because wee come to them?" to which the author responded: "Is it not against the lawe of nations, to violate a peaceable stranger, or to denie him harbour? The Ethiopians, Egyptians, and men of China, are branded with a foule marke of sanguinarie and barbarous inhumanity, for blessing

16 *See* Andrew Fitzmaurice, Sovereignty, Property and Empire, 1500-2000 (2014).

17 Hugo Grotius, The Free Sea 11 (David Armitage ed., Richard Hakluyt trans., 2004); Vitoria, *supra* note 8, at 278; *see also* Virgil, Aeneid 94 (John Dryden trans., 1909).

18 Vitoria, *supra* note 8, at 279.

19 *Id.* at 280.

20 Grotius, *supra* note 17, at 12.

21 Francisco de Vitoria, *Letter to Miguel de Arcos on November 8, 1534*, *in* Vitoria: Political Writings, *supra* note 8, at 331.

their Idols, with the bloud of strangers."[22] The author portrays the colonizer as the refugee, seeking harbor and sanctuary. The people being colonized will be inhumane if they oppose this right. Rejection of that right was a violation of the law of nations and a just cause, again, for war. The author of the *True Declaration* warned that for anyone who had compunctions about such a war, "Let him know that *Plato* defineth it to be no iniustice, to take a sword out the hand of a mad man; That Austen [i.e., Augustine] hath allowed it for a lawful offensive war, *quod ulcitor injurias* that revengeth bloudie injuries."[23]

Recent scholars have not been the first to cast doubt upon the integrity of conventions in the law of nations concerning rights of communication and hospitality, nor have they been the first to see Vitoria as an apologist for Spanish expansionism rather than a critic. Writing in 1672, in *De jure naturae et gentium*, or *On the Law of Nature and Nations*, Samuel Pufendorf critiqued Vitoria in these terms, albeit with the hindsight of the previous two hundred years of expansionist practice.[24] According to Pufendorf, "Franciscus a Victoria, *Relectiones de Indis*, Pt. V, § 3, does not win many to his position when he discusses the adequate grounds on which the Spaniards felt themselves entitled to subdue the Indians."[25] He continued:

> It is crude indeed to try to give others so indefinite a right to journey and live among us, with no thought of the number in which they come, their purpose in coming, as well as the question of whether . . . they propose to stay but a short time or settle among us permanently.[26]

For Pufendorf, ideas of common humanity, and the concomitant rights of natural communication and fellowship, all central for Vitoria, were subordinate to his own conviction that sociability is driven by the universal rule of self-interest and self-preservation.

Writing in 1795, in his *Third Definitive Article for Perpetual Peace*, Immanuel Kant entered into this debate, firmly taking the position that "universal hospitality" was a "cosmopolitan right," and he accordingly rejected Pufendorf's position on the issue. For Kant, the possibility of seeking commerce with

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22 A True Declaration of the Estate of the Colonie in Virginia 9 (printed for William Barret, 1610).

23 *Id.*

24 2 Samuel Pufendorf, De Jure Naturae et Gentium [On the Law of Nature and Nations] 364 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1672); *see also* Richard Tuck, Rights of War and Peace: Political Thought and the International Order from Grotius to Kant 155-65 (1999) (discussing Pufendorf's critique of empire).

25 Pufendore, *supra* note 24, at 364-65.

26 *Id.*

others provided the opportunity for peoples to "enter peaceably into relations with one another" and so bring "the human race ever closer to a cosmopolitan constitution."[27] Importantly, however, and in agreement with Pufendorf, Kant was able to reflect on the fact that the right to communicate with other peoples had been grossly abused by European colonizers: "the injustice they show in *visiting* foreign lands and peoples (which with them is tantamount to *conquering* them) goes to horrifying lengths."[28] In the hundred years separating Pufendorf and Kant, and against a background of long and highly costly wars driven by European imperial rivalries, European philosophers and jurists had become increasingly skeptical of the legal arguments used to justify colonization and Kant's arguments in *Perpetual Peace* reflected those concerns.[29]

Despite the skepticism of Kant and his contemporaries, including William Blackstone, Adam Ferguson, and David Hume, regarding the use of human fellowship, communication and the right of refuge to justify empire, these arguments continued to play an important role in expansionism through to the twentieth century.[30] Indeed, as I shall discuss below, a new wave of European empires in the nineteenth century was built upon humanitarian arguments. It is difficult to separate the history of humanitarianism from the history of expansionism and recent appeals for a responsibility to protect must address that imperial past.

II. Need and Self-Preservation

The second category of assumptions that underpin the notion of sovereignty as trusteeship and the responsibility to protect concern questions of need and self-preservation. According to these assumptions, sovereigns are obliged "toward humankind to use the resources under their control efficiently and sustainably."[31] Moreover, sovereigns cannot exclude others from the use of resources necessary to their own survival and flourishing, particularly when it comes at little cost to them. These assumptions, in common with those based upon sociability, have deep roots in natural law theories. Sixteenth and seventeenth century natural law theorists argued that our first duty is to our

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27 Immaneul Kant, *Toward Perpetual Peace*, *in* Kant: Practical Philosophy 329 (Mary Gregor ed., Mary Gregor trans., 1996).

28 *Id.* at 329.

29 Fitzmaurice, *supra* note 16; Sankar Muthu, Enlightenment Against Empire (2003).

30 For William Blackstone, Adam Ferguson, and David Hume's skepticism of empires, see Fitzmaurice, *supra* note 16.

31 Benvenisti, *supra* note 1, at 309.

own preservation. This principle held true for individuals and also for states, which, as Thomas Hobbes observed, were modeled upon the self-preserving individual in the state of nature.[32] However, because our own preservation depends upon others — no person can survive alone — we are bound in mutually obliging relationships in which we must consider the needs of others when doing so does not compromise our interests, just as they must consider what is necessary to our own survival.

When we consider such ideas in relation to the justification of expansionism, we must again begin with Vitoria. Vitoria agreed with the broader implications of the Roman law of occupation, namely, that where a people inhabit a territory without exploiting it that territory should be open to the use of others, so that "[a]ll things which are unoccupied or deserted become the property of the occupier by natural law and the law of nations, according to the law *ferae bestiae*" (Institutions II.1.12).[33] He hastened to argue, however, that such was not the case with the territories of the peoples the Spaniards had conquered. Those peoples were exploiting the potential in nature: "they have some order (*ordo*) in their affairs: they have properly organised cities, proper marriages, magistrates and overlords (*domini*), laws, industries, and commerce, all of which require the use of reason."[34] Nevertheless, in his typically ambivalent discussion, Vitoria left the door open to the justification of trade and occupation: "the barbarians have a surplus of many things which the Spaniards might exchange for things which they lack. Likewise, they have many possessions which they regard as uninhabited, which are open to anyone who wishes to occupy."[35]

While Vitoria argued that the peoples the Spanish had encountered were efficiently employing their resources, and so could not be occupied or conquered, he had created a potentially powerful justification for expansion: that is, through a simple trope, a people could be re-described from being exploiters of natural resources to not having realized the potential in nature and thus open to occupation. This argument could apply equally to the exploitation of natural resources and to the exploitation of the moral and political laws of nature. As Vitoria said, the existence of laws, conventions and certain social and political systems were as much, or even more, the test of a legitimate society as the instances of material exploitation such as buildings, roads and bridges, which were the outward signs of such moral development. A society,

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32 Thomas Hobbes, Leviathan 90 (Richard Tuck ed., 1991); *see also* Tuck, *supra* note 24, at 13-15.

33 Vitoria, *supra* note 8, at 264.

34 *Id.* at 250.

35 *Id.* at 291.

for example, that had not developed the concept of individual property could not exercise the rights of property over material things, including land and resources, and would therefore be failing to exploit the gifts of nature. The description of non-European peoples' lands and social and political systems as having not sufficiently exploited resources became one of the dominant justifications of occupation and conquest from the sixteenth century to the twentieth.[36] Indeed, it was an argument that became fundamental to the kinds of empire that were established.

In contrast to the Spanish, English plans for colonization were slow to take hold and the English were accordingly slow to engage with Vitoria's writings on the Americas. However, when they established a foothold in Virginia in the first decade of the seventeenth century, Vitoria's thought became central to the justification of their enterprise. One of their promoters was the Dean of St Paul's, John Donne, who, writing more than eighty years after Vitoria, eloquently praised the idea of a common humanity. In his *Meditation 17*, from *Devotions upon Emergent Occasions*, he wrote: "Any man's death diminishes me, Because I am involved in mankind." Indeed, he began this poem on the theme of (im)perfectibility by pointing out that none of us is complete and we are therefore in need of others: "No man is an island/ Entire of itself/ Each is a piece of the continent,/ A part of the main."[37] It comes as little surprise therefore that, preaching a year earlier in his sermon to the Virginia Company, on November 13, 1622, Donne declared that all peoples must take care to use the resources of the world efficiently because they are bound in webs of mutual obligation and mutual need. He argued that the rule in the "municipal" law in "particular States" that "*The State must take order, that every man improove that which he hath, for the best advantage of that State*, passes also through the Law of Nations, which is to all the world, as the *Municipall* law is to a particular State."[38] The conclusion for the law of nations, therefore, was that "The whole world, all Mankinde, must take care, that all places be improved, as far as may be, to the best advantage of Mankind in general."[39] He continued:

> In the law of Nature and Nations, a land never inhabited, by any, or utterly derelicted and immemorially abandoned by the former Inhabitants, becomes theirs that will possesse it. So also is it, if the inhabitants do

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36 Fitzmaurice, *supra* note 16.

37 John Donne, *Meditation 17*, *in* Devotions upon Emergent Occasions 98 (John Sparrow ed., 1923) (1624).

38 John Donne, A Sermon Preached to the Honourable Company of the Virginia Plantation 26-27 (London, Thomas Jones 1622).

39 *Id.* at 27.

> not in some measure fill the Land, so as the Land may bring forth her increase for the use of men.[40]

In this passage, Donne reveals how Vitoria's assumptions regarding our obligation to exploit the resources of the earth could be easily turned into a justification of the appropriation of foreign lands if the people who inhabit those lands can be shown to have failed to address the necessity of pursuing their own self-preservation as well as that of others.

Donne, who probably met Grotius, made an apparent gloss on Grotius's *Mare liberum*, when he concluded: "a man does not become proprietary of the Sea, because he hath two or three Boats, fishing in it, so neither does a man become Lorde of a maine continent, because he hath two or three Cottages in the skirtes thereof."[41] The American Indians, as far as Donne was concerned, were not living up to this responsibility to humanity, they did not "fill the Land," and their territory could accordingly be occupied. The stakes were the preservation of all humanity and, therefore, any resistance on the part of the American Indians could once again be met with force. These claims were repeated throughout justifications of English colonization: "Who will think," Strachey demanded, "it is an unlawful act, to fortefye, and strengthen our selves (as Nature requires) . . . in the wast and vast, unhabited groundes of their[s]" which, he added, they do not "use or know how to turne to any benefit?"[42] Similarly, Strachey's contemporary, the London preacher and Virginia Company promoter Robert Gray, claimed that

> these Savages have no particular proprietie in any part or parcell of that Countrey, but onely a general residencie there, as wilde beasts have in the forest, for they range up and downe like wilde beasts in the forest, without law or government . . . there is not *meum* or *tuum* amongst them.[43]

In these declarations we see that the principle of use, employed by Vitoria in defense of the rights of indigenous Americans, was easily reversed to undermine the rights of other peoples. English colonists quickly seized upon the malleability of these philosophical and rhetorical terms.

John Locke notoriously brought the arguments in these colonizing tracts that the resources of the world should be exploited for the benefit of all into

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40 *Id.* at 26.

41 *Id.* at 27.

42 Strachey, *supra* note 10, at 25.

43 Robert Gray, A Good Speed to Virginia, at C3v-[C4]r (William Welbie ed., 1610).

his theory of property in the *Two Treatises of Government*.[44] Many of the assumptions of Locke's understanding of property — the necessity of exploiting nature, the difference made by labor — were already apparent in the tracts on colonization published in the first decades of the seventeenth century. Conscious of this colonial context, Locke explained his theory of property by analyzing the contrast between the English exploitation of resources and that of American Indians. Locke's own engagement in the colonization of Carolina deepened these ties. Given Locke's place in the liberal canon, for many historians the colonial context of Locke's theory of property points to a structural tendency within liberalism towards expansionism and empire.[45]

For Locke, as for most seventeenth century natural lawyers, self-preservation was a primary natural law. "Natural reason," he argued, "tells us, that Men, being once born, have a right to their Preservation."[46] They have a right, therefore, to such things "as Nature affords for their Subsistence."[47] This meant that the boundaries of states or nations had little importance if questions of need were at stake, particularly given that "God gave the world to men in common."[48] No man, he argued, should have more resources than "he can make use of," although this was clearly the case in America where an abundance of land lay waste or, rather, underutilized.[49] The cost of this underutilization was both to the English, who could flourish on the same land, but also, he pointed out, to the "wretched inhabitants" of the Americas who were ignorant of how to act in the interests of their own self-preservation. In tones reminiscent of Donne,

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44 John Locke, Two Treatises of Government 285 (Peter Laslett ed., Cambridge University Press 1960) (1689).

45 *See* Barbara Arneil, John Locke and America: The Defence of English Colonialism (1996); Uday Singh Mehta, Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought 46-76 (1999); James Tully, An Approach to Political Philosophy: Locke in Contexts (1993); David Armitage, *John Locke, Carolina and the* Two Treatises of Government, 32 Pol. Theory 602 (2004); Duncan Ivison, *The Nature of Rights and the History of Empire*, *in* British Political Thought in History and Literature, 1500-1800, at 191 (David Armitage ed., 2006). For skepticism on this scholarship, see David Armitage, Foundations of Modern International Thought 114-31 (2014); and Paul Corcoran, John Locke on the Possession of Land: Native Title vs. the 'Principle' of Vacuum Domicilium, Paper Presented at Australian Political Studies Association Annual Conference (Monash Univ., Melbourne, Austl., Sept. 24-26, 2007).

46 Locke, *supra* note 44, at 285.

47 *Id.*

48 *Id.* at 291.

49 *Id.* at 293-94.

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Gray and Strachey, Locke declared that "in the wild woods and uncultivated wast of America left to Nature," a thousand acres of land yielded the "needy" inhabitants less of the "conveniences of life" than ten acres of cultivated land in Devonshire.[50]

Implicit in Donne's and Locke's analyses of human needs was the assumption that we are not born in possession of all that we require for our preservation and flourishing. Indeed, for Grotius, human imperfection underlay the necessity for commerce and freedom of the sea. Nature, he argued, gave "all things to all men, but seeing they were barred from the use of many things whereof a man's life standeth in need . . . it was needful to pass from place to place."[51] In Enlightenment thought, these assumptions were developed into a full theory of human perfectibility of which Christian Wolff was one of the earliest exponents.[52] The central concern of Wolff's political philosophy was human perfectibility. According to Wolff, natural law commands all humans to use their natural abilities to achieve the highest state of happiness and harmony with others.[53] Emer de Vattel agreed with Wolff that in addition to pursuing self-preservation and self-perfection, all persons and thus all states, which are fictional persons, should seek the preservation and perfection of others.[54] Just as the seventeenth century natural law theorists had shown that self-preservation needed others in order to succeed, self-perfection similarly needed the help of others because nobody is born with all that they need in order to perfect themselves. For nations, this meant that they must pursue commerce and society with other nations, not out of mutual love, as Vitoria had argued, but out of the need to survive.

Wolff's concern with human perfectibility led him to embrace historical progress and enthusiastically endorse the virtues of civilization. "It is plain," he argued, "because it has to be admitted, that what has been approved by the more civilized nations is the law of nations."[55] At the same time, he argued that the pursuit of human perfectibility meant that nations should respect the

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50 *Id.* at 294.

51 Grotius, *supra* note 17, at 49.

52 2 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum [The Law of Nations Treated According to a Scientific Method] 20-25 (Joseph H. Drake trans., 1934) (1764).

53 *Id.* at 28-29; *see also* Knud Haakonssen, *German Natural Law*, *in* Cambridge History of Eighteenth Century Political Thought 270 (Mark Goldie & Robert Wokler eds., 2006).

54 Emer de Vattel, The Law of Nations 73 (Bela Kapossy & Richard Whatmore eds., 2008) (1758).

55 Wolff, *supra* note 52, at 17; *see also* Brett Bowden, The Empire of Civilization: The Evolution of an Imperial Idea 118-19 (2009); Tuck, *supra* note 24, at 188.

different choices others have made. We are obliged to make our own decisions about how to govern ourselves and restrain our passionate nature, and for this reason each society has to be left to itself to make decisions about how to achieve these goals.[56] According to Wolff, therefore, there is an obligation not only to respect the choice each society makes about its own organization, but also to respect its pursuit of the perfectibility of human nature. These principles whereby each people determined their own internal concerns were vital to post-Westphalian European states, which defined themselves in contrast to the horrors of the wars of religion.

The tolerance implicit in Wolff's understanding of human perfectibility was not, however, sustained in all uses of the concept. The pursuit of perfection, the pursuit of union with others in order to become complete, could be interpreted as a robust form of expansionism in the embrace of other peoples through commerce. It could also lead to the crushing of any peoples who impeded such a right and necessity. Vattel agreed to some degree with Wolff's acceptance of the different paths to perfection, but for Vattel the same pursuit of perfection meant that no people could deny the resources necessary to another people's flourishing. Like Locke, he stipulated that a "nation" may not "appropriate to itself" a country "which it does not really occupy."[57] All humans are under an "obligation to cultivate the earth" and, as with colonizing powers, no nation can appropriate more land than they can "settle and cultivate."[58] His now notorious conclusion from these premises was that peoples like the "ancient Germans" and "modern Tartars" who "disdain to cultivate their lands," living instead by "plunder," "deserve to be extirpated as savage and pernicious beasts."[59] War, and even the extermination of a people, was justified in cases where they impeded others' self-preservation and pursuit of perfection. For Vattel, these conclusions applied to people in the present, not just the historical past, as he ominously concluded at a time of rapid westward expansion in North America: "the Indians of North America had no right to appropriate all that vast continent to themselves."[60]

A final species of the argument concerning need and self-preservation as platforms for sovereign trusteeship and the responsibility to protect is the

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56 Wolff, *supra* note 52, at 17; *see also* Haakonssen, *supra* note 53, at 272-73.

57 Vattel, *supra* note 54, at 214.

58 *Id.* at 216.

59 *Id.* at 129.

60 *Id.* at 234. For nineteenth century jurists' endorsement of human perfectibility, see Henry Bonfils, Manuel de Droit International Public 3 (Paul Fauchille rev., 3d ed. 1901) ("[I]nternational law has its roots in the nature of man, in the instincts and needs of sociability and in perfectibility.").

claim that resources should be shared when sharing comes at no cost to the giver. Borrowing from economic theory, this has been described as a form of Pareto optimality.[61] This idea that resources should be shared has a deep history and one again that is entangled in justifications of empire. While seventeenth century natural jurisprudence generally insisted on the primacy of the right of self-preservation, most jurists also pointed out that, because we are born incomplete and in need of others, when we have done what is necessary for our preservation we should seek the good of others. This means sharing with others those things of which we have plenty, or more than enough. Such claims were made again with regard to colonized peoples. In his 1622 sermon to the Virginia Company, Donne explicitly grounded the necessity for one people to share with another in the natural law of self-preservation and the law of nations:

> [I]f the Land be peopled, and cultivated by the people, and that Land produce in abundance such things, for want whereof their neighbors, or others (being not enemies) perish, the Law of Nations may justify some force, in seeking, by permutation of other commodities which they need, to come to some of theirs.[62]

In such cases, "Plantations in lands, not formerly, our owne, may be lawfull."[63] This was a different kind of claim from that made by Locke, or by Vattel for that matter, when he discussed a land that was not fully occupied. For Donne, of course, the people who must share what was spare were not the English but the American Indians, and force, as he argued, was justified on the part of the English in the exercise of this right of self-preservation in pursuit of the surplus of the American Indians. For Locke, a failure to use the land to produce a surplus meant that the natural law of self-preservation justified the appropriation of that land by people in need. Donne elsewhere, as we have seen, used a very similar argument to that used by Locke, but here, by contrast, he suggests that if other peoples' land produces a surplus, that surplus may be appropriated by recourse to the argument of sharing with those who are in need. Similarly, preaching before the Virginia Company thirteen years earlier, William Crashaw had argued that "[i]t is most lawful to exchange with other Nations, for that which they may spare."[64] He hastened to add that nothing would be taken by "power nor pillage," but only

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61 Benvenisti, *supra* note 1, at 321.

62 Donne, *supra* note 37, at 27.

63 *Id.*

64 William Crashaw, A Sermon Preached Before the Right Honourable the Lord Lawarre, at [D3]v-[D4]v (London, William Welby, 1610).

> what they may spare: first, land and roome for us to plante in. . . . Again, they may spare us Timber, Masts, Crystal (if not better stones), Wine, Copper, Iron, Pitch, Tar, Sassafras, Sope ashes (for all these and more we are sure the Countrey yeeldes in great abundance) . . . . These things they have, these they may spare, these we neede, these we will take of them.[65]

As in the case of the notion of sanctuary, whereby English colonizers claimed to be seeking sanctuary, in the law of nations the question of who is in need is often a matter of perspective. The argument of need, or necessity, and the maxim "*necessitas non habet legem*," or necessity knows no law, was a central pillar of the early modern reason of state tradition.[66] As such, necessity was notoriously an argument that could be rhetorically manipulated. What, the critics asked, constitutes necessity? Who decides cases of necessity? Similarly, and as Donne's and Crashaw's arguments reveal, cases of need or necessity beyond the state were equally, if not more, open to manipulation.

III. The Obligation to Take Others' Interests into Account

One of the most important assumptions underlying sovereign trusteeship is the notion that, as trustees of humanity and not just of national interests, sovereigns have an obligation to take the interests of peoples outside their sovereignty into account.[67] The obligation of sovereigns to take others' interests into account was derived from a conception of human interdependency, so the interests of citizens of the sovereign may be bound up with the interests of non-citizens (diseases, for example, know no borders), and from these ties is derived a responsibility of the sovereign to protect non-citizens. This idea has a long historical genealogy. It is a history, once again, that has been closely bound with European expansion and empire.

The English conquest of North America was justified precisely as a venture undertaken, above all, for the benefit of the Native Americans. Citing Augustine and Justice Lipsius, Robert Gray argued "that warre is lawfull which is undertaken, not for covetousnesse and crueltie, but for peace and unities sake: so that lewde and wicked men may thereby be suppressed and good

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65 *Id.*

66 Istvan Hont, Jealousy of Trade: International Competition and the Nation-State in Historical Perspective 11 (2005).

67 Benvenisti, *supra* note 1, at 314-18.

men maintained and relieved."[68] Applying this principle of intervention to support the virtuous and punish the wicked to Virginia, he argued: "The warre be undertaken to this ende, to reclaime and reduce those Savages from their barbarous kinde of life, and from their brutish and ferine manners to humanitie, pietie, and honestie."[69] He was therefore able to conclude: "Those people are vanquished to their unspeakable profite and gaine."[70] The interests served were those of the colonized rather than the colonizer. The idea that colonization was undertaken for the benefit of the colonized was a standard claim of seventeenth and eighteenth century empires.

Sir William Blackstone cast a skeptical eye over that history when he observed:

> But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.[71]

Blackstone was writing at a time, just after the Seven Years' War and more than one hundred and fifty years after Robert Gray, when skepticism of European empires and the wars they generated was high. Nevertheless, the civilizing mission, undertaken to further the interests of non-European peoples, had not even reached its peak. That came in the second half of the nineteenth century in the so-called "scramble for Africa" and in Western states' extension of extraterritorial powers over large parts of the globe. In July 1885, Jules Ferry declared in the French chamber of deputies: "the superior races have a right because they have a duty. They have a duty to civilise the inferior races."[72]

This civilizing mission was embraced by many international lawyers, even those who shared some of Blackstone's concerns about its unintended consequences. While many jurists understood that humanitarian sentiments had been used to justify plunder, appropriation, and massacres in the past,

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68 Gray, *supra* note 43, at [C4]v.

69 *Id.* at [C4]r-[C4]v.

70 *Id.* at [C4]v.

71 2 William Blackstone, The Commentaries on the Laws of England 7 (1765-1769).

72 Jules Ferry, Speech Given Before the House of Representatives (July 28, 1885), *printed in* 5 Discours et Opinions de Jules Ferry [Discourses and Opinions of Jules Ferry] 210 (Paul Robiquet ed., Armand Colin & Cie 1897).

they believed that they had learned from those mistakes and were inaugurating an epoch of liberal intervention. Robert Joseph Phillimore, Admiralty Court judge and probably Britain's most senior international lawyer in the 1870s and 1880s, conceded that even Britain "is not without her share of the guilt in forcibly dispossessing and exterminating unoffending inhabitants of countries with whom she had no just cause of war."[73] But at the same time, he was in no doubt that "the cultivation of the soil is an obligation imposed upon man."[74] He insisted the "practice of nations in both hemispheres . . . is in favour of any civilized nation making settlement of an uncivilized country."[75] Similarly, Phillimore's Scottish contemporary, James Lorimer, Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh, was strongly in agreement on this question. Lorimer argued that Europeans were bound by an obligation of "guardianship" to races who suffered from "nonage" or imbecility.[76]

In France, Frantz Despagnet echoed anxieties about the injustices inflicted by the pursuit of others' interests, claiming that "the true end of the occupation of territories is the enrichment of the strong to the detriment of the weak."[77] The "pretended right to spread civilisation" had been used to "despoil savage peoples of their sovereignty."[78] "We know," he said, "with what casualness the powers have treated . . . the rights of indigenous peoples: neither their institutions, their property, their goods, nor, most of all, has their sovereignty as states been respected."[79] He continued: "publicists, in favour of respect for their right of sovereignty, such as Francisco de Vitoria, Dominique de Soto, Diego Covarrubias and Francisco Suarez were without effect in stopping the monstrous abuses of force against the weakest races."[80] This "lamentable history" was well known, he observed, and it would seem "that the series of horrors observed in the past have not completely ended."[81] He concluded, therefore, that the "propaganda of civilisation" could only justify the nourishment of pacific relations with barbarian countries, including the right of communication

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73 Robert Joseph Phillimore, 1 Commentaries upon International Law 210 (Butterworths 1854-1861).

74 *Id.* at 209.

75 *Id.*

76 1 James Lorimer, The Institutes of the Law of Nations 157 (William Blackwood & Sons 1884).

77 Frants Despagnet, Cours de Droit International Public 433 (Larose & Forcel, 2d ed. 1899).

78 *Id.*

79 Frantz Despagnet, Essai Sur Les Protectorats 241 (Larose & Forcel 1896).

80 *Id.* at 242.

81 *Id.*

and trade.[82] "An absolute respect," he declared, "was due to all sovereignty, even barbarian."[83] Despagnet's absolute respect for sovereignty meant that any peoples who were not perceived to live in sovereign political systems could have the sovereignty of their territory occupied, albeit not their property. We can, he argued,

> consider as susceptible to occupation a land inhabited by groups without appreciable political organisation, who don't even have a conception of sovereignty and who cannot, as a consequence, make a claim to that right. We can, in the same manner, recognise a right of property or at least an anterior possession, but of sovereignty there is no question.[84]

It was on these principles that in his later work on the diplomacy of the French Third Republic, Despagnet argued forcefully to justify French occupations, or "protectorates," in Africa, including Tunisia and Brazza's civilizing mission in the Congo.[85] Like Philimore, despite his warnings and his strong consciousness of the miserable history of European interventions in the interests of non-European peoples, Despagnet was able to justify further actions taken in the name of an obligation to others, for example in the Congo, that would come at a terrible human cost.

The context for Despagnet's observations was the Berlin Conference of 1884-1885, also known as the Congo Conference (although it was concerned with rules governing imperial occupation around the globe). From December 1884 through to February 1885, ambassadors and other representatives of the great powers met in conference in Berlin, at the invitation of Prince Bismarck, to debate the future of Africa, the principles of occupation, and the destiny of European empires more generally. One of the principal stated aims of that conference was to take the interests of non-European peoples into account. Indeed, the General Act of Berlin Conference, signed by the plenipotentiaries on February 26, 1885, declared that the aim of the conference was to discover "the means of furthering the moral and material well-being of the native populations [of Africa]."[86] This objective included a *Declaration Relative to*

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82 Despagnet, *supra* note 77, at 434.

83 *Id.*

84 *Id.*

85 *See* Despagnet, La Diplomatie Da La Troisième République [The Diplomacy of the Third Republic] (1904); Martti Koskenniemi, The Gentle Civlizer of Nations 272-73 (2001).

86 Henry Wellington Wack, *General Act of the Berlin Conference*, *in* The Story of the Congo Free State 531 (1905).

the Slave Trade, which forbade the trade of slaves in Africa "in conformity with the principles of international law."[87]

According to the delegates at the conference, one of the reasons why the slave trade continued to flourish in Africa in the second half of the nineteenth century was that the Congo Basin was a semi-anarchic territory, void of effective sovereignty.[88] A further cause for concern to the Powers was that this supposedly anarchical state left the traders of different nations operating in the Congo in a situation where conflicts easily arose and could not easily be adjudicated. In the years leading up to the conference, the eminent British jurist Travers Twiss argued in the *Law Magazine and Review* that while the tribes of the Congo exercised a form of sovereignty comparable with the personal sovereignty of medieval European princes, the territory lacked any form of territorial sovereignty characteristic of a modern state: "The organisation of the native races on the banks of the Congo is still *tribal*, and *territorial* Sovereignty in the sense in which it has superseded *personal* Sovereignty in Europe, is still unknown."[89] According to Twiss, it was possible for the Europeans to occupy such vacuums in territorial sovereignty, while bringing the benefits of order to the inhabitants of those territories, without violating the existing rights of property and personal sovereignty. Such territories, Twiss argued, using a term he imported from ecclesiastical law into international law, were "*nullius territorium*" or "*territorium nullius*." In the debates amongst jurists in the *Institut de droit international* concerning the principles established at the Berlin Conference, the term *territorium nullius* came to be used to describe peoples who lacked a form of territorial sovereignty (to be distinguished from the later use of "*terra nullius*" to describe the absence of property as well as sovereignty, and also to be distinguished from the term "*res nullius*" in civil law).[90]

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87 *Declaration Relative to the Slave Trade*, *in* The Story of the Congo Free State, *supra* note 86, at 531, 535.

88 *See* Fitzmaurice, *supra* note 16, ch. 9.

89 Travers Twiss, An International Protectorate of the Congo River 17 (1883), *reprinted in* Travers Twiss, *An International Protectorate of the Congo River*, 250 Law Mag. & Rev. 1 (1883); *see also* Travers Twiss, *La libre navigation du Congo* [*The Free Navigation of the Congo River*], 15 Revue De Droit International [Rev. Int'l L.] 437 (1883); Travers Twiss, *La libre navigation du Congo. Deuxième article* [*The Free Navigation of the Congo River. Second Article*], 15 Revue De Droit International [Rev. Int'l L.] 547 (1883).

90 Edouard Englehardt, Etude sur la déclaration de la conférence de Berlin relative aux occupations africaines suivie d'un projet de déclaration générale sur les occupations en pays sauvages [Study of the Declaration of the Berlin Conference Concerning African Occupation Following a Project for a General

Although it was not publicly acknowledged or stated in his publications, Twiss was working for King Leopold II of Belgium on the elevation of Leopold's International Association of the Congo to recognition as a state in international law. Leopold and Twiss would achieve this objective at the Berlin Conference, which Twiss attended with the British delegation, even as he wrote the constitution of the Congo Free State.[91] Leopold's Congo Free State certainly curtailed the slave *trade* in the Congo Basin even as it effectively enslaved and decimated the population of the territories at a cost in lives estimated at several millions. The idea of *territorium nullius* flourished while protectorates continued to be employed as instruments of the civilizing mission, but it almost vanished from international law in the period following decolonization. The history of the idea of *territorium nullius* serves as a reminder of how the codification in international law of conventions enabling states to take the interests of others into account can have devastating consequences, sometimes unintended.

Conclusion

When modern European empires declined in the twentieth century, the arguments of human fellowship, self-preservation and the protection of others were translated to the new international order, along with much of the vocabulary of Western political thought, including the understandings of sovereignty, property and international law itself.[92] That transformation should give us cause to be optimistic about the malleability of political ideas. It suggests that we are not prisoners of our intellectual landscape, that political concepts can be turned to different ends. Many contemporary scholars of the history of international law, and historians and social scientists more generally, argue that the instruments of Western political and legal thought cannot easily

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Declaration of Occupation in Savage Countries] (Bruxelles 1887); Ferdinand Martitz, *Occupation des territoires: Rapport et projet de résolutions présentés a l'Institut de droit international* [*Occupation of Territory: Report of the Project and Resolutions Presented at the Institute of International Law*], 19 Revue De Droit International [Rev. Int'l L.] 373 (1887); *see also* Fitzmaurice, *supra* note 16, ch. 9.

91 Andrew Fitzmaurice, *Liberalism and Empire in Nineteenth Century International Law*, 117 Am. Hist. Rev. 122 (2012).

92 I say "much of" because certain political vocabularies specific to empire, such as the vocabulary of occupation, including *territorium nullius*, were significantly diminished in the postcolonial political environment. *See* Fitzmaurice, *supra* note 16.

transcend the historical circumstances of their emergence.[93] Given that those conditions include the use of those tools over centuries to justify European empire, expansion and hegemony, these scholars speculate on whether the ties are not merely accidental but causal. In light of the history of arguments concerning a common humanity, self-preservation and consideration of the interests of others, it is hard to conclude otherwise.

Nevertheless, the conventions of political thought, I would argue, are just tools: the conditions of their production should not determine the ends to which they are put. They certainly should be capable of being transported into different historical circumstances albeit while changing their meaning at the same time. Such conventions are not, that is, trans-historical unit ideas of the kind that A.O Lovejoy believed should be the subject of the history of ideas.[94] Sometimes changes in the conventions of political thought are subtle and difficult to identify, so that it may look like we are dealing with the same thing. Nevertheless, what is true of material tools should be true of abstract tools. We do not regard with the same suspicion the ideological baggage of material tools transferred between cultures, whether that would be gunpowder, paper, or antibiotics. There is often a failure in what might be called the postcolonial scholarship on political thought to recognize that changes in the context of the terms of political discourse will lead to changes in the meaning of those terms.

The problem is not, as many such historians have argued, the degree to which political languages are extricable from their contexts; it is, rather, one of knowing which contexts we are looking at. The circumstances of the return of sovereign trusteeship and the responsibility to protect can be interpreted in contrasting ways. One account of the "turn to protection" ties it to a post-Cold War international order reacting against liberal economic ideas.[95] From this perspective, the responsibility to protect is a rejection of the idea that international institutions should be indifferent to questions of representation and an attempt to harness the authority that those organizations have exercised in

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93 For international law, see Anghie, *supra* note 9. For Western political thought, see, for example, Mehta, *supra* note 45; Tuck, *supra* note 24; James Tully, Strange Multiplicity: Constitutionalism in the Age of Diversity (1995); Williams, *supra* note 9; and B. Parekh, *Liberalism and Colonialism*: *A Critique of Locke and Mill*, *in* The Decolonization of the Imagination: Culture, Knowledge and Power 81 (J.N. Pieterse & B. Parekh eds., 1995).

94 On Lovejoy and unit ideas, see Quentin Skinner, Visions of Politics: Regarding Method 83 (2002).

95 Orford, *supra* note 1.

the decolonized world.[96] At the same time, many recent appeals to trusteeship address problems concerning the sharing of resources and the environment which cannot be resolved with an atomized view of state sovereignty.[97] With the return, however, in recent times to what many scholars believe is a new period of, if not empire, at least hegemony, domination and dependence in international relations, it is important to recall the strong historical ties to expansionism of the central ideas underpinning sovereign trusteeship.[98] History does not determine how concepts can be used, but it does provide us with an understanding of what may be possible. The "turn" to sovereign trusteeship can be interpreted either in terms of a new and more positive view of international relations, or in terms of the projection of sovereignty and the resurgence of empire, or both.

The key question is how we can tell which it is. As the examples given above show, we cannot know from the simple statement of a concept, such as trusteeship, protection, or rights, what the meaning of that concept is. One of the most striking characteristics of this political vocabulary, as I have attempted to show, is that its terms are susceptible to rhetorical manipulation. To understand what is meant by the utterance of those terms in a particular case, we need to examine them in their contexts. Only from context can we understand what somebody is doing in appealing to a particular concept. In a recent article, Anne Orford has criticized the so-called Cambridge school of the history of political thought and defended anachronism.[99] She argues that

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96 Anne Orford, *Global Responsibility to Protect? The Legal Significance of the Responsibility to Protect Concept*, 3 Global Resp. Protect 400 (2011).

97 Benvenisti, *supra* note 1, at 331.

98 On the perceived return to empire, see Anghie, *supra* note 9, at 292; Lessons of Empire: Imperial Histories and American Power (C.J. Calhoun, Frederick Cooper & K.W. Moore eds., 2006); and Jennifer Pitts, *Political Theory of Empire and Imperialism*, 13 Ann. Rev. Pol. Sci. 211 (2010).

99 Anne Orford, *On International Legal Method*, 1 London Rev. Int'l L. 166, 170-77 (2013). Orford is responding to critiques of anachronism in the history of international law. *See, e.g.*, Georg Cavallar, *Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?*, 10 J. Hist. Int'l L. 181 (2008); Ian Hunter, *The Figure of Man and the Territorialisation of Justice in "Enlightenment" Natural Law: Pufendorf and Vattel*, 23 Intell. Hist. Rev. 289, (2012); Randall Lesaffer, *International Law and Its History: The Story of an Unrequited Love*, *in* Time, History and International Law 27 (M. Craven, M. Fitzmaurice & M. Vogiatzi eds., 2007). These critiques draw upon the methodology outlined in Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 Hist. & Theory 3 (1969).

"legal scholarship is necessarily anachronistic" because it is concerned with the operation of past concepts in the present.[100] The concern with anachronism in contextualist methodology, which is prominent in the "Cambridge School" methodology, is based upon a Wittgensteinian theory of the creation of meaning.[101] Orford argues that international law, by contrast, must also be concerned with the "movement of meaning" over time.[102]

However, problems of time are not the only reason why we need to understand concepts in context. Above all, meaning is created by the operation of terms within particular linguistic fields. If we ignore those linguistic contexts, it becomes possible not only to impose meanings from other times, but also to impose alternative meanings that could belong to the same time. Thus the meanings of fellowship, self-preservation, and protection differ radically between situations in which they are used to understand relations between sovereigns and subjects in the context of the state, on the one hand, and between sovereigns and non-state subjects, on the other.[103] In other words, when a concept is not understood in terms of what its utterance is doing in context, its meaning becomes susceptible to rhetorical manipulation. Such manipulation should be a concern not only to historians but also from the perspectives of law or politics. Sovereign trusteeship and the responsibility to protect are good examples of terms that are easily rhetorically manipulated. If we abandon contextualism, we open ourselves to the danger that sovereigns may, for example, hide expansionist politics behind claims to protect the rights of others without being subject to critical scrutiny. Understanding the history of the imperial context of the arguments of human fellowship, self-preservation and the protection of others should at least alert us to the possible manipulation of those concepts to justify expansionism.[104]

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100 Orford, *supra* note 99, at 175.

101 *See* Skinner, *supra* note 99.

102 Orford, *supra* note 99, at 175.

103 As the complex history of European expansion reveals, however, for example in the cases of eighteenth century British America or mid-twentieth century Algeria, who is to say when a subject belongs to the state or to an empire? For citizenship in pre-independence Algeria, see Saliha Belmessous, Assimilation and Empire (2013).

104 See Anghie, *supra* note 9, at 320 for a similar argument.

Three Grotian Theories of Humanitarian Intervention

*Evan J. Criddle**

This Article explores three theories of humanitarian intervention that appear in, or are inspired by, the writings of Hugo Grotius. One theory asserts that natural law authorizes all states to punish violations of the law of nations, irrespective of where or against whom the violations occur, to preserve the integrity of international law. A second theory, which also appears in Grotius's writings, proposes that states may intervene as temporary legal guardians for peoples who have suffered intolerable cruelties at the hands of their own state. Each of these theories has fallen out of fashion today based on skepticism about their natural law underpinnings and concerns about how they have facilitated Western colonialism. As an alternative, this Article outlines a third theory that builds upon Grotius's account of humanitarian intervention as a fiduciary relationship, while updating Grotius's account for the twenty-first century. According to this new fiduciary theory, when states intervene to protect human rights abroad they exercise an oppressed people's right of self-defense on their behalf and may use force solely for the people's benefit. As fiduciaries, intervening states bear obligations to consult with and honor the preferences of the people they seek to protect, and they must respect international human rights governing the use of force within the affected state. By clarifying the respective responsibilities of the Security Council and individual states for humanitarian intervention, the fiduciary theory also lends greater coherency to the international community's "responsibility to protect" human rights.

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Introduction

This Article examines three theories of humanitarian intervention[1] that can be traced to Hugo Grotius, the brilliant seventeenth-century Dutch scholar and diplomat whose writings have left an indelible mark on international law. Two of the theories appear in Grotius's influential treatise *On the Laws of War and Peace*.[2] The third theory, while not advanced by Grotius himself, seeks to reconcile Grotius's ideas with a key feature of the contemporary international legal order: the U.N. Security Council's exclusive authority under the U.N. Charter to authorize humanitarian intervention.[3] All of these theories qualify as "juridical theories" insofar as they seek to explain the formal legal basis, structure, and scope of state authority to use force in response to human rights violations abroad. Despite their common tie to Grotius, however, the three theories offer distinct visions of the purpose and limits of humanitarian intervention.

The first theory asserts that when states use force in response to human rights violations abroad, the primary purpose is to punish the violation of international norms in order to protect the integrity of international law as a normative order. Grotius famously argued that all states are entitled to punish violations of the law of nature (*ius naturale*) and the positive law of nations (*ius gentium*),[4] irrespective of where or against whom the violations occur, to vindicate the rule of law.[5] Echoes of this theory can be discerned in contemporary practice, as some states continue to argue that they may use force without the U.N. Security Council's authorization to counter serious violations of international law. Yet, the idea that international law supports a universal right of punishment no longer commands widespread acceptance

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1 Although the term "humanitarian intervention" may refer to other measures such as economic coercion and the delivery of humanitarian aid, this Article focuses on the narrower question whether states may use *force* to protect human rights abroad.

2 Hugo Grotius, On the Law of War and Peace (A.C. Campbell trans., London 1814) (1625).

3 U.N. Charter art. 42.

4 For Grotius, "natural law" denotes rules derived from "right reason, shewing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational nature." Grotius, *supra* note 2, bk. I, ch. 1, pt. X. In contrast, the "law of nations" represents a system of positive rights applicable to the relations among sovereign states, and between sovereign states and their people, "deriving its authority from the consent of all, or at least of many nations." *Id.* bk. I, ch. 1, pt. XIV.

5 *Id.* bk. II, ch. 20, pt. VII.

across the international community. Most international lawyers now reject the idea that states are entitled to punish one another unilaterally, based on concerns that a state's unilateral assertion of punitive powers over another state presupposes a hierarchical relationship that is inconsistent with the principle of sovereign equality.[6] Moreover, the suggestion that humanitarian intervention is fundamentally punitive in nature does not mesh well with the primarily defensive character of humanitarian intervention as observed in practice. Grotius's general theory of international law enforcement is ill-suited, therefore, to explain when and how states may engage in humanitarian intervention today.

A second theory of humanitarian intervention appears in a passage from *On the Law of War and Peace* that has passed into relative obscurity. Addressing his attention to the "Causes of Undertaking War for Others," Grotius asserts that the law of nature authorizes states to serve as temporary guardians for foreign nationals abroad who have suffered intolerable cruelties at the hands of their own state.[7] Under Grotius's guardianship theory, states that use force to protect human rights abroad exercise a foreign people's natural right to resist oppression on their behalf, and they accordingly bear fiduciary obligations to use force solely for the benefit of a foreign people. Unlike Grotius's theory of international punishment, this guardianship theory resonates with the contemporary practice of humanitarian intervention in important respects; states that invoke humanitarianism as a basis for intervention tend to justify their actions as a purely defensive measure undertaken for and on behalf of an oppressed people to prevent death and suffering.[8] On the other hand, Grotius's guardianship theory is vulnerable to the objection that the international community has retreated from the idea that natural law constitutes an independent source of authority for military intervention.[9] Moreover,

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6 *See* Harry D. Gould, The Legacy of Punishment in International Law 29-34 (Palgrave Macmillan 2010); Alexis Blane & Benedict Kingsbury, *Punishment and the* Ius Post Bellum, *in* The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire 241, 241-43 (Benedict Kingsbury & Benjamin Straumann eds., 2010) (observing that states no longer formally justify inter-state enforcement measures in punitive terms).

7 Grotius, *supra* note 2, bk. II, ch. 25, pt. VIII.

8 *See, e.g.*, Press Statement of NATO Secretary-General Javier Solana, NATO Press Release 040 (Mar. 23, 1999) (explaining that NATO intervention in Kosovo would "be directed towards disrupting . . . violent attacks" and "prevent[ing] more human suffering and more repression and violence").

9 *See* John J. Merriam, Note, *Kosovo and the Law of* Nations, 33 Case W. Res. L. Rev. 111, 118 (2001); *cf.* Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 Brit. Y.B. Int'l L. 1, 46 (1946) ("The doctrine of

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fiduciary concepts such as "guardianship" and "trusteeship" have a disturbing historical legacy, as colonial powers have used these concepts to dress up their domination and exploitation of first nations as a form of benevolent humanitarianism.[10] The fact that Grotius's guardianship theory allows each state to judge for itself the legality of its intervention further augments its potential for abuse. As a result, Grotius's vision of humanitarian intervention as a guardian-ward relationship between intervening states and oppressed foreign peoples has all but disappeared from contemporary legal discourse.

As an alternative to Grotius's own theories, this Article articulates and defends a third theory of humanitarian intervention that draws inspiration from Grotius's guardianship theory. Although Grotius could not have anticipated the U.N. Charter's collective security regime, the juridical structure of humanitarian intervention as authorized by the U.N. Security Council bears the hallmarks of a fiduciary relationship akin to guardianship or trusteeship. When the Security Council green-lights humanitarian intervention, it entrusts states and regional organizations with authority to use force abroad in a fiduciary capacity. Like other fiduciaries in private and public law, states that engage in humanitarian intervention hold discretionary power over the legal and practical interests of their designated beneficiaries (foreign nationals), and they bear a concomitant fiduciary obligation to exercise this power exclusively for their beneficiaries' benefit. These features of the juridical structure of humanitarian intervention clarify the legal basis and scope of states' authority to protect human rights abroad. For ease of reference, I refer to this account — which takes inspiration from Grotius, but does not depend on Grotius's own natural law premises — as the "fiduciary theory" of humanitarian intervention.

The remainder of this Article introduces the fiduciary theory in four steps. Part I reviews Grotius's theory that states have a universal right to punish violations of the law of nature, and it explains why this theory does not offer a plausible theoretical framework for humanitarian intervention today. Part II describes Grotius's lesser-known guardianship theory of humanitarian intervention and evaluates its strengths and weaknesses. Drawing insights from Grotius's guardianship theory, Part III outlines the fiduciary theory of humanitarian intervention and shows how the theory fits within the landscape of contemporary international norms and institutions, including the controversial

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humanitarian intervention has never become a fully acknowledged part of positive international law.").

10 *See* Antony Anghie, Imperialism, Sovereignty and the Making of International Law 28-30 (2005); Evan J. Criddle, *A Sacred Trust of Civilization: Fiduciary Foundations of International Law*, *in* Philosophical Foundations of Fiduciary Law 404, 406-08 (Andrew Gold & Paul Miller eds., 2014).

Responsibility to Protect (R2P) principle.[11] To illustrate how the fiduciary theory should inform the law and practice of humanitarian intervention prospectively, Part IV briefly sketches three proposals for reforming current international norms and institutions. First, when states engage in humanitarian intervention, the fiduciary theory suggests that they bear a corresponding obligation to consult with and honor the preferences of those whom they seek to protect. Second, intervening states must respect international human rights norms governing the use of force — including the strict proportionality standards associated with the human "right to life."[12] Third, when issuing resolutions that authorize humanitarian intervention, the Security Council should incorporate more robust procedural and substantive checks to ensure that intervening states can be held accountable for abusing their entrusted authority. For the fiduciary theory to transcend its colonialist past and serve as a credible bulwark against great-power domination,[13] these and other concrete legal and institutional reforms will be necessary to ground the rhetoric of fiduciary duty in reality.

I. Grotius's Theory of International Punishment

The idea that states may enforce international law through punitive military action can be traced back to Grotius, who famously claimed that all members of international society were entitled to punish violations of natural law and the positive law of nations, irrespective of where or against whom the violations occurred. This universal license to punish was justified, Grotius argued, based on the absence of a "superior" authority in international society and the need for retribution and deterrence to vindicate principles of natural justice.[14] A state did not need to demonstrate that it had suffered any individualized injury

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11 *See* 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter World Summit Outcome].

12 International Covenant on Civil and Political Rights art. 6.1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

13 Some scholars argue that colonialism is a fundamentally unreformable feature of international law generally, and of humanitarian intervention in particular. *See, e.g.*, China Miéville, Between Equal Rights: A Marxist Theory of International Law 3 (2005); Anne Orford, Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law 46-48 (2003).

14 *See* Grotius, *supra* note 2, bk. II, ch. 20, pt. III; Benjamin Straumann, *The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law*, 2 Stud. Hist. Ethics 1 (2006).

before it could undertake enforcement action; instead, "any one of sound judgment who is not subject to vices of the same kind or of equal seriousness" could administer punishment.[15] The mere fact that the law had been violated was sufficient cause to support enforcement action by any member of the international community.

Grotius stressed that his theory of punishment justified warfare for the purpose of punishing states that violate the law of nature.[16] Hence, a sovereign could justly wage war "against those who feed on human flesh . . . . Regarding such barbarians, wild beasts rather than men, one may rightly say . . . that war against them is sanctioned by nature."[17] According to Grotius's account, any state could rightfully claim authority to use force to punish another state's inhumane treatment of its own people because enforcement action was necessary to vindicate natural law.

Grotius's theory of international punishment continues to surface from time to time in international legal discourse today. A striking recent example is the reaction of the United States and the United Kingdom to Syria's use of chemical weapons against its own people during its ongoing civil war. In August 2013, the international news media reported that the Syrian government of Bashar al Assad had used poison gas during an assault against Adra, a densely inhabited northern suburb of Damascus.[18] The attack claimed nearly 1500 lives, including at least 426 children.[19] Although Syria was not a party to the Chemical Weapons Convention at the time,[20] its indiscriminate use of

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15 Grotius, *supra* note 2, bk. II, ch. 20, pt. VII. John Locke famously echoed Grotius's theory of a universal right to punish. *See* John Locke, Second Treatise on Government § 7 (C.B. Macpherson ed., 1980) (1690).

16 *See* Grotius, *supra* note 2, bk. II, ch. 20, pt. XL (arguing that sovereigns "have the right of demanding punishments not only on account of injuries committed against them or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations to any persons whatsoever").

17 *Id.*

18 Joby Warrick, *More Than 1400 Killed in Syrian Chemical Weapons Attack, U.S. Says*, Wash. Post, Aug. 30, 2013, http://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html.

19 *Id.*

20 *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 316 (entered into force Apr. 29, 1997). Syria was a party to the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare at the

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chemical weapons against civilian neighborhoods violated bedrock principles of international humanitarian law that are widely accepted as universally binding in non-international armed conflict.[21] The Adra attack also made headlines internationally because it crossed a "red line" that U.S. President Barack Obama had imposed against Syria exactly one year earlier, raising the possibility of an international military response.[22]

Both the United States and the United Kingdom swiftly declared that Syria's use of chemical weapons could not go unpunished. With the U.N. Security Council paralyzed by the threat of a Russian veto, U.S. President Barack Obama stated that he was prepared "to order a limited strike against the Assad regime . . . to deter the further use of chemical weapons."[23] U.K. Prime Minister David Cameron concurred: "This is not about wars in the Middle East. This is not even about the Syrian conflict. It is about the use of chemical weapons and making sure, as a world, we deter their use and we deter the appalling scenes that we've all seen on our television screens."[24] Although neither the United States nor the United Kingdom suffered any direct injury from Syria's use of chemical weapons against its own people, both claimed authority under international law to use force unilaterally to punish Syria's inhumane actions.

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time of the Adra attack, but the Protocol did not apply because it prohibits the use of chemical weapons only in *international* armed conflict. *See* Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, *available at* https://www.icrc.org/ihl/INTRO/280?OpenDocument.

21 *See* Additional Protocol I to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts art. 51, June 8, 1977, 1125 U.N.T.S. 3 (prohibiting indiscriminate attacks and attacks directed against the civilian population); Int'l Comm. of the Red Cross, Customary International Humanitarian Law Rules, Rule 74 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), *available at* http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter24_rule74 (characterizing the prohibition against the use of chemical weapons as customary international law applicable during non-international armed conflict).

22 Press Release, The White House, Remarks by the President to the White House Press Corps (Aug. 20, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps.

23 President Barack Obama, Remarks in Address to the United Nations General Assembly (Sept. 24, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/09/24/remarks-president-obama-address-united-nations-general-assembly.

24 *See Syria: Transcript of PM's Interview*, Prime Minister's Office (Aug. 27, 2013), https://www.gov.uk/government/speeches/syria-transcript-of-pms-interview.

In the end, military action was averted when Syria unexpectedly agreed to cooperate in the disposal of its chemical weapons stockpiles. Nonetheless, the United States and the United Kingdom did not repudiate their earlier claims that international law would permit them to use force unilaterally as a punitive measure to enforce the international prohibition against chemical weapons attacks. Although neither the United States nor the United Kingdom explicitly invoked Grotius, their arguments for using force against the Assad regime without the Security Council's approval closely tracked Grotius's theory that "a serious crime cannot be unpunishable."[25]

Few legal scholars accepted the U.S.-U.K. argument for military intervention in Syria,[26] and for good reason. Article 2(4) of the U.N. Charter expressly prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[27] Although creative interpretations of this provision abound,[28] Article 2(4) is generally understood to prohibit states from using

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25 Grotius, *supra* note 2, bk. II, ch. 20, pt. II; *cf. Chemical Weapon Usage by Syrian Regime: UK Government Legal Position*, Prime Minister's Office (Aug. 29, 2013), https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position (defining conditions for lawful unilateral humanitarian intervention); Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, Just Security (Oct. 2, 2013), http://justsecurity.org/2013/10/02/koh-syria-part2/ (same).

26 For a sampling of the critical reception, see Oona A. Hathaway & Scott J. Shapiro, *On Syria, A U.N. Vote Isn't Optional*, N.Y. Times, Sept. 13, 2013, *available at* http://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html?_r=0; Kevin Jon Heller, *Four Thoughts on Koh's Defense of Unilateral Humanitarian Intervention*, Opinio Juris (Oct. 2, 2013), http://opiniojuris.org/2013/10/02/four-thoughts-kohs-defense-unilateral-humanitarian-intervention/; David Kaye, *Harold Koh's Case for Humanitarian Intervention*, Just Security (Oct. 7, 2013), http://justsecurity.org/1730/kaye-kohs-case/; and Carsten Stahn, *On 'Humanitarian Intervention,' 'Lawmaking' Moments and What the 'Law Ought to Be' — Counseling Caution Against a New 'Affirmative Defense to Article 2(4)' After Syria*, Opinio Juris (Oct. 8, 2013), http://opiniojuris.org/2013/10/08/guest-post-humanitarian-intervention-lawmaking-moments-law-counseling-caution-new-affirmative-de/.

27 U.N. Charter art. 2(4).

28 A few scholars have argued, for example, that humanitarian intervention without Security Council authorization does not ordinarily transgress Article 2(4), because it is not directed against the "territorial integrity" or "political independence" of the target state and advances the purposes of the United Nations. *See, e.g.*, Fernando R. Tesón, Humanitarian Intervention: An Inquiry into Law and

force except in cases of "individual or collective self-defense if an armed attack occurs" or pursuant to Security Council authorization "to maintain or restore international peace and security."[29] Neither of these exceptions to Article 2(4) can plausibly be stretched to permit unilateral punitive action. Nor do general state practice and *opinio juris* in the Charter era support the idea that international custom would permit states to use force for punitive purposes.[30]

Taking a broader view, resistance to the proposed U.S.-U.K. intervention is consistent with the international community's rejection of Grotius's theory of international punishment. After Grotius advanced his theory, other publicists such as Samuel Pufendorf and Emerich de Vattel raised strenuous objections, arguing that punishment was permissible only within a hierarchical relationship between subject and sovereign, whereas the law governing international relations rested on an entirely different premise: the formal equality of sovereign states.[31] By the twentieth century, international lawyers had overwhelmingly abandoned Grotius's vision of natural law as a self-standing source of law wholly independent of state consent.[32] The principle that states could not claim authority over other states without their consent (*par in parem non habet imperium*) thus became firmly entrenched as a foundational principle of international law.[33] As a result, there is little support among international

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Morality 192-97 (3d ed. 2005); W. Michael Reisman & Myres McDougal, *Humanitarian Intervention to Protect the Ibos*, *in* Humanitarian Intervention and the United Nations 167, 171-73 (Richard B. Lillich ed., 1973).

29 U.N. Charter arts. 42, 51.

30 *See generally* Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law (2001).

31 *See* VIII Samuel Pufendorf, The Law of Nature and of Nations §§ 3, 7 (Basil Kennet trans., 5th ed. London 1749); 2 Emer de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns ch. IV § 55 (Joseph Chitty trans., T. & J.W. Johnson & Co. 1883) (1758); Christian Wolff, Jus gentium method scientifica pertractatum § 169 (1764), *reprinted and translated in* 13 The Classics of International Law 9, 18-19 (James B. Scott ed., Joseph H. Drake trans., 1934). *See generally* Richard Tuck, The Rights of War and Peace: Political Thought and International Order from Grotius to Kant 158-59 (1999) (discussing Pufendorf's view that punishment could only be administered by "someone with political authority over" another).

32 *See* Duncan B. Hollis, *Why State Consent Still Matters — Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley J. Int'l L. 137, 142 (2005) (observing that "most international lawyers still rely on [a positivist doctrine of sources] as international law's operating framework").

33 *See, e.g.*, 1 Lassa Oppenheim, International Law 169 (2d ed. 1912).

lawyers today for a universal right to use force to punish states for violating international law.[34]

A further problem with relying on Grotius's theory of international punishment is that this approach does not fit naturally with the core purpose of humanitarian intervention, at least as traditionally understood. As Stephen Neff has observed, Grotius's theory of punishment is concerned primarily with "the punishment of the wrong-doer, rather than with the rescue of the victims, which is the chief focus of humanitarian intervention in the modern sense."[35] To the extent that the Grotian theory of punishment emphasizes other values such as retribution and deterrence, it focuses on a different set of concerns than humanitarian intervention, which aims to secure the safety of human beings from present or imminent threats. For these reasons, among others, recent scholarship has tended to give relatively short shrift to Grotius's punishment theory of international law enforcement as an account of contemporary humanitarian intervention.[36]

II. Grotius's Guardianship Theory of Humanitarian Intervention

In contrast to his theory of international punishment, Grotius chose to model humanitarian intervention on the fiduciary relationship between guardians and wards. Grotius begins his account of humanitarian intervention with the observation that the relationship between a sovereign and his subjects shares common features with the parent-child relationship. Like parents, a sovereign bears special responsibility for "the support of his dependents or subjects."[37] Although Grotius expresses skepticism that states are duty-"bound to risk their own safety" to protect a foreign people from oppression,[38] he nonetheless asserts that states may take up arms to deliver foreign nationals from tyrants who "provoke their people to despair and resistance by unheard of cruelties."[39] Rulers who have "abandoned all the laws of nature" through the inhumane

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34 *See* Blane & Kingsbury, *supra* note 6, at 241-43.

35 *See* Hugo Grotius, On the Law of War and Peace: Student Edition 285 n.32 (Stephen C. Neff ed., 2012) (editor's annotation).

36 For thoughtful reflections on how Grotius's punishment theory has influenced the theory of humanitarian intervention over time, see Chesterman, *supra note 30, at* 10-13; and Theodor Meron, *Common Rights of Mankind in Gentili, Grotius, and Suarez*, 85 Am. J. Int'l L. 110, 110-11 (1991).

37 Grotius, *supra* note 2, bk. II, ch. 25, pt. I.

38 *Id.* pt. VII.

39 *Id.* pt. VIII.

treatment of their own people "lose the rights of independent sovereigns, and can no longer claim the privilege [of freedom from foreign intervention] under the law of nations."[40] Once the relationship between a state and its people has been ruptured by systematic atrocities, Grotius concludes, other states may use force in order to render temporary "assistance or protection."[41]

Rather than characterize humanitarian intervention as an exercise in punitive law enforcement, Grotius asserts that the law of nature permits intervening states to exercise an oppressed people's natural rights of collective self-defense on their behalf. Under Grotius's account of the law of nations, subjects' duty of fealty to their sovereign means that they lack the legal capacity to redress any mistreatment they may suffer at the hands of their sovereign by force.[42] This does not, however, leave subjects wholly without recourse. According to Grotius, the legal incapacity that prevents an oppressed people from taking up arms against their sovereign "is of a personal nature"; it is not "inherent in the nature of the action itself." Hence, the duties of fidelity that preclude subjects from taking up arms against their sovereign do not necessarily preclude other powers from interceding on their behalf. Just as the law permits a guardian to undertake an action for a ward, which the ward lacks legal capacity to do for himself, intervening states could take up arms to exercise an oppressed people's natural right to protect themselves collectively from cruel mistreatment.[43] Thus, under Grotius's guardianship theory, humanitarian intervention constitutes a fiduciary relationship in which a state undertakes to represent the people of another state for the purpose of conducting collective self-defense on their behalf and for their benefit.

Grotius's choice of guardianship as a model for humanitarian intervention was hardly unprecedented. Nearly a century earlier, Francisco de Vitoria had invoked the guardian-ward relationship in his 1532 lecture *On the Indians Lately Discovered* to explain the circumstances in which the law of nations would permit European states to impose colonial rule in the Americas. Vitoria argued that indigenous peoples in the Americas, being endowed with reason and moral agency, "had true dominion in both public and private matters, just like Christians, and . . . neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners."[44] Nonetheless, Spanish conquest of the Americas might be justified if first nations

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40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 Francisco de Vitoria, *On the Indians Lately Discovered*, *in* De Indis et de Ivre Belli Relectiones 128 (Ernest Nys ed., John Pawley Bate trans., 1917).

violated the natural rights of their Spanish visitors or engaged in "tyrannical and oppressive acts" such as human sacrifice or cannibalism against their own people.[45] In such cases, other states could intervene as benevolent guardians to guarantee basic security and fundamental rights, subject to a fiduciary obligation to use the power thus conferred for the benefit of the indigenous people. For both Vitoria and Grotius, the fiduciary structure of guardianship offered an intelligible legal and moral framework for humanitarian intervention. Whenever any state ruptured its own fiduciary relationship with its own people through acts of intolerable cruelty, international law entrusted authority to other states to stand in as temporary fiduciaries for the oppressed people for the purpose of exercising a natural right of self-defense on their behalf.

The guardianship theory developed by Vitoria and Grotius highlights salient features of the juridical structure of humanitarian intervention. In private law, fiduciary relationships are generally understood to arise when one party (the fiduciary) undertakes to exercise discretionary power over the legal or practical interests of another (the beneficiary).[46] Within such relationships, the law obligates the fiduciary to exercise the beneficiary's legal rights on her behalf and for her benefit. Central to Grotius's theory of humanitarian intervention is his argument that the natural law of humanitarian intervention bears a similar formal structure: whenever one state ruptures its own fiduciary relationship with its people, other states possess a residual fiduciary authority to protect foreign nationals, exercising foreign nationals' rights of self-defense on their behalf. Like private-law fiduciaries such as guardians, agents, and trustees, states that engage in humanitarian intervention stand in a legal relationship wherein they are required to use their entrusted powers (the use of force) for a prescribed purpose (defensive action to prevent grave human rights abuse), acting in what they perceive to be the best interests of their beneficiaries (a foreign people).[47] Thus, in Grotius's view, natural law entrusts states with authority as joint-guardians for humanity to defend foreign nationals who suffer under unconscionable abuse at the hands of their own sovereign.

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45 *Id.* at 159.

46 *See* Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. Toronto L.J. 570 (2013).

47 There is some debate in the literature as to whether fiduciaries are required to act in a manner that is *objectively* in the best interests of their beneficiaries or what they *perceive* to be their beneficiaries' best interests. *See* Stephen R. Galoob & Ethan J. Leib, *Intentions, Compliance, and Fiduciary Obligation*, 20 Legal Theory 106 (2014); Lionel Smith, *Fiduciary Obligations: Ensuring the Loyal Exercise of Judgment on Behalf of Another*, 130 L.Q. Rev. 608 (2014). I use the latter formulation here, though the argument developed in this Article does not depend upon the distinction.

Notwithstanding its virtues as an interpretivist theory of humanitarian intervention, Grotius's guardianship theory has several serious weaknesses as applied to contemporary international law. First, the theory is based on controversial natural-law premises. Like Grotius's account of a universal right to punish, the guardianship theory contemplates the existence and jurisprudential authority of a universal law of "right reason"[48] — a premise that has fallen out of fashion in an era dominated by international legal positivism and normative pluralism.[49] To be sure, natural-law accounts of humanitarian intervention have not disappeared entirely from international legal discourse.[50] For example, George Fletcher and Jens Ohlin have argued recently that Article 51 of the U.N. Charter preserves and codifies a natural-law right for states to use force on their own independent initiative for the "legitimate defense" (*légitime défense*) of human rights victims abroad.[51] Most experts, however, reject the idea that the Charter's recognition of an "inherent right of self-defense" contemplates unilateral humanitarian intervention.[52] Moreover, although some legal scholars have advocated recognizing a new norm of unilateral humanitarian intervention following the North Atlantic Treaty Organization's (NATO) 1999 intervention to protect ethnic Albanians in Kosovo,[53] this proposal has not attracted sufficient support in state practice and *opinio juris* to generate customary international law.[54] Hence, even those who support Kosovo-style interventions tend to defend this idea based on appeals to "justice" and respect for "human dignity" rather than international law.[55] The dominant view among international lawyers today, therefore, is

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48 Grotius, *supra* note 2, bk. I, ch. 1, pt. X.

49 *See generally* Hollis, *supra* note 32.

50 *See, e.g.*, William C. Bradford, *"The Duty to Defend Them": A Natural Legal Justification for the Bush Doctrine of Preventive War*, 79 Notre Dame L. Rev. 1365 (2004); Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 73 Foreign Aff. 2 (1999); Jens David Ohlin, *The Doctrine of Legitimate Defense*, 91 Int'l L. Stud. 119 (2015).

51 *See* George P. Fletcher & Jens David Ohlin, Defending Humanity: When Force Is Justified and Why (2008); Ohlin, *supra* note 50.

52 *See, e.g.*, Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. Rev. 1275, 1285-89 (2010); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 Eur. J. Int'l L. 1, 3 (1999).

53 *See, e.g.*, Louis Henkin, *Kosovo and the Limits of "Humanitarian Intervention,"* 93 Am. J. Int'l L. 824, 825 (1999).

54 *See* Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 Cornell Int'l L.J. 499, 521-35 (2013).

55 *See, e.g.*, Glennon, *supra* note 50.

that international law prohibits states from unilaterally declaring themselves the guardians of foreign peoples for the purpose of undertaking unilateral humanitarian intervention on their behalf.[56]

Second, any serious effort to translate Grotius's guardianship theory for contemporary international law must come to grips with its dismal historical legacy. Although Vitoria and Grotius introduced the guardianship theory as a framework for safeguarding foreign nationals from domination, Western nations quickly pressed the theory into service as a justification for precisely the opposite purpose: the global expansion of European colonialism and the systematic exploitation of foreign peoples. As Robert Williams has explained, the guardianship concept "provided Western legal discourse with its first secularly oriented, systematized elaboration of the superior rights of civilized Europeans to invade and conquer normatively divergent peoples."[57] Over time, fiduciary concepts have also supplied a justificatory framing narrative for consolidating and perpetuating power, as European states invoked their "imperious humanitarian duty" to protect vulnerable peoples from the Ottoman Empire during the nineteenth century[58] and maintained control over former colonies as "mandates" or "trusteeships" in the twentieth century.[59] In recognition of this troubling history, critics have argued that the guardianship theory of humanitarian intervention serves only to dress up might as right, cementing geopolitical inequality as juridical inequality and thereby facilitating powerful states' neo-imperialist ambitions.[60]

At the close of his discussion of humanitarian intervention in *On the Law of War and Peace*, Grotius frankly acknowledges the risk that states may

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56 *See id.* at 542-67. A stronger argument can be made that customary international law authorizes states to use countermeasures such as trade restrictions and asset freezes in response to grave human rights abuse abroad. *See* Evan J. Criddle, *Standing for Human Rights Abroad*, 100 Cornell L. Rev. 269 (2015).

57 Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 106 (1992).

58 Davide Rodogno, Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815-1914, at 12, 63-117 (2012); *see also* Stephen C. Neff, War and the Law of Nations: A General History 224 (2005) (quoting *Note to the Porte, 8 Apr. 1830*, *in* Concert of Europe 121 (René Albrecht-Carrié ed., 1968)).

59 *See* League of Nations Covenant art. 22 (mandates); U.N. Charter arts. 75-91 (trusteeships).

60 *See* Linda Alcoff, *The Problem of Speaking for Others*, 20 Cultural Critique 5 (1991) ("[T]he practice of privileged persons speaking for or on behalf of less privileged persons has actually resulted (in many cases) in increasing or reinforcing the oppression of the group spoken for.").

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abuse the power reposed in them. Nonetheless, he insists that the potential for abuse does not necessarily undermine the legitimacy of humanitarian intervention generally:

> We know . . . from both ancient and modern history, that the desire for what is another's seeks such pretexts as this for its own ends; but a right does not at once cease to exist in case it is to some extent abused by evil men. Pirates also sail the sea; arms are carried also by brigands.[61]

This defense of the guardianship theory rings hollow today. If centuries of experience have taught us anything, it is that "pirates" and "brigands" are no less likely than saints to invoke the "right" to humanitarian intervention.[62] Moreover, even interventions that begin with the best of intentions ultimately may engender a form of foreign domination that undermines self-determination. Hence, Grotius's suggestion that each state may decide for itself whether to engage in humanitarian intervention carries too great a potential for abuse to serve as a model for twenty-first century international law.

In sum, Grotius's theory of humanitarian intervention as a form of legal guardianship has some features that are attractive and others that should give any sober observer pause. On the one hand, the idea that intervening states serve as fiduciaries illuminates the juridical structure of humanitarian intervention in a manner that highlights states' other-regarding obligations to use their power for the benefit of human rights-holders. On the other hand, Grotius's guardianship theory rests on natural-law premises that no longer command general acceptance as an independent legal basis for humanitarian intervention. Furthermore, the fact that the guardianship theory has greased the wheels for colonialist exploitation suggests that the theory is too susceptible to abuse. Even if Grotius's theory captures important features of the juridical structure of humanitarian intervention, it is doubtful that it can be rehabilitated and deployed in a manner that would advance the normative commitments of twenty-first century international society.

III. The Fiduciary Theory of Humanitarian Intervention

This Part outlines a new fiduciary theory of humanitarian intervention that better explains the legal basis, purpose, and scope of state authority to protect human rights abroad. This theory takes as its point of departure Grotius's

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61 Grotius, *supra* note 2, bk. II, ch. 25, pt. VIII.

62 *See* Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 Am. J. Int'l L. 107 (2006) (observing that Hitler offered humanitarian arguments "as a pretext for his incursions into Austria and Czechoslovakia").

claim that under some circumstances states may use force abroad as temporary fiduciaries for foreign nationals who risk grievous abuse at the hands of their own sovereign.[63] Although the fiduciary theory owes a significant debt to Grotius, it does not rely upon Grotius's controversial view that states have authority under natural law to use force unilaterally to protect foreign nationals abroad. Instead, the theory proposed uses the fiduciary character of humanitarian intervention as an interpretive framework to explain the character and limits of humanitarian intervention at a time when the Security Council bears exclusive responsibility under the U.N. Charter for authorizing humanitarian intervention without a target state's consent.

At first glance, the Charter's collective-security regime might easily be misconstrued as a wholesale repudation of Grotius's theories of humanitarian intervention. After all, the most striking feature of Grotius's theories of international punishment and humanitarian intervention is the idea that states have authority to act unilaterally under natural law. Conversely, the Charter is generally understood to prohibit the unilateral use of force, except in settings where states are compelled to defend their own people from armed attacks.[64] States do not, in fact, have a general license to use force abroad unilaterally as agents of global law enforcement (the punishment theory) or as joint-fiduciaries for the protection of humanity (the guardianship theory). Despite these fundamental differences, however, Grotius's writings on humanitarian intervention cannot be so easily dismissed, for several reasons.

First, as discussed previously, even if the Charter prevents states from relying on a natural right of humanitarian intervention, Grotius's characterization of humanitarian intervention as a fiduciary relationship remains fundamentally sound today. As Grotius adroitly recognized, humanitarian intervention bears the distinguishing features of a fiduciary relationship; namely, the entrustment of discretionary power over another person's legal interests.[65] The discretionary powers that states exercise during lawful humanitarian intervention derive from the confluence of two sources: (1) an oppressed people's legal right to defend themselves against grave human rights abuse,[66] and (2) the Security Council's power under the Charter to authorize action to restore international

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63 Grotius, *supra* note 2, bk. II, ch. 20, pt. VIII.

64 U.N. Charter art. 51. *But see* Fletcher & Ohlin, *supra* note 51; Ohlin, *supra* note 50.

65 *See* Paul B. Miller, *The Fiduciary Relationship*, *in* Philosophical Foundations of Fiduciary Law, *supra* note 10, at 63 (2014).

66 *See* Ohlin, *supra* note 50; Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 46 Cornell Int'l L.J. 1, 12-14 (2013).

peace and security.[67] When states exercise authority entrusted to them by the Security Council for the protection of human rights victims abroad, the powers they exercise are not their own; rather, these powers are held in a fiduciary capacity to be exercised for the exclusive benefit of a foreign people.[68] Grotius's fiduciary conception thus accurately captures the juridical structure of humanitarian intervention.

Viewed from this perspective, the relational character of an intervening state's authority to use force comes into clearer focus. As in other fiduciary relationships, the legal authority that intervening states exercise during humanitarian intervention is other-regarding, purposive, and institutional.[69] The authority is *other-regarding* in the straightforward sense that it is legally capable of being exercised only for the benefit of a foreign people, not to advance the self-regarding interests of the intervening state. It is *purposive* in the sense that it is limited to humanitarian objectives, as specified by the Security Council. And it is *institutional* in that it generates an institutional relationship between states or regional organizations and the people they seek to protect. This institutional relationship is closely analogous to fiduciary relationships involving court-appointed guardians, successor trustees, and representative plaintiffs in shareholder derivative litigation. In each of these settings, the abuse of power by one fiduciary activates another fiduciary's subsidiary authority to protect the interests of their shared beneficiaries.[70]

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67 *See* Alex J. Bellamy, Responsibility to Protect 63 (2009) (identifying Kofi Annan and Francis Deng as proponents of this approach); Anne Orford, International Authority and the Responsibility to Protect 34 (2011) (describing humanitarian intervention as "international executive rule"); Terry Nardin, *Introduction*, *in* Humanitarian Intervention: Nomos XLVII 1, 18-21 (2006) (considering humanitarian intervention as an exercise in law enforcement).

68 While a guardian may be thought to exercise a form of *parens patriae* power by delegation on behalf of the state, this power relates to the ward's legal or practical interests, and the guardian's fiduciary obligations therefore run to the ward, not to the state itself. By the same token, even if states receive their mandate to intervene from the Security Council, they hold this authority in a fiduciary capacity and are required to exercise their authority for the benefit of an oppressed people.

69 *See* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Int'l L. 331 (2009).

70 This account of the juridical basis for humanitarian countermeasures resonates with Eyal Benvenisti's vision of states as "trustees of humanity." *See* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295 (2013).

The juridical structure of humanitarian intervention thus supports Grotius's argument that intervening states exercise authority as fiduciaries.

Second, requiring Security Council authorization for the use of force is fully consistent with a fiduciary conception of humanitarian intervention.[71] This is true irrespective of whether the use of force in humanitarian intervention is best understood as deriving from an oppressed people's collective right of self-defense or from the Security Council's power under the Charter "to take such action . . . as may be necessary to maintain or restore international peace and security."[72] Under both accounts, Security Council approval serves as the mechanism for entrusting authority to states to intercede in defense of an oppressed people for their benefit. Just as individuals must obtain judicial approval before they may serve as legal guardians for children who have suffered abuse at the hands of their parents, the U.N. Charter requires states to obtain Security Council approval before they may assume responsibility for using force abroad to protect foreign nationals. This requirement of positive authorization marks a significant departure from Grotius's original naturalist theory, but it is fully consistent with his insight that intervening states stand in a fiduciary relationship with the intended beneficiaries of humanitarian intervention.

Third, the fiduciary theory also clarifies the controversial R2P principle, which suggests that when states are unable or unwilling to protect their own people from grave human rights abuse, the international community as a

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71 Since the early 1990s, the Security Council has authorized humanitarian intervention on a number of occasions, including in Somalia, Bosnia-Herzegovina, East Timor, Sierra Leone, and Libya. *See, e.g.*, S.C. Res. 1973, ¶¶ 4, 8, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (authorizing air strikes to enforce a no-fly-zone and prevent war crimes and crimes against humanity in Libya); S.C. Res. 1270, U.N. Doc. S/RES/1270 (Oct. 22, 1999) (establishing the U.N. Mission in Sierra Leone (UNAMSIL) to keep peace and ensure the delivery of humanitarian aid); S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999) (authorizing a multinational force to restore peace in East Timor); S.C. Res. 758, U.N. Doc. S/RES/758 (June 8, 1992) (authorizing the U.N. Protection Force (UNPROFOR) in the former Yugoslavia to take steps to ensure the delivery of humanitarian aid to Sarajevo). Although the Charter does not provide expressly for the Security Council to authorize military intervention to prevent human rights abuses confined within a single state's borders, the international community has accepted this principle as part of the Security Council's authority "to maintain or restore international peace and security" under U.N. Charter art. 42.

72 U.N. Charter art. 42.

whole bears a subsidiary responsibility to furnish protection and assistance.[73] Proponents of R2P argue that the international community may satisfy R2P in most settings by providing material assistance and training to strengthen a state's capacity to protect its own people. When such measures prove to be inadequate, however, the international community may use force to prevent large-scale human rights disasters such as those that unfolded in Rwanda and Darfur.[74]

Over time, the U.N. Security Council, the Secretary General, and the General Assembly have all expressed support for R2P, affirming that individual states and the international community collectively are assigned complementary roles in preventing mass atrocities.[75] Nonetheless, R2P continues to stir debate among international lawyers and political theorists. Some critics have faulted R2P for assigning protective responsibility to the nebulous "international community" without specifying what obligations and authority, if any, particular states and international organizations have to protect human rights abroad.[76] Other scholars have argued that R2P has little direct relevance for international law, because it is merely an expression of the international community's collective *political* commitment to guaranteeing human security rather than a binding *legal* obligation to take action in response to humanitarian crises.[77]

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73 *See, e.g.*, Int'l Comm. on Intervention & State Sovereignty, The Responsibility to Protect 13, ¶ 2.15 (2001) ("[S]tate authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare."); Francis M. Deng et al., Sovereignty as Responsibility: Conflict Management in Africa, at xii, xvii (1996) (characterizing the international community as "the ultimate guarantor of the universal standards that safeguard the rights of all human beings"); Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 Am. J. Int'l L. 298 (2012).

74 *See* World Summit Outcome, *supra* note 11, ¶ 139.

75 *See* Kofi Annan, *Two Concepts of Sovereignty*, Economist (Sept. 18 1999), http://www.economist.com/node/324795; U.N. Secretary-General, Implementing the Responsibility to Protect, U.N. Doc. A/63/677 (Jan. 12, 2009); World Summit Outcome, *supra* note 11, ¶¶ 138-39; S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1973, *supra* note 71; S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

76 *See, e.g.*, James Pattison, Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene? 4 (2010); William W. Burke-White, *The Adoption of the Responsibility To Protect*, *in* The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time 17 (Jared Gensler & Irwin Cotler eds., 2011).

77 *See, e.g.*, Alex J. Bellamy, The Responsibility to Protect: A Defense 13-14 (2015); Aiden Hehir, *The Responsibility to Protect: Sound and Fury Signifying Nothing*, 24 Int'l Rel. 218, 218-19, 234-35 (2010).

The fiduciary theory reorients R2P in a manner that irons out some of the wrinkles in contemporary debates. The fiduciary theory suggests that R2P does have legal significance, because the principle affirms that human rights protection does not fall within the exclusive jurisdiction of national authorities.[78] International institutions such as the Security Council also serve as indirect guardians of humanity with authority to take action when states do not honor their fiduciary obligations to their people. Rather than encumber the Security Council or the "international community as a whole" with an affirmative duty to intervene, however, R2P operates primarily as a power-conferring gloss on the U.N. Charter, affirming the Security Council's authority to approve humanitarian intervention by U.N. member-states over a target state's objections.[79] When mass atrocities prompt calls for military action, the responsibility to provide direct protection is assumed voluntarily by states and regional organizations that are entrusted with this authority by the Security Council.[80] Just as an individual must consent to serve as guardian for a ward or a trustee for beneficiaries, states and regional organizations are under no legal obligation to place their armed forces in harm's way to protect a foreign people from their own government.[81] Once a state or regional organization voluntarily assumes this responsibility as a direct guardian for an oppressed people abroad, however, the fiduciary theory supports the idea

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78 *See* Bellamy, *supra* note 77, at 95 (observing that prior to the 2011 NATO intervention in Libya, humanitarian interventions authorized by the Security Council had always received the target state's consent).

79 *See* Orford, *supra* note 67, at 25-26 (arguing that R2P is best understood as a power-conferring rule rather than a duty-imposing rule). The fiduciary theory is compatible, however, with the idea that the Security Council bears an affirmative obligation to authorize intervention when necessary and appropriate to prevent an imminent humanitarian crisis. *Cf.* Anna Spain, *The U.N. Security Council's Duty to Decide*, 4 Harv. Nat'l Security J. 320 (2013) (arguing that the Security Council should be charged with an affirmative, quasi-judicial "duty to decide").

80 Although the U.N. Charter originally provided for states by "special agreement" to contribute "armed forces, assistance, and facilities" for a standing international security force under the Security Council's command, *see* U.N. Charter art. 43, this provision has remained dormant. U.N. agencies have played a more direct role, however, in helping states and regional organizations to develop and sustain the capacity for durable human rights protection through peacekeeping and other missions. *See* Orford, *supra* note 67, at 209 (arguing that U.N. peacekeeping operations represent the paradigm case for R2P).

81 *See* Grotius, *supra* note 2, bk. II, ch. 20, pt. VII. *But see* Monica Hakimi, *Toward a Legal Theory of the Responsibility To Protect*, 39 Yale J. Int'l L. 247 (2014) (arguing that some states may assume responsibility to intervene abroad based on their contribution to humanitarian crises).

that intervening forces must use their entrusted power in a manner that is consistent with the R2P principle. In each of these respects, the fiduciary theory helpfully disentangles R2P's legal and political dimensions.

The Security Council's 2011 resolution authorizing humanitarian intervention in Libya offers the clearest illustration of the fiduciary theory in action. While "reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians," the Security Council concluded that international intervention was warranted to address the Libyan government's indiscriminate attacks against civilians.[82] The Security Council therefore authorized "Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack."[83] The Security Council thus entrusted states with authority to use force in a fiduciary capacity for the limited purpose of defending civilians in Libya from war crimes and crimes against humanity. With this mandate in hand, NATO countries commenced a campaign of air strikes and cruise missile attacks to prevent the Libyan government from perpetrating further human rights abuses.[84]

Requiring international authorization for humanitarian intervention provides an important institutional check against powerful states proclaiming themselves the rightful "guardians" for foreign peoples and using force without adequate justification.[85] But is this requirement sufficient to ensure that humanitarian intervention will be used only where strictly necessary and in a manner that is faithful to the interests of an oppressed people? Surely not. Once authority for intervention has been conferred upon a state or group of states, further checks are needed to hedge against the risk of abuse. These checks should be carefully calibrated to promote accountability without unduly constraining intervening states' capacity for effective action.

Although enthusiasts of the R2P doctrine have pointed to the NATO-led intervention in Libya as a promising example of U.N.-authorized humanitarian intervention,[86] it also serves as a cautionary tale. NATO intervention may

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82 S.C. Res. 1973, *supra* note 71, pmbl.

83 *Id.* pmbl. ¶¶ 4-8.

84 *Libya: US, UK and France Attack Gaddafi Forces*, BBC News (Mar. 20, 2011), http://www.bbc.com/news/world-africa-12796972.

85 *See* Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarianism After Iraq*, 19 Ethics & Int'l Aff. 31 (2005) (observing that the 2003 Iraq War undermined the credibility of the United States and the United Kingdom as agents for humanitarian intervention).

86 *See, e.g.*, Powell, *supra* note 73.

have averted massive civilian casualties in some areas of Libya,[87] but NATO members soon expanded the operation in ways that extended far beyond their mandate from the Security Council. By supplying arms and other assistance to rebel militia groups and by targeting Libyan forces and infrastructure that were not involved in attacks against civilians, the NATO-led mission decisively shifted the balance of power in Libya's civil war, paving the way for regime change.[88] NATO also flouted the Security Council's express call for a negotiated solution to the crisis by rebuffing the Libyan regime's efforts to negotiate.[89] While scholars might debate whether NATO's efforts to bolster the Libyan insurgency advanced the interests of the Libyan people in the long run, there can be little doubt that in a variety of respects NATO forces exceeded the scope of their mandate from the Security Council.

The Libya intervention thus poses an important challenge to the fiduciary theory. For the fiduciary theory to have credibility, it is critical that international law regulate not only *who* may engage in humanitarian intervention, but also *how* they may do so.[90] And the international community needs to develop more effective procedures for holding states accountable when they abuse their entrusted authority during humanitarian intervention.

IV. Operationalizing the Fiduciary Theory

This Part proposes three specific measures to make the fiduciary theory of humanitarian intervention more credible in practice. First, intervening states must respect a foreign people's right to self-determination by making good-faith efforts to consult with and respect the actual preferences of the people for whose benefit they purport to act. Second, states that engage in humanitarian intervention must use force in a manner that respects the requirements of international human rights law (IHRL), including the heightened proportionality requirements associated with the human "right to life."[91] Third, the Security Council must become a more effective oversight body for humanitarian intervention, not only with respect to the Security Council's oft-criticized decision-making structure, but also with respect to how the Security Council designs its authorizing resolutions ex ante and supervises intervention ex

87 *See* Bellamy, *supra* note 77, at 187.

88 *Id.* at 187-89.

89 *Id.* at 187.

90 *See id.* at 189 (discussing Brazil's proposal for a new "responsibility while protecting" principle that would focus attention on the international community's responsibilities during implementation of R2P).

91 ICCPR, *supra* note 12, art. 6.1.

post. These three proposals are not meant to be exhaustive; other reforms will surely be needed to fully operationalize the fiduciary theory of humanitarian intervention. Nonetheless, these proposals illustrate how the fiduciary theory might enhance the normative coherence and legitimacy of humanitarian intervention in practice.

A. The Duty of Deliberative Engagement

A major weakness of Grotius's guardianship model for humanitarian intervention is that it treats human rights-holders as mere passive objects of state concern, not as autonomous agents whose idiosyncratic values and preferences are entitled to respect. As discussed previously, critics have observed that the paternalistic character of humanitarian intervention raises "the spectre of potential neo-colonialism."[92] In response to these concerns, advocates of the R2P doctrine have argued that the international community needs to consider "the problem from the victim's point of view" and focus "on rebuilding [humanitarian intervention] around local empowerment."[93] Thus, the R2P movement has endeavored to shift the international community's attention away from international military action toward measures that can be taken before a crisis arises to strengthen states' commitment and capacity to respect and protect human rights.

Less attention has been paid to what it would mean for states to consider "the victim's point of view" when they contemplate military intervention. Taking seriously the victim's point of view could simply mean that states must give due regard to how military intervention would impact foreign nationals' legitimate, legally protected *interests*. At a minimum, states might engage in reasoned deliberation to determine whether military intervention would serve the best interests of a foreign people, taking into account factors such as the impact that military intervention would likely have upon human security, infrastructure, and economic development within the target state.[94] This approach is consistent with a fiduciary theory of humanitarian intervention,

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92 Bellamy, *supra* note 77, at 43.

93 *Id.* at 43-44 (describing the approach of the International Commission on Intervention and State Sovereignty).

94 This approach resonates with Edmund Burke's much-criticized trusteeship conception of political representation, wherein a "natural aristocracy" would determine what policies and programs would best advance the interests of their constituents. Edmund Burke, *The French Revolution*, *in* Burke's Politics: Selected Writings and Speeches of Edmund Burke on Reform, Revolution, and War 277, 397-98 (Ross J.S. Hoffman & Paul Levack eds., 1949) (1770).

because the duties of loyalty and care require fiduciaries to consider and prioritize the best interests of their beneficiaries.

Alternatively, taking the victim's point of view could mean that an intervening state must endeavor to ascertain and honor the actual *preferences* of their beneficiaries. Many fiduciary relationships such as agent-principal and lawyer-client require fiduciaries to consult with their beneficiaries and follow their actual preferences when critical decisions arise.[95] These fiduciary relationships, which seek to empower beneficiaries to control their fiduciaries' performance, arguably provide a better model for humanitarian intervention than Grotius's guardianship analogy. As David Ponet and Ethan Leib have observed, fiduciary law contains "a constellation of obligations that can be read to require 'deliberative engagement.'"[96] These obligations of deliberative engagement include the fiduciary duty of loyalty, which dictates that beneficiaries must give informed consent to any conflicts of interest.[97] The duty of care likewise requires public fiduciaries to "consult with and deliberatively engage constituents as part of the process of rationally considering their preferences and assessing the full panoply of potential courses of action within the public fiduciary's authorization."[98] In the context of humanitarian intervention, these deliberative features of fiduciary law underscore the idea that intervening states must demonstrate solicitude for the actual values and preferences of the foreign peoples they purport to represent. For example, a plausible implication of the fiduciary theory is that states may not conduct military intervention without Security Council authorization unless they have sought human rights victims' consent to foreign assistance, and they should not use force if such measures would be inconsistent with the express preferences of the human rights-holders whom they purport to represent. Thus, a serious effort to respect the preferences of a foreign people is arguably required by the idea of "taking the victim's point of view."

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95 *See, e.g.*, Restatement (Third) of Agency § 1.01 cmt. f (2005) ("An essential element of agency is the principal's right to control the agent's actions."); Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 Loy. U. Chi. L.J. 511, 514 (2012) (observing that a lawyer's duty of loyalty includes obligations to "communicate effectively with the client regarding the representation, and consult with the client regarding the matters essential to the representation" (citations omitted)).

96 David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. Rev. 1207, 1215 (2011).

97 *Id.* at 1215-16.

98 *Id.* at 1216-17.

This requirement of deliberative engagement resonates with similar requirements in other fields of international law where states stand in fiduciary relationships with their own citizens or foreign nationals. For example, the U.N. International Law Commission has concluded that when states espouse the claims of their nationals for the purpose of asserting legal claims on their behalf, they must "take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought."[99] Likewise, the international law of indigenous rights, another regime that has been shaped by fiduciary concepts, obligates states to "consult and cooperate in good faith with . . . indigenous peoples . . . through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[100] Whenever a state exercises public powers on behalf of others, it bears a corresponding fiduciary obligation to ascertain and respect the preferences of its beneficiaries.[101]

The requirement of deliberative engagement poses a nettlesome challenge for humanitarian intervention, however, because it is often difficult for the international community to find and access appropriate "representative institutions" when a people faces a threat from their own state. Where a host state seeks to commit crimes against humanity against a discrete and well-organized political party, ethnic group, or religious community, identifying

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99 Draft Articles on Diplomatic Protection with Commentaries, art. 19(b), Int'l Law Comm'n, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. GAOR, 61st Sess., Supp. No. 10, A/61/10 (2006).

100 Declaration on the Rights of Indigenous Peoples art. 19, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *cf.* Saramaka People v. Suriname, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 172, ¶ 134 (Nov. 28, 2007) (requiring good-faith consultation and informed consent for large-scale development or investment projects); Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), June 27, 1989, 28 I.L.M. 1382 (providing that states must honor "the social, cultural, religious and spiritual values and practices of [indigenous] peoples"; "consult the peoples concerned . . . whenever consideration is being given to . . . measures which may affect them directly"; and conduct these consultations "in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures"). *See generally* Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 Theoretical Inquiries L. 507 (2015).

101 For more detailed treatments of this principle, see Evan J. Criddle & Evan Fox-Decent, International Law's Fiduciary Constitution (forthcoming 2015); and Evan Fox-Decent, Sovereignty's Promise: The State as Fiduciary (2011).

the appropriate opposition leaders for deliberative engagement may be a relatively straightforward matter, and it is critical that intervening states obtain these representatives' free and informed consent for military intervention. If representatives of an oppressed group request the modification or discontinuation of humanitarian intervention, intervening states should make every effort to respect these requests, provided that they can do so within the constraints of the Security Council's relevant resolutions.

Conversely, where a vulnerable group lacks effective representation, deliberative engagement may prove to be a more complex challenge. In the current Syrian civil war, for example, it is unclear which antigovernment factions, if any, best represent the values and preferences of Syrians whose lives have been jeopardized by the Assad regime's war crimes and crimes against humanity. In such settings, the duty of deliberative engagement would require intervening states to make public their proposed action with a statement of the humanitarian rationale for intervention. Intervening states would also bear a responsibility to engage a broad spectrum of stakeholders in order to make a fully informed and rational decision that reflects due regard for the interests of all. Irrespective of the setting, intervening states must create spaces for foreign nationals to contest whether and how intervening states may use force on their behalf.[102]

The fiduciary theory's requirements of deliberative engagement mark an important advance over Grotius's punishment and guardianship theories of humanitarian intervention, which commit enforcement to the intervening state's unilateral discretion. To the extent that states intervene on behalf of others, they bear a fiduciary obligation to proceed deliberatively, seeking out and giving due regard to the preferences of their intended beneficiaries.

B. The Human Right to Life

The fiduciary theory also has important implications for how states use force when they conduct humanitarian intervention. In particular, because international law entrusts intervening states with authority to use force for the benefit of an oppressed people, intervening states bear a fiduciary obligation to observe human rights standards for the use of force whenever they engage in humanitarian intervention.[103]

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102 *See* Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts & Estates 653, 657-58 (9th ed. 2013) (observing that the "duty of impartiality" in trust law requires "due regard" to the beneficiaries' respective interests).

103 Elsewhere I have argued that the fiduciary character of a state's relationship with its own people and foreign peoples under its authority also requires the

In recent years, an energetic debate has arisen among legal scholars concerning how standards from IHRL and international humanitarian law (IHL) interact during armed conflict.[104] International human rights tribunals and the International Court of Justice have become increasingly receptive to the idea that human rights norms apply during armed conflict, creating areas of jurisdictional overlap and potential normative conflict.[105] For example, IHRL and IHL offer distinct accounts of who may be targeted and the circumstances in which lethal forced may be used. Under the IHL principle of distinction, a state in armed conflict need not establish that any particular enemy combatant poses an imminent threat to their own security; the mere fact that an enemy combatant has taken direct part in hostilities against the state is sufficient to qualify them as a legitimate target for the use of lethal force.[106] IHL's "principle of proportionality in attack"[107] provides that states are free to conduct attacks that are "expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof," as long as such collateral damage is not manifestly "excessive in relation to the concrete and direct military advantage anticipated."[108]

IHRL standards for the use of force are considerably more restrictive, both with respect to who may be targeted and the type of force that may be employed. The human "right to life" prohibits states from using lethal force unless they can show that this measure is "absolutely necessary" to protect

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application of human rights constraints on the use of force. *See* Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 Notre Dame L. Rev. 1073 (2012).

104 *See, e.g.*, International Humanitarian Law and International Human Rights Law (Orna Ben-Naftali ed., 2011) (providing a useful survey of these debates).

105 *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9); Isayeva v. Russia, 41 Eur. Ct. H.R. 39 (2005); Bámaca-Velásquez v. Guatemala, Merits and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 209 (Nov. 25, 2000).

106 *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Additional Protocol I to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts arts. 40-41, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

107 Int'l Comm. of the Red Cross, Customary International Humanitarian Law Rules ch. 4, rule 14 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), *available at* http://www.icrc.org/customary-ihl/eng/docs/v1.

108 API, *supra* note 106, art. 51(5)(b).

human life or legal order.[109] States must take precautions to avoid or minimize casualties "to the greatest extent possible,"[110] and they may use lethal force only if nonlethal measures such as arrest or incapacitation would be likely to impose disproportionate injury.[111] Moreover, IHRL's proportionality principle requires states to consider all potential casualties — lawful combatants, noncombatant fighters, and ordinary citizens alike — when planning and executing operations that involve the use of force,[112] whereas military casualties are irrelevant to IHL's proportionality inquiry.[113] By limiting the use of lethal force and extending this constraint to all human beings, combatants and noncombatants alike, IHRL permits states to use force under a significantly narrower set of circumstances than IHL.

The fiduciary theory of humanitarian intervention suggests that IHRL's more restrictive standards for the use of force should apply whenever states use force to protect the human rights of foreign nationals abroad. As fiduciaries entrusted with the responsibility to protect human rights, intervening states bear a special responsibility to avoid using force in a manner that exceeds this mandate. In particular, the fiduciary character of the relationship between an intervening state and a foreign people suggests that states must take care to avoid inflicting any harm that is not strictly necessary to fulfill their entrusted responsibility to guarantee basic security under the rule of law. Merely ensuring that collateral injury to noncombatants is not "excessive" in relationship to an intervening state's military objectives is insufficient, given that the purpose of humanitarian intervention is to protect international human rights, which include the right to life. Nor may an intervening state use lethal force against foreign combatants unless such action is strictly necessary to prevent grave human rights abuse. These requirements flow naturally from the fiduciary theory's

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109 *See* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(2), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221; McKerr v. United Kingdom, 2001-III Eur. Ct. H.R. 475, 516-17 ¶ 110 (2001); Human Rights Committee, General Comment No. 6, ¶¶ 3, 129, 16th Sess., 37 U.N. GAOR, Supp. (No. 40), U.N. Doc. A/37/40 (1982).

110 *Isayeva*, 41 Eur. Ct. ¶ 175.

111 *See, e.g.*, Khatsiyeva v. Russia, App. No. 5108/02, Eur. Ct. H.R. (2008).

112 *See* David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 Harv. Int'l L.J. 231, 260-61 (2005); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l L. 1, 32 (2004).

113 *See* Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 129 (2d ed. 2010) ("Proportionality has nothing to do with injury to combatants or damage to military objectives.").

formal legal requirement that states conducting humanitarian intervention must treat foreign nationals always as equal beneficiaries of their coercive power.[114]

Under the fiduciary theory, intervening states may assume human rights obligations toward foreign nationals even if they do not exercise effective control over foreign territory. The assumption of coercive power over foreign territory as fiduciary for foreign nationals is sufficient to trigger the obligation to respect human rights.

This principle has not been uniformly accepted, despite the fact that the two clearest examples of multilateral humanitarian intervention from the past fifteen years, Kosovo (1999) and Libya (2011), both involved humanitarian airstrikes without intervening states "putting boots on the ground." In the 2001 case *Bankovic v. Belgium*, the European Court of Human Rights considered whether this type of intervention triggered state responsibility under the European Convention on Human Rights.[115] At issue in the case was a NATO airstrike against television and radio production facilities in Belgrade that had claimed sixteen lives and seriously wounded an equal number of others.[116] Emphasizing the contractual character of the European Convention, the Court held that the airstrike did not fall within the Convention's scope, because the intervening states lacked "effective control of the relevant territory and its inhabitants."[117]

The fiduciary theory, in contrast, suggests that states conducting humanitarian intervention assume human rights obligations toward foreign nationals regardless of whether or not they obtain effective control over a foreign people or foreign territory. More consistent with the fiduciary theory is an alternative approach that the Court articulated several years later in *Issa v. Turkey*: if a state claims "authority" over foreign people or territory (as during humanitarian intervention) the heightened requirements of IHRL apply.[118] Respect for human rights is a requirement that accompanies any use of force by a state that purports to engage in humanitarian intervention. An important contribution of the

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114 *But see* Jeff McMahan, *The Just Distribution of Harm Between Combatants and Noncombatants*, 38 Phil. & Pub. Aff. 342, 359-61 (2010) (arguing that the beneficiaries of military action may be subjected to greater harm than other persons because "the *risks* of defensive action ought to be borne by those who stand to benefit from" measures that are designed to reduce their overall risk of harm).

115 Bankovic v. Belgium, 2001-XII Eur. Ct. H.R. 333, 346 ¶ 34 (posing the question whether mere airstrikes entailed an exercise of "jurisdiction" under Article 1 of the European Convention).

116 *Id.* at 340-41 ¶¶ 9-11.

117 *Id.* at 355 ¶ 71, 358-59 ¶ 80.

118 Issa v. Turkey, App. No. 31821/96, 41 Eur. H.R. Rep. 567 ¶ 72 (2004).

fiduciary theory, therefore, is to call into question the idea that intervening states may treat humanitarian intervention as ordinary international armed conflict, subject to IHL's general principles of distinction, necessity, and proportionality. Whenever states conduct humanitarian intervention (with or without a host state's consent), they assume a correlative obligation to use force in a manner that fully respects the human right to life.

C. Security Council Oversight

Given the grave injustices that states have perpetrated against one another in the name of humanitarian "guardianship," robust international institutions are essential to guarantee the fiduciary obligations associated with humanitarian intervention. Requiring states to obtain approval from either the target state itself or the Security Council when initiating humanitarian intervention provides some assurance that intervening states will possess the capacity and commitment to serve as faithful fiduciaries for foreign nationals. After authority for humanitarian intervention has been entrusted to particular states, continuing international review is necessary to ensure that the states do not abuse their discretionary power for self-interested purposes. In short, the fiduciary theory presupposes the existence of international institutions that are capable of holding states accountable for violating their fiduciary obligations.

Unfortunately, the Security Council's flawed decision-making structure has compromised its ability to perform this function effectively. The Security Council has often lacked the political will to approve intervention in response to even the most serious humanitarian crises. Moreover, because the Security Council's veto-wielding permanent members (P5) generally play key roles in conducting U.N.-approved humanitarian interventions, the Security Council is poorly equipped to curb interventions that exceed the scope of states' entrusted authority. As reflected in the U.S.-led military actions in Iraq (2003) and Libya (2011), narrowly tailored Security Council resolutions can easily be reinterpreted as open-ended licenses for the use of force. Once a P5 state has received a mandate for humanitarian intervention, this mandate is virtually impossible to withdraw through a new resolution. This accountability deficit has made it more difficult for states advocating humanitarian intervention (chiefly, the United States and the United Kingdom) to persuade other P5 states (chiefly, China and Russia) to support Security Council resolutions authorizing intervention. The accountability deficit also provides fodder for critics who argue that the lofty rhetoric of "humanitarianism" and "fiduciary duty" merely serves as a pretext for great-power domination. In the long run, the Security Council will need to develop new and better ways to supervise humanitarian intervention if the fiduciary theory is to be credible in practice.

Pending more fundamental reform of the Security Council's decision-making structure, some relatively modest changes could significantly narrow the current accountability deficit. One commonsense reform, which Brazil has proposed in the wake of NATO's intervention in Libya, would be to establish standardized reporting and review procedures to enable the Security Council to continuously "monitor and assess the manner in which resolutions are implemented" and thereby provide for "the accountability of those to whom authority is granted to resort to force."[119] The Security Council could also establish its own independent monitoring body to investigate complaints that intervening states have exceeded their mandates.[120] While such oversight procedures would require the Security Council to devote more resources to monitoring and could risk further politicizing humanitarian interventions,[121] the requirement that intervening states provide a regular accounting for their use of force flows directly from the fiduciary character of their entrusted authority.

A second option for enhancing Security Council oversight would be to include a provision in future Security Council resolutions allowing the Security Council or a separate committee composed of Security Council members to narrow or withdraw mandates for humanitarian intervention by a simple majority vote, narrowing the threat of a P5 veto. This mechanism could deter states from undertaking humanitarian intervention in the first place by raising the possibility that the Security Council could seek to micromanage their military engagements or cancel a mission prematurely after an intervening state has already committed significant resources. On the other hand, allowing the Security Council to withdraw its mandate for humanitarian intervention by a simple majority would help to counter the threat of "mission creep" by enabling the Security Council to rein in intervening states that exceed the scope of their entrusted authority.

Should this option prove impracticable, the Security Council could achieve a similar result by adding "sunset provisions" — clauses that provide a fixed expiration date — to resolutions that authorize humanitarian intervention.[122] In other settings, lawmakers have used sunset provisions to promote flexible and responsive governance,[123] and similar objectives could be achieved by requiring

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119 Bellamy, *supra* note 77, at 192 (quoting Letter from the Permanent Representative of Brazil, to the U.N. Secretary-General (Nov. 9, 2011)).

120 *See id.* at 201.

121 *Id.* at 199.

122 *See id.* at 200 (observing that sunset clauses are "standard practice for UN peacekeeping operations").

123 *See* Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 Ga. L. Rev. 335, 337 (2006).

states to seek periodic reauthorization for humanitarian intervention. While the duration of the sunset period would obviously have to be calibrated to the scope of the anticipated intervention, a sunset period in the range of sixty to ninety days should give intervening states sufficient scope for action to avert an impending humanitarian crisis (e.g., Kosovo, Libya), while preventing the exigencies of the moment from generating an open-ended mandate for a sustained foreign military presence in the target state. Requiring periodic Security Council reauthorization would compel intervening states to account for their performance, while also helping to ensure that their actions are consistent with fiduciary principles of integrity, impartiality, and solicitude. Should an intervening state abuse its discretion, the Security Council could decline to renew its authorization for the use of force, or it could issue a revised mandate that would define the humanitarian mission more precisely or transfer responsibility for intervention to other states. The Security Council could also establish U.N.-sponsored institutions to facilitate deliberative engagement between intervening states and representatives of oppressed peoples. While these are not the only conceivable mechanisms for enhancing international accountability for humanitarian intervention, they are suggestive of the kinds of sensible reforms that may help to address concerns about the fiduciary theory's potential for abuse.

Of course, these proposals for narrowing the accountability gap are premised upon the idea that the Security Council itself can become a credible fiduciary for humanity, and not merely a forum for Machiavellian political maneuvering among the world's most powerful states. Given the Security Council's mixed track record, there are valid grounds for skepticism about whether the Security Council is up to the task.[124] Yet the Security Council need not be directed by angels to serve as an effective oversight body for humanitarian intervention. The deep political divisions and mutual distrust that attend Security Council decision-making may actually be a virtue if they can be channeled productively to generate rigorous review of humanitarian interventions. Developing effective mechanisms for post-authorization review could also make some P5 states

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124 To the extent that the fiduciary theory depends on a well-functioning Security Council, this is a serious weakness, though it is one that the fiduciary theory shares with many other theories of humanitarian intervention, including those that treat humanitarian intervention as a form of supranational executive action. *See, e.g.*, Bellamy, *supra* note 77, at 63 (observing that "both Francis Deng and Kofi Annan admitted that sovereignty as responsibility implied that sovereigns should be made accountable to a higher authority and that this required the creation of a legitimate and representative global body," but the Security Council "had to become more efficient, representative, and accountable in order to [serve this function]").

more willing to consider allowing humanitarian intervention in the future. Thus, even if international law cannot exclude political bias from coloring the Security Council's decision-making process, there may be ways to harness states' self-interest in the service of the fiduciary theory's emancipatory vision.

Conclusion

This Article has argued that legal scholars have been too quick to dismiss Grotius's contributions to the legal theory of humanitarian intervention. Updated for the twenty-first century, Grotius's characterization of humanitarian intervention as a fiduciary relationship best explains how foreign military intervention can facilitate human rights protection without unleashing new forms of international domination. When states intervene to protect foreign peoples from widespread and systematic abuse, they serve as fiduciaries, exercising foreign peoples' legal rights to self-defense on their behalf. By framing humanitarian intervention within a relational legal framework, the fiduciary theory ensures that international law regulates not only *when* states may use force abroad to protect human rights, but also *how* they must do so. Specifically, the fiduciary theory suggests that intervening states bear duties of loyalty and care, which require them to use their entrusted powers for the benefit of an oppressed people, including by respecting and protecting human rights such as the right to life. The fiduciary theory also reconciles foreign intervention with the principle of self-determination by requiring intervening states to consult with and honor the preferences of the people on whose behalf they purport to act. In these and other respects, the fiduciary theory's relational conception of humanitarian intervention clarifies the source and character of intervening states' authority to protect human rights abroad. To make the fiduciary theory of humanitarian intervention fully operative in practice, however, the international community must develop more robust institutions and procedures for holding intervening states accountable for the manner in which they exercise their entrusted powers.

Sovereignty as Trusteeship and Indigenous Peoples

*Evan Fox-Decent and Ian Dahlman**

We explore two special challenges indigenous peoples pose to the idea of sovereigns as trustees for humanity. The first challenge is rooted in a colonial history during which a trusteeship model of sovereignty served as an enabler of paternalistic colonial policies. The challenge is to show that the trusteeship model is not irreparably colonial in nature. The second challenge, which emerges from the first, is to specify the scope and nature of indigenous peoples' sovereignty within the trusteeship model. Whereas the interaction between states and foreign nationals is the locus of cosmopolitan law, the relationship between states and indigenous peoples is distinctive. In the ordinary cosmopolitan case, foreign nationals do not purport to possess legal authority. Indigenous peoples often do make such a claim, pitting their claim to authority against the state's. We discuss how international law has attempted to come to grips with indigenous sovereignty by requiring states to include indigenous peoples in decision-making processes that affect their historical lands and rights. A crucial fault line in the jurisprudence, however, separates a duty to consult indigenous peoples from a duty to acquire their free, prior and informed consent (FPIC). The latter but not the former recognizes that indigenous peoples possess a veto over state projects on their lands, in effect recognizing in them a limited co-legislative power. We focus on recent jurisprudence from the Inter-American Court of

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Human Rights, and consider whether either the duty to consult or FPIC are enough to dispel the shadow of the trusteeship model's colonial past. We suggest that they are a move in the right direction, and that implicitly they represent international law's recognition that states are no longer the sole bearers of sovereignty at international law. In limited circumstances, international law recognizes indigenous peoples as sovereign actors.

Introduction

> Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. This very kindness stings with intolerable insult. To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level of those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals.[1]

One need not have any sympathy for C.S. Lewis's theological apologetics to appreciate the various dangers posed by "omnipotent moral busybodies." If such persons hold public power and believe they are morally entitled to exercise it over the objections of the people subject to it, they are likely to cause those individuals great harm. Morally sanguine about their prescriptions, the busybodies may indeed "torment us without end." A deeper and more significant problem, however, is that subjection to any busybody is wrongful because it constitutes an ongoing "intolerable insult." The subject is "classed with infants, imbeciles, and domestic animals" because implicitly she is deemed incapable of governing herself. And so the idea that one person may gain authority over another by purporting to serve the latter person's interests is rightly condemned as paternalistic, even if governance by the alleged authority would in fact serve the putative subject's interests.

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1 C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, 228 (1953).

This presents a puzzle for trustee or fiduciary[2] conceptions of public authority: if the state holds sovereignty in trusteeship for its peoples and humanity at large, and the state's mandate as trustee is (in part) to act with due regard for the interests of its people and foreign nationals, how does the fiduciary state avoid the pratfall of becoming a paternalistic and "omnipotent moral busybody"? In other words, can we specify the state's role as trustee in a way that insulates it from the charge of paternalism? This is an especially pressing challenge when one considers, as we suggest below, that the state's position as trustee arises in part from the private legal subject's incapacity to exercise public powers.[3]

To explore this puzzle, we focus on a particularly hard case for fiduciary conceptions of sovereignty: the case of indigenous peoples who live within sovereign states. Indigenous peoples pose a hard case for two main reasons. First, as we discuss in Part I, European powers deployed an ethnocentrically busybody version of the trusteeship model to justify colonial expansion and domination of indigenous peoples.[4] This dark and lengthy history raises the question whether the trusteeship model can in principle take a non-paternalistic form. Moreover, even if paternalism is not a necessary implication of the fiduciary approach, there remains the further normative question whether it is worth adopting a model that appears so susceptible to abuse.

The second reason why indigenous peoples present a hard case has to do with the nature of their claims. The predominant claims of indigenous peoples are grounded in their historical occupation of certain lands, rights connected to indigenous uses of land (e.g., rights to hunt and fish), treaties with Europeans, and their own political and legal forms of self-government. These claims are communal or collective in character. But more important still, they comprise a claim to autonomy: i.e., a claim to a collective entitlement to govern their people and territory autonomously. Consequently, it is not obvious that a trusteeship model premised on human rights and democratic participation can respond adequately to the sub-state but collective demand of autonomy of indigenous peoples.[5] Whereas it is intuitively plausible to

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2 We use "trustee" and "fiduciary" interchangeably: both denote a power that is held in trust for others.

3 *See* Evan J. Criddle, *Reclaiming the Grotian Theory of Humanitarian Intervention*, 16 Theoretical Inquiries L. 473 (2015) (warning of the danger of paternalism that haunts trusteeship accounts of sovereignty); Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inquiries L. 447 (2015) (same).

4 For discussion of this colonial history, see Fitzmaurice, *supra* note 3.

5 *See generally* Eyal Benvenisti, *Sovereigns as Trustees for Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295 (2013) (affirming human rights and democracy as bases for viewing sovereigns as

imagine that international law, post-World War II, might concern itself with the human rights and democratic access of citizens and noncitizens alike, individuals and sub-state groups do not ordinarily claim territorial land rights, treaty rights and sovereign powers of their own. Indigenous peoples do make these claims. To the extent that they seek to retain or reclaim their right to self-government, their claim to possess public authority over the members of their communities and their territory is pitted against the state's.

In Part II we discuss how international law has attempted to come to grips with indigenous peoples' claims to autonomy by requiring states to include indigenous peoples in decision-making processes that affect their historical lands and rights. A crucial fault line in the positive law and jurisprudence separates a duty to consult indigenous peoples from a duty to acquire their free, prior and informed consent (FPIC). The latter but not the former recognizes in indigenous peoples an entitlement to veto state projects on their lands, in effect recognizing in them a limited co-legislative power. We focus on recent jurisprudence from the Inter-American Court of Human Rights (IACHR).

In Part III we elaborate a pluralist account of the sovereigns-as-trustees-of-humanity model, arguing that such an account must look within as well as outside states to accommodate the special claims and status of indigenous peoples. We claim that this pluralist rendering of the trusteeship theory is presupposed by the IACHR jurisprudence. Importantly, the IACHR jurisprudence suggests that the trusteeship model must recognize that some non-state actors — indigenous peoples — are cognizable to international law as sovereign actors. Under this approach, indigenous peoples do not acquire a claim to statehood. Rather, they enjoy a form of sub-state autonomy that yields a measure of the independence that comes with sovereignty. Sub-state but sovereign indigenous peoples may thus come to enjoy, as Martti Koskenniemi puts it when discussing sovereignty, "the thrill of having one's

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trustees for humanity). Of course, if one views indigenous claims as human rights claims — nothing Benvenisti says about human rights would block such a move — then a trusteeship model premised on human rights and democracy could accommodate indigenous claims. But because human rights are conventionally viewed as emanating from the moral status individuals possess by virtue of their shared humanity, and because they are usually rights asserted by individuals or groups against a state whose authority is taken for granted, our point is simply that some work would have to be done to show that indigenous collective claims to sub-state autonomy are also human rights claims. For a defense of the conventional view of human rights, see John Tasioulas, *Human Rights, Legitimacy, and International Law*, 58 Am. J. Int'l L. 1 (2013). For the distinctiveness of indigenous claims, see Patrick Macklem, Indigenous Difference and the Constitution of Canada (2001).

life in one's own hands."[6] With the pluralist model in place, we suggest that the IACHR regime can help overcome the moral-busybody challenge as well as the objection that the fiduciary approach lends itself to abuse.

I. Trusteeship, Sovereignty and Oppression

Accounts of European colonialism inevitably recount the use and abuse of the concept of trusteeship by colonial powers, typically traced back to the writings of Francisco de Vitoria.[7] For Vitoria, while indigenous peoples were the true owners of the land, it was necessary that European powers assume authority over the new world for indigenous benefit, as a sort of trustee of sovereignty.[8] Indigenous peoples were "sufficiently rational" to possess original rights, but they were "unfit to found or administer a lawful State up to the standard required by human and civil claims."[9] Thus began a well-documented tradition of using a civilization-based claim of indigenous incapacity to justify domination under the guise of trusteeship.

Vitoria was somewhat ambivalent about the relationship he conceptualized: "I dare not affirm it at all, nor do I entirely condemn it."[10] Yet he never explained his trepidation. Arguably, Vitoria was hesitant because he recognized that his theory lacked coherence and could generate undesired consequences. Undergirding the colonial use and abuse of trusteeship was a contradiction in its treatment of indigenous peoples. On the one hand, indigenous peoples were conceived as having no sovereignty, inhabiting *terra nullius*, and as such had no claim to standing or consideration under international law, allowing colonial claims to "new" or "discovered" territory. On the other hand, in practice indigenous peoples were treated as though they had sovereignty, or at least as though they had a moral claim to it: treaties were sought and signed, implicitly recognizing a form of original sovereignty that lay with indigenous peoples. Thus, indigenous sovereignty was at once both affirmed and denied. Antony Anghie has argued that it was the European encounter

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6 Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 Asian J. Int'l L. 61, 70 (2011).

7 Francisco de Vitoria, De Indes et De Ivre Belli Reflectiones (James Brown Scott ed., John Pawley Bate trans., 1917) (1532).

8 *See* S. James Anaya, Indigenous Peoples in International Law 18 (2d ed. 2004); *see also id.* at 31-34 (discussing the widespread European commitment to trusteeship over indigenous peoples in the nineteenth and early twentieth centuries, and its "civilizing" mission).

9 Vitoria, *supra* note 7, at 161.

10 *Id.* at 160.

with indigenous peoples that produced the concept of sovereignty,[11] but even in that case the concept was forged only so it could be at once recognized and denied with respect to indigenous nations. To this day, international law remains plagued by this formative contradiction as it struggles to recognize and accommodate the status of indigenous peoples, indigenous treaties, and indigenous rights.

Under the Westphalian conception of state sovereignty in international law, states possess exclusive and absolute dominion over a territory and its people. James Tully has labelled the result of this conception of sovereignty "the Empire of Uniformity," whereby a drive towards absolute and centralized power produced "monologic" relations — that is, an undifferentiated relation of dominion over aboriginal peoples, justified as an inherent dimension of European state sovereignty.[12] P.G. McHugh, however, in his magisterial history of English commonwealth colonialism, suggests that it was only by the mid- to late-nineteenth century that Tully's "Empire of Uniformity" accurately captured "the misery-ridden experience of aboriginal peoples in the North American and Australasian jurisdictions."[13] By this point, indigenous peoples were entirely subsumed within the state, and subject to a "non-justiciable trust."[14] Indigenous peoples were denied what we now refer to as aboriginal standing or aboriginal rights because the relationship between them and the Crown was viewed as a function of the Crown's prerogative.[15] Their status served to negate any indigenous legal capacity, swallowed by a positivist vision of Crown sovereignty.[16]

It is important to recognize that the "Empire of Uniformity" form of sovereignty did not emerge fully formed, but was rather the result of shifting doctrines and practices which, McHugh stresses, lacked any consistent application in the early nineteenth century.[17] The inconsistency of Crown policy toward indigenous peoples was epitomized by the tension between the recommendations of an 1837 Select Committee on Aboriginals and actual

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11 *See* Antony Anghie, Imperialism, Sovereignty and the Making of International Law 29 (2005).

12 *See* James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (1995).

13 P.G. McHugh, Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self Determination 129 n.20 (2004) (implying in a footnote that he is giving historical location to what Tully merely described as a "powerful tendency").

14 *Id.* at 191.

15 *Id.*

16 *Id.* at 213.

17 *Id.*

Crown practice. The Committee recommended that Britain no longer conclude treaties with tribes under British sovereignty, so as to avoid the claim that indigenous polities possessed a measure of sovereignty.[18] The Committee believed that "proper recognition of the rights of aboriginal peoples came through the Crown guardianship of its aboriginal subjects rather than the 'decorous veil' of a pretended, retained tribal sovereignty," a sovereignty the Committee claimed was unsustainable under common law doctrine.[19] McHugh notes, however, that the report came too late for many colonies, which had been concluding treaties for years, and in practice representatives of the Crown continued to make treaties, driven by a need to obtain aboriginal land for resources rather than any ideological project.[20] The sum was a massive inconsistency: in British practice, indigenous people were seen as capable of relinquishing sovereignty and land, but without the legal status requisite for such a cession.[21] It was only by the end of the nineteenth century that the Westphalian conception of state sovereignty would implicitly oust indigenous sovereignty, in effect denying the previous two centuries' practice that recognized tacitly the sovereign capacity of indigenous groups.[22]

The simultaneous recognition and denial of indigenous sovereignty is emblematic of what Koskenniemi identifies as the "exclusion-inclusion" discourse of international law.[23] For Koskenniemi, treaty practices of the nineteenth century — or in poignant terms for this Article, the seeking of "native consent in written form"[24] — epitomized the double play of colonialism. Treaties were an important part of justifying an empire: "[n]ative consent given in a treaty cession seemed to constitute an irreproachable moral-legal basis for European title and did away with the suspicion that Europeans were merely following in the footsteps of the fifteenth- and sixteenth-century empires."[25] Nonetheless, for the treaties to be valid implied both indigenous

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18 *Id.* at 133.

19 *Id.* at 134.

20 *Id.* at 126.

21 *Id.* at 132-33.

22 *Id.* at 213. A sceptic might suggest that there is no inconsistency here, that sovereignty was merely surrendered in exchange for Crown protection. One of us has argued elsewhere that such an account is unconvincing. A surrender of sovereignty was unnecessary for acceptance of British protection, and any such deal would have been unconscionable and void. *See* Evan-Fox Decent, Sovereignty's Promise: The State as Fiduciary 65-66 (2011).

23 Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960, at 130 (2002).

24 *Id.* at 137.

25 *Id.* at 138.

possession of sovereignty and standing for indigenous peoples, which would subsequently be denied under orthodox conceptions of international law. From the beginning, indigenous peoples were inside and outside international law, with and without sovereignty, and in possession of land that had been viewed as *terra nullius* but still required cession by treaty.

Animating this nineteenth-century evolution of sovereignty, McHugh claims, was a justification of the relationship between the Crown and indigenous peoples as one of trusteeship or guardianship. McHugh explains how Enlightenment thinking — which saw history as progress and humanity at various points on a spectrum guided by a universal law of development ("monogenism") — combined with a liberty-extending vision of imperialism to define Britain's relationship with non-Christian peoples.[26] Equally important was the liberal belief "that human nature was intrinsically the same everywhere, and that it could be totally and completely transformed, if not by revelation . . . then by the workings of law, education, and free trade."[27] Civilization became the catch-all discourse, albeit inconsistently deployed, to sum up these beliefs and practices; a standard whereby aboriginal culture fell short but which colonialism could help cultivate, thereby justifying imperial rule. As Anghie puts it, in the nineteenth-century "the acquisition of sovereignty was the acquisition of European civilization," which meant that for "the non-European world, sovereignty was the complete negation of power, authority and authenticity."[28] Indigenous peoples were seen through familiar tropes as either barbarians or noble savages, untouched by the enlightening or corrupting power of civilization. These tropes were subsequently blended with Social Darwinist beliefs that rose to popularity in the 1860s and which affirmed that survival was the prize for the fittest culture. Within Britain's intellectual culture at the time, civilization "came to describe a state into which aboriginal culture would be prodded and shepherded,"[29] producing the assimilationist practices that would violently define indigenous life within an "Empire of Uniformity."

Koskenniemi writes that the nineteenth-century colonial discourse of civilization equally presents a case of "exclusion-inclusion" regarding indigenous sovereignty. Sovereignty, understood as both an indicator and a gift of civilization, was to be judged by European standards. In the presence of indigenous difference, civilization as a measure of sovereignty worked as a paradoxical justification of colonialism due to its malleability and Eurocentrism:

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26 McHugh, *supra* note 13, at 121-22.

27 *Id.* at 125.

28 Anghie, *supra* note 11, at 104.

29 McHugh, *supra* note 13, at 126.

> [I]f there was no external standard for civilization, then everything depended on what Europeans approved. What Europeans approved, again, depended on the degree to which aspirant communities were ready to play by European rules. But the more eagerly the non-Europeans wished to prove they played by European rules, the more suspect they became . . . . In order to attain equality, the non-European community must accept Europe as its master — but to accept a master was proof that one was not equal.[30]

Koskenniemi's history reveals a colonialism that both denied and extended sovereignty at the same time, through a conception of civilization that assured European domination under an imperial rule cloaked in trusteeship.

Alternative accounts, such as the one provided by Ronald Niezen, suggest these contradictions only existed so long as they were necessary to solidify colonial power. "Only as the balance of power shifted," he writes, "in favour of immigrant peoples with a growing settler population, increased military power, and the decimation of indigenous populations through diseases of European origin was the status of indigenous peoples as nations reappraised and legally diluted."[31] While the dynamics of power are undeniable, what such an account misses is that sovereignty's indigenous contradiction was more than a convenient power placeholder; it became the foundation and continuing *modus operandi* of the international legal order *vis-à-vis* indigenous peoples. Far from being "a one-shot affair," Patrick Macklem stresses that international law "is an ongoing process of exclusion and inclusion to the extent that it continues to subsume indigenous populations under the sovereign power of States not of their making."[32] On Macklem's view, international law is predominantly a legal system that vests sovereignty in states.[33] Its starting point allowed indigenous sovereignty only insofar as it could be forfeited, and the dual inclusion-exclusion discourse enabled the creation of an international legal order that is with us to this day.

The question now, then, is whether international law, as a system that distributes sovereignty to some actors and not others, is amenable to reconceptualization from the point of view of indigenous peoples. The immense challenge in restructuring the international legal order so as to include indigenous peoples has led some theorists to suggest sovereignty is conceptually irredeemable.

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30 Koskenniemi, *supra* note 23, at 135-36.

31 Ronald Niezen, The Origins of Indigenism: Human Rights and the Politics of Identity 29 (2003).

32 Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 Mich. J. Int'l L. 177, 186 (2008).

33 *Id.* at 182.

For Karen Shaw, the liberal conception of sovereignty operates pre-politically, as a set of shared ontological and epistemological conditions that become the foundation of the exercise of politics.[34] As a result, indigenous peoples are rendered external or other in the production of sovereignty in international law: "the violence of [sovereignty's] production is rendered necessary and inevitable, rather than open to scrutiny and contestable."[35] In other words, sovereignty is a precondition that sets limits on the political and results in an "othering" of indigeneity. Any project of reform that fails to take the pre-political status of sovereignty seriously, she writes, is guilty of "reinscribing the problem in [its] efforts to find solutions."[36] From this perspective, the structure of international law is necessarily incompatible with plurality and will inevitably marginalize indigeneity in its maintenance and distribution of sovereignty.

Macklem, however, suggests just the opposite: it is the structure of international law, and its foundational denial of indigenous sovereignty, that justifies and gives standing to indigenous people, particularly in the form of indigenous rights. In this regard, indigenous rights emerge in order to

> mitigate some of the adverse consequences of how the international legal order continues to validate what were morally suspect colonization projects by imperial powers . . . whose claims of sovereign power possess legal validity because of an international legal refusal to recognize these peoples and their ancestors as sovereign actors.[37]

What is fascinating in Macklem's conception, then, is that the ongoing colonial machinations at the base of international law are what now drive international legal recognition of aboriginal standing and rights. In this sense,

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34 Karen Shaw, Indigeneity and Political Theory: Sovereignty and the Limits of the Political 8-9 (2008). Shaw draws particular attention to Thomas Hobbes, whose blueprint for sovereignty in *Leviathan*, she claims, necessarily begins with "an entire — quite specific — attitude towards time, history, meaning" and constructs a knowing subject against the figure of the savage. *Id.* at 32-37. While Hobbes at times expressed the ethnocentric views of his day, Shaw misinterprets him badly when she casts him as an advocate of a pre-political view of sovereignty. For Hobbes, the state of nature is pre-political, but sovereignty is an artifice and always human-made. One of us has disputed Shaw's pre-political and authoritarian reading of Hobbes. *See* Evan Fox-Decent, *Hobbes's Relational Theory: Beneath Power and Consent*, *in* Hobbes and the Law 118 (David Dyzenhaus & Tom Poole eds., 2012).

35 Shaw, *supra* note 34, at 203.

36 *Id.* at 156.

37 Macklem, *supra* note 32, at 179.

international law's contradiction with regard to indigenous peoples — the aforementioned "ongoing process of exclusion and inclusion"[38] — justifies an internal correction because "the sovereign power of the States in which they are located is grounded in international law's refusal to recognize their ancestors as sovereign legal actors."[39] Whereas for Shaw the concept of sovereignty denies meaningful recognition of indigenous rights and sovereignty *ab initio*, Macklem suggests that international law's system of sovereignty itself explains contemporary recognition of indigenous claims.

In 2007, James Anaya outlined four major effects indigenous peoples have had on modern international law, an influence that supports Macklem's position and suggests an ongoing process of correction within international law. The first way indigenous peoples have shaped international law, Anaya writes, is by pushing it past the individual-state dichotomy and toward recognition of collective rights,[40] while the second is a general weakening of an absolutist doctrine of state sovereignty.[41] The third effect of indigenous peoples on international law is contestation of the assumed connection between self-determination and statehood, thus undermining "the premise of the state as the highest and most liberating form of human association."[42] The final effect is a breakdown of the classical understanding of the subjects of international law, since a true plurality of sub-state and autonomy-seeking actors must now be considered.[43] Each development challenges, to some degree, the exclusion of indigenous sovereignty from international law.

We have argued that, as a general matter, colonial powers recognized indigenous sovereignty when it suited their interests to do so, and denied it otherwise. International law enabled this inclusion-exclusion approach to indigenous peoples by supplying the framework under which European states could seek to justify colonialism by purporting to place indigenous peoples under a civilizing trusteeship, allegedly for their own good. In the next Part, we begin with a brief overview of the development of modern international law on indigenous peoples. We then discuss the development under international law of indigenous peoples' right to participate in public decision-making. We pay particular attention to IACHR jurisprudence that imposes on states a duty to consult and, in some cases, an FPIC duty to obtain

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38 *Id.* at 186.

39 *Id.* at 209.

40 S. James Anaya, *Indigenous Law and Its Contribution to Global Pluralism*, 6 Indigenous L.J. 3, 6-7 (2007).

41 *Id.* at 8.

42 *Id.* at 9.

43 *Id.* at 10.

indigenous consent to intended state-sponsored projects. As we shall see, the IACHR jurisprudence implicitly affirms an ideal of constitutional pluralism. To that extent, it holds the promise of letting trusteeship in international law break with its colonial and paternalist past.

II. Indigenous Participation as Indigenous Sovereignty

A. The Rise of Indigenous Rights

At the Berlin Conference on Africa in 1884, European powers divided up Africa for colonization while committing themselves to "watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being. . . ."[44] Similarly, the members of the League of Nations later undertook "to secure just treatment of the native inhabitants of territories under their control."[45] Under the League's mandate system, which applied to territories annexed to or colonized by Germany and the Ottoman Empire before World War I, mandatories pledged to provide "tutelage" of local inhabitants "not yet able to stand by themselves" in accordance with "the principle that the well-being and development of such peoples form a sacred trust of civilization. . . ."[46] Around the same time, during the Interwar period, the International Labour Organization (ILO) began to extend its supervision of working conditions to the colonies.[47]

It was not until 1957, however, that the ILO adopted the Indigenous and Tribal Populations Convention (Convention 107),[48] which for the first time extended international law to indigenous peoples living not in colonies but independent states. Drafted in the shadow of the Universal Declaration of Human Rights,[49] Convention 107 enshrined a significant array of rights protective of indigenous

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44 General Act of the Conference of Berlin Concerning the Congo art. 6 (Feb. 26. 1885), *reprinted in* 2 E. Hertslet, The Map of Africa by Treaty 468, 473 (3d ed. 1908).

45 League of Nations Covenant art. 23, para. b.

46 *Id.* at art. 22.

47 *See* Luis Rodríguez-Piñero, Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989) (2005) (providing a detailed account of the ILO's interventions and initiatives regarding indigenous peoples).

48 International Labour Organization Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247 [hereinafter ILO No. 107].

49 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

peoples — e.g., rights to traditional territory,[50] nondiscrimination in political and civic life[51] and employment,[52] social security,[53] health services,[54] and education.[55] Nonethless, these rights were all subsumed within an overarching policy of integration that considered the suffering of indigenous peoples to stem from a failure to integrate them into the liberal settler state. The Preamble of Convention 107 affirms that a lack of integration of indigenous peoples explains their disadvantaged position, and calls for "their progressive integration into their respective national communities."[56] Implicit throughout is an erasure of indigenous sovereignty and any entitlement to sub-state autonomy. In other words, Convention 107 preserves and even entrenches more deeply the paternalistic approach.

As with the commitments undertaken at the Berlin Conference of 1884 and later on through the League of Nations' mandate system, the rights protected under Convention 107 emerge from a deep-seated view that the central problem afflicting indigenous peoples is that they are distinctively indigenous. Plainly, Convention 107 was drafted under the still-prevalent influence of colonial misconceptions about the inferiority of indigenous peoples. While the measures used to bring about integration were not to include "force or coercion"[57] — Convention 107 marks a shift in policy from forcible assimilation to non-coercive integration — the Convention nevertheless sought the "progressive integration" of indigenous peoples into Western society and with it the extinguishment of indigenous peoples *qua* peoples. To this extent, the Convention upheld the assumption of the mandate system that aboriginal individuals were in need of "tutelage," and likewise would have appeared to many of its intended beneficiaries as the alien constitutional regime of an intermeddling moral busybody.

Convention 107 did contain a forerunner of the duty to consult. Under Article 5, state parties were to "seek the collaboration of [indigenous] populations and of their representatives."[58] But the context of this collaboration was limited to the state's application of "the provisions of this Convention relating to the

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50 ILO No. 107, *supra* note 48, art. 11.
51 *Id.* art. 2.
52 *Id.* art. 15.
53 *Id.* art. 19.
54 *Id.* art. 20.
55 *Id.* arts. 21-25.
56 *Id.* pmbl.
57 *Id.* art. 2(4); *see also id.* art. 4 (addressing the harms that can befall groups and individuals "when they undergo social and economic change").
58 *Id.* art. 5(a).

protection and integration of the populations concerned."[59] In other words, the scope of indigenous collaboration was limited to the assistance it could provide to liberal rights protection and the dissolution of indigenous peoples as distinctive entities.

In 1989, Convention 107 was replaced by the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169).[60] While many of the same substantive rights affirmed in Convention 107 are retrenched in Convention 169, the latter makes no reference to an overarching policy of integration. Moreover, while Convention 107 stipulated that indigenous peoples "shall be *allowed* to retain their own customs and institutions where these are not incompatible with the national legal system or the objective of integration programmes,"[61] Convention 169 affirms that indigenous peoples "shall have the *right* to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights."[62] Convention 169 also anticipates the establishment of procedures to resolve conflicts between indigenous customary law and national law or international human rights.[63] These provisions have led many scholars to suggest that Convention 169's signal achievement is its recognition of legal pluralism within multinational and pluriethnic states.[64]

B. Between Consultation and Consent

Implicit to intrastate legal pluralism is an idea of constitutional pluralism under which sovereign powers related to lawmaking, adjudication and administration are distributed within a single state across separate entities that have primary jurisdiction over certain territories and persons. Plausibly, under this constitutional model, indigenous peoples would have primary jurisdiction over the lands and aboriginal inhabitants within their territory. Tensions arise, however, when states seeks to utilize indigenous lands for national purposes in ways that will harm indigenous communities. States, for example, may wish to develop hydro projects or grant concessions for

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59 *Id.* art. 5.

60 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO No. 169].

61 ILO No. 107, *supra* note 48, art. 7(2) (emphasis added).

62 ILO No. 169, *supra* note 60, art. 8(2) (emphasis added).

63 *Id.*

64 *See, e.g.*, Anaya, *supra* note 8, at 58-59.

the extraction of natural resources. These forms of state action may infringe indigenous rights to land or indigenous rights to use certain lands for traditional purposes, such as religious ceremonies, hunting or fishing.

Crucial for present purposes is the way invasive state action tests both the constitutional pluralist model and the idea that sovereignty is held in trust for humanity. Constitutional pluralism is tested because state action over indigenous peoples and their lands brings to the fore the issue of whether state or indigenous authorities have ultimate decision-making power with respect to such matters. The limits of the trusteeship model are likewise tested: can the trusteeship model entrust sovereign powers to joint but conflicting public entities within the same state? And if it can, how are conflicts between state and indigenous legal authorities to be resolved? At the limit, the question is whether international law can go deeply intra-national and meet the demands of constitutional pluralism that arise from the presence of indigenous peoples within sovereign states. The challenge is not to pierce the veil of sovereignty, but to reimagine sovereignty's structure and foundations.

Convention 169 addresses the problem of constitutional pluralism, in part, by entrenching a much more robust duty to consult than appeared in Convention 107. Article 7(1) affirms that indigenous peoples are entitled to participate in public policy- and decision-making that affects them directly.[65] More specifically still, Article 6(1) declares that states must "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."[66]

In drafting Convention 169, a major stumbling block concerned whether indigenous people would have a veto over invasive state action. State parties roundly condemned this proposal as an unwarranted violation of their sovereignty, while indigenous representatives insisted on an FPIC duty and its implicit veto.[67] In the result, the drafters settled on the following compromise that fell short of a full FPIC obligation, but nonetheless identified FPIC as the "objective" of the duty to consult: "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."[68]

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65 ILO No. 169, *supra* note 60, art. 7(1).

66 *Id.* art. 6(1).

67 *See* Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 Okla. City U. L. Rev. 677, 690-91 (1990) (discussing the dispute).

68 ILO No. 169, *supra* note 60, art. 6(2).

In 2007, the U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP).[69] Whereas Convention 169 is silent on the issue of self-determination and indeed undercuts such claims by stipulating that the term "*peoples*" in the Convention is not to be read as having any implications under international law,[70] UNDRIP declares forthrightly that "[i]ndigenous peoples have the right to self-determination."[71] Similarly, UNDRIP recognizes in indigenous peoples "the right to autonomy or self-government,"[72] as well as "the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions."[73] UNDRIP protects a wide range of indigenous cultural and religious practices, and places states under an unqualified FPIC duty in relation to any action that might compel a community's relocation.[74] Furthermore, the general duty to consult from UNDRIP is stronger and closer to an FPIC duty than the cognate duty from Convention 169:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[75]

This is not an FPIC duty, strictly speaking, since the requirement that states consult "*in order to obtain*" indigenous consent leaves open the possibility that a state may engage in a good-faith consultation, fail to obtain consent, and then proceed with its project having consulted in good faith. Although UNDRIP is nonbinding, it and Convention 169 formed part of the international legal context within which the IACHR recently adjudicated two important cases

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69 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, 46 I.L.M. 1013 (Sept. 13, 2007) [hereinafter UNDRIP]. 143 countries voted for the Declaration, four voted against, eleven abstained, and thirty-four were absent from the vote. Australia, New Zealand, Canada and the United States voted against.

70 ILO No. 169, *supra* note 60, art. 1(3) ("[T]he term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.").

71 UNDRIP, *supra* note 69, art. 3.

72 *Id.* art. 4.

73 *Id.* art. 5.

74 *Id.* arts. 8, 9, 10, 11, 12, 13, 15, 24, 25, 34.

75 *Id.* art. 32(2).

involving the duty to consult: *Saramaka People v. Suriname*[76] and *Kichwa People of Sarayaku v. Ecuador*.[77]

C. Consultation and FPIC at the IACHR[78]

The Saramaka are a Maroon people of African descent. Their ancestors were taken forcibly to Suriname as slaves during European colonization in the seventeenth century. They fought and won freedom from slavery in the eighteenth century, establishing themselves as autonomous communities in the rainforest of the Upper Suriname River region. The Court found that they organized themselves in matrilineal clans, had a communal system of property holding, maintained a strong spiritual connection to their lands, and regulated themselves (at least partially) using their own norms and cultural traditions. Thus they were considered a tribal community, and as such entitled to rely on special measures of protection the Court had established in its prior decisions

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76 Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007). For commentary, see Lisl Brunner, *The Rise of Peoples' Rights in the Americas: The* Saramaka People *Decision of the Inter-American Court of Human Rights*, 7 Chinese J. Int'l L. 699 (2008); James Harrison, *International Law — Significant Environmental Cases 2007-08*, 20 J. Envtl. L. 475 (2008); and Marcos Orellana, Saramaka People v. Suriname *(Case Note)*, 102 Am. J. Int'l L. 841 (2008). The Court provided an "interpretation judgment" in 2008 to clarify certain findings in its original 2007 judgment. *See* Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185 (Aug. 12, 2008).

77 Kichwa People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012). For commentary, see Lisl Brunner & Karla Quintana, *The Duty to Consult in the Inter-American System: Legal Standards After Sarayaku*, Am. Soc'y Int'l L. Insights, Nov. 28, 2012, at 35; Upsana Khatri, *Indigenous Peoples' Right to Free, Prior and Informed Consent in the Context of State-Sponsored Development: The New Standard Set in* Sarayaku v. Ecuador *and Its Potential to Delegitimize the Belo Monte Dam*, 29 Am. U. Int'l L. Rev. 165 (2013); and Carol Verbeek, Note, *Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of* The Kichwa People of Sarayaku v. Ecuador, 37 Am. Indian L. Rev. 263 (2012-2013).

78 The IACHR's mandate is to adjudicate claims where States Parties are alleged to have violated the American Convention on Human Rights, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969) [hereinafter American Convention]. Beginning in 2001, the IACHR began to recognize the rights of indigenous peoples to their ancestral lands.

on indigenous and tribal land rights. In *The Moiwana Community v. Suriname*,[79] in particular, the Court had found that another Maroon community in Suriname was a tribal community to which special measures of protection applied.

Saramaka People arose from Suriname's failure to recognize and secure the Saramakas' rights to traditional lands and resources, and its violation of those rights through concessions to mining and logging companies. The key articles of the American Convention on which the Saramaka relied were Articles 1, 2 and 21. Article 1 commits the Convention's signatories to respecting the rights and freedoms it enshrines.[80] Article 2 aims to ensure that the commitment under Article 1 has domestic effect by requiring states to adopt any legislative or other measures as may be necessary.[81] Finally, Article 21 establishes a right to property subject to lawful restrictions that serve the public interest and which are accompanied by "just compensation."[82]

The Court held that Article 21 protects the communal property of indigenous communities.[83] This expansive interpretation of Article 21, the Court said, is "based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples."[84] The Court found that Suriname was under an obligation to adopt an appropriate legislative framework to give domestic effect to the Saramakas' communal property right, and a further duty to delimit and demarcate this property in consultation with the Saramakas and neighboring peoples. The Court declared Suriname in breach of both duties.[85]

These findings more or less reaffirmed and applied the Court's prior case law. The Court's subsequent conclusions with respect to natural resource rights, however, were largely novel and in a good sense revolutionary. In two prior cases, *Yakye Axa* and *Sawhoyamaxa*, the Court had held that members of indigenous and tribal communities have the right to ownership of natural resources traditionally used within their territories, because without such

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79 The Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

80 American Convention, *supra* note 78, art. 1(1).

81 *Id.* art. 2.

82 *Id.* art. 21.

83 *Saramaka People*, (ser. C) No. 172, ¶ 89 (quoting The Indigenous Community Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 143 (June 17, 2005)).

84 *Id.* ¶ 90.

85 *Id.* ¶ 96.

ownership their physical and cultural survival would be imperiled.[86] But those cases did not confront the issue of commercial exploitation of natural resources, nor the issue of subsoil rights.

In *Saramaka People*, the Inter-American Commission and the Saramakas' representatives alleged that concessions to forestry and mining companies, unless granted after full and effective consultation with the Saramakas, violated the community's right to natural resources lying on and within the land. Suriname countered that all land ownership, including all natural resources, vests in the State, and thus the State may grant at its discretion mining and logging concessions within Saramaka territory. Suriname also argued, in the alternative, that if the Court found that the Saramakas had some entitlement to resources, that this entitlement should be limited to the tribe's subsistence requirements (e.g., agriculture, hunting and fishing).[87]

The Court acknowledged that mining and logging operations could have unintended deleterious consequences with respect to the Saramakas' traditional use of resources, but noted that Article 21 provides that national law may restrict property rights for public purposes so long as the restriction respects proportionality.[88] Additionally, the Court held that the State could restrict the Saramakas' use and enjoyment of ancestral lands only if the restriction "does not deny their survival as a tribal people."[89] From this principle of physical and cultural survival, the Court adduced three concrete obligations owed by the State to the Saramakas whenever a concession over natural resources within their territory is under contemplation. First, the Saramakas must be ensured effective participation within any development, investment, exploration or extraction plan. Second, the Saramakas must receive a reasonable benefit from any such plan. Third, no concession may be granted until an independent environmental and social impact assessment has been conducted.[90]

In elaborating the content of "effective participation" within development or investment plans, the Court said that at a minimum this implies a duty to consult with the community "at the early stages . . . not only when the need arises to obtain approval from the community."[91] The State must also ensure

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86 *Yakye Axa*, (ser. C) No. 125, ¶ 137; The Indigenous Community Sawhoyamaxa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006).

87 *Saramaka People*, (ser. C) No. 172, ¶¶ 118-125.

88 *Id.* ¶ 127. The Court held that restrictions on property must be "a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society." *Id.* ¶¶ 144-145.

89 *Id.* ¶ 128.

90 *Id.* ¶¶ 129-140.

91 *Id.* ¶ 133.

that the community is aware of environmental and health risks. All this is consistent with the duties to consult found in Convention 169 and UNDRIP.

The Court broke new ground, however, when it turned its attention to the requirements of "effective participation" where "large-scale" development or investment projects are involved that would have a major impact within Saramaka territory. In these cases, the Court held that "the State has a duty, not only to consult the Saramakas, but also *to obtain their free, prior, and informed consent, according to their customs and traditions*."[92] The Court, in other words, plainly affirmed an unequivocal FPIC duty. The obligation of the state in these circumstances is not simply to consult "in order to obtain" indigenous consent (UNDRIP) or with such consent as its "objective" (Convention 169). The FPIC duty imposed by the Court is qualitatively different in nature than the duty to consult because it alone gives indigenous peoples a veto over large-scale state action within their territory. In support of the FPIC duty, the Court cited a report by the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People.[93] The Special Rapporteur found that large-scale projects can have devastating effects related to "loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence."[94] In sum, where the physical and cultural survival of an indigenous people is threatened by a large-scale project, the Court imposes an FPIC duty to resolve the question of "Who decides?" in favor of indigenous peoples.[95]

In *Sarayaku*, the Court had to rule on the legality of Ecuador's grant of a permit to a private oil company to carry out exploration and exploitation activities in Sarayaku territory in the 1990s without previously consulting the Sarayaku or obtaining their consent. The Kichwa People of Sarayaku

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92 *Id.* ¶ 134 (emphasis added).

93 *Id.* ¶ 135 (citing Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, submitted in accordance with Commission Resolution 2001/65, 59th Sess., U.N. Doc. E/CN.4/2003/90, at 2 (24/02/2003) (by Rodolfo Stavenhagen)).

94 *Id.*

95 There is a helpful analogy to the FPIC duty in U.S. corporate law. In certain settings, classes of shares are entitled to vote separately on decisions that will have a material adverse effect on their interests, and their vote may be decisive, even if the class constitutes a minority position in the corporation. Del. General Corp. Law art. 242(b)(2). We thank Andrew Gold for pointing out this analogy to us.

inhabit a remote tropical forest area of the Amazonian region of Ecuador. Numbering roughly 1200, they have traditional lawmaking and executive institutions, and live according to ancestral customs and traditions, subsisting on collective farming, hunting, fishing and gathering.[96] In 1992, Ecuador awarded territory to indigenous peoples in which the Sarayaku territory composed 135,000 hectares.[97] In 1998, Ecuador ratified Convention 169, and a month later adopted its 1998 Constitution which recognizes the collective rights of indigenous peoples.[98]

In 1996, however, Ecuador had granted a private oil company a permit to explore and exploit hydrocarbons in an area encompassing sixty-five percent of the Sarayaku territory.[99] The contractor assumed obligations to prepare an Environmental Impact Assessment (EIA) and an Environmental Management Plan aimed at preserving the ecological integrity of the region, but these were never put into practice.[100] Instead, the contractor offered inducements to various individuals within the Sarayaku community to win their support so as to obtain the consent of the community as a whole.[101] On June 25, 2000, the Sarayaku held a General Assembly at which, in the presence of the contractor, it decided to reject the company's offer of sixty-thousand dollars total and jobs for 500 men of the community.[102] In 2001, the contractor hired a team of anthropologists and sociologists that attempted to divide the community through a campaign of defamation waged against various leaders and local organizations.[103] In 2002, the government approved the contractor's EIA and Environmental Management Plan over the objections of the Sarayaku. The contractor engaged in seismic exploration using explosives, with increasing conflicts between the Sarayaku, the military and the contractor's security personnel. The Sarayaku declared an "emergency" in November 2002, ceasing their daily economic, educative and administrative activity for four to six months. The Court found that the oil company destroyed one site of special significance for the spiritual life of the Sarayaku, and also "laid down seismic lines, set up seven heliports, destroyed caves, water sources and underground rivers needed to provide drinking water for the community; and cut down trees

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96 *Sarayaku*, (ser. C) No. 245, ¶¶ 52-57.
97 *Id.* ¶ 61.
98 *Id.* ¶ 71.
99 *Id.* ¶ 65.
100 *Id.* ¶¶ 67-69.
101 *Id.* ¶¶ 73-75.
102 *Id.* ¶ 74.
103 *Id.* ¶ 75.

and plants of great environmental and cultural value, and used for subsistence food by the Sarayaku."[104]

Citing Convention 169, UNDRIP and *Saramaka People*, the Court affirmed that the right to consultation is "one of the fundamental guarantees to ensure the participation of indigenous peoples and communities in decisions regarding measures that affect their rights,"[105] and characterized the obligation as a "general principle of international law."[106] Although the Court did not discuss the FPIC duty of *Saramaka People* explicitly, it referred to the paragraph that contained it at numerous junctures.[107] Given the numerous adversarial measures the state and the contractor had taken against the Sarayaku, and the lack of any meaningful consultation, the Court did not need to rely on an FPIC duty to hold Ecuador liable — a robust duty to consult was more than adequate. Significantly, however, various aspects of the Court's articulation of the duty to consult in *Sarayaku* arguably presuppose or admit something very close to an FPIC obligation. Consultation must take place in the early stages and "not only when it is necessary to obtain the community's approval, if appropriate."[108] The Court also held that the duty to consult includes a duty to disclose the potential risks and benefits of a project.[109] The justification of this duty is cast in terms of allowing the members of the indigenous community to make an informed decision whether or not to approve the project.[110] This duty to disclose would have no purpose if a community's subsequent negative decision had no legal effect.

We turn now to the question whether this beefed-up duty to consult and an FPIC duty of limited scope can save a trusteeship model of sovereignty from its alleged susceptibility to abuse and the charge of busybody paternalism. But to address these concerns, we first need to bring into view the *plural* fiduciary structure of sovereignty suggested by the constitutional pluralism that underwrites the IACHR's duty-to-consult jurisprudence.

III. Implications of Constitutional Pluralism

The plural and fiduciary conception of sovereignty builds on the idea that states hold sovereignty in trust for humanity. The implication of this thought

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104 *Id.* ¶ 105.
105 *Id.* ¶ 160.
106 *Id.* ¶ 164.
107 *Id.* notes 178, 236, 242.
108 *Id.* ¶ 177.
109 *Id.*
110 *Id.*

is that states must take account of the interests of foreign stakeholders when they adopt policies that have spillover or negative externality effects.[111] States are entitled to favor their nationals because they are entrusted by international law to secure political and legal order on their behalf within the territory under their jurisdiction, but states cannot adopt an attitude of indifference to foreign nationals who stand to be wronged by their policies. On this view, states can treat their nationals as a predominant but not exclusive moral concern.[112] While the members of indigenous peoples are citizens and not foreign nationals, the pluralist account of sovereigns as trustees nonetheless must extend the trusteeship model in two directions so as to explain the special status and claims of indigenous peoples under international law.

First, the pluralist account borrows from the path-breaking work of Will Kymlicka, treating indigenous peoples as a special case on the grounds that no one can reasonably be asked to forsake the legal and political institutions that are thickly constitutive of their distinctive culture and sense of place in the world.[113] Busybody policies of assimilation and integration are wrongful precisely because they foist this unreasonable demand on indigenous peoples and their members. The special status of indigenous peoples is reinforced by their thick attachment to ancestral lands, an attachment on which their cultural survival is often said to depend.[114] Whereas the sovereigns-as-trustees model suggests that foreign stakeholders have fewer and weaker claims against states than citizens, in the indigenous case, just the opposite is true: the sovereigns-as-trustees model, applied in a manner that is sensitive to indigenous difference, suggests that indigenous peoples and their members have wider and stronger claims against the state than non-indigenous citizens.

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111 Benvenisti, *supra* note 5, at 8 (characterizing this approach as a rejection of monism in favor of "other-regarding dualism"). As will become clear, our defense of constitutional pluralism pushes "other-regarding dualism" into new pluralistic territory.

112 A rich literature on cosmopolitanism has developed around this idea. *See, e.g.*, Kok-Chor Tan, *The Demands of Justice and National Allegiance*, *in* The Political Philosophy of Cosmopolitanism 164 (G. Brock & H. Brighouse eds., 2005).

113 *See* Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (1995).

114 *See, e.g.*, *Saramaka People*, (ser. C) No. 172, ¶ 90. A "thick" attachment is an attachment partially constitutive of a person or group's identity; the person or group cannot forego the attachment without suffering a grave sense of loss, such as one experiences with the passing of a loved one or an injury that ends one's career. These considerations reveal that the pluralist model applies to indigenous peoples where there is no (or an attenuated) history of colonialism, such as the Samis in Scandinavia, as well as to the majority who have endured colonialism.

Indigenous claims are *wider* because they encompass, for example, the duty to consult and a limited FPIC duty, as well as ancestral claims to land and resources that non-indigenous citizens do not possess. Indigenous claims are *stronger* because they proceed from a claim to share sovereign authority with the state so as to constrain its lawmaking power. This is what the duty to consult and the FPIC duty are all about. While non-indigenous citizens may benefit from entrenched constitutional norms that restrict lawmaking, ordinarily there is no duty on the state to consult its non-indigenous citizens *before* enacting legislation, much less a duty to obtain their consent.

The second and more radical way in which the pluralist account extends the fiduciary model is by taking seriously the intrinsic, intrastate sovereign authority of the legal and political institutions of indigenous peoples. The FPIC duty in relation to large-scale projects is difficult to explain without reference to international law's recognition of indigenous peoples' sovereignty over their lands and themselves.[115] As noted already, an FPIC duty confers a veto on indigenous peoples. This in effect gives them co-legislative power with respect to large-scale projects within their territories, which is precisely why state parties resisted incorporating a general FPIC duty in Convention 169 and UNDRIP. To explain this development in international law, the sovereigns-as-trustees model must admit that states are not the only sovereign actors cognizable to international law. Just as the post-World War II human rights movement expanded the subjects of international law to include individuals as bearers of human rights, the modern indigenous movement expands the class of sovereign persons at international law to include indigenous peoples. This is the second direction in which the pluralist account of sovereignty pushes the trusteeship model. Whereas the first direction regulates the vertical relations between the state and indigenous peoples, this second direction establishes a

115 This is not to deny, of course, that the positive source of the obligation is the American Convention on Human Rights, and that the IACHR at many junctures, relying on a large interpretation of property under Article 21, points to social, cultural and economic human rights to justify the FPIC duty. Still, it is significant that the Court has not found a duty to consult or obtain consent where property rights of non-indigenous persons are infringed. Moreover, the legal right-bearer in the indigenous case is not the usual bearer of human rights — the individual — but rather the community. In our view, a plausible and normatively attractive way to account for the Court's recognition of the FPIC duty in the indigenous case is to see it as an attempt to overcome the paternalistic inclusion/exclusion logic of prior trusteeship models through a limited recognition of indigenous sovereignty. It may well be that a capacious and context-sensitive understanding of human rights can incorporate — or even require — recognition of indigenous sovereignty, but we cannot explore this possibility here.

horizontal relationship between states and indigenous peoples, albeit one of limited scope. Its regulation falls properly within the province of inter*national* law, understood literally to denote the law that regulates relations between separate nations, even if those nations happen to occupy the same state.

This is the intrastate model of constitutional pluralism presupposed by the IACHR's imposition of an FPIC duty in cases of large-scale projects within indigenous territory. The model is constitutional in the ordinary sense that it bears on the lawmaking authority of the state. But it is also constitutional in the sense that it articulates an ideal of constitutionalism appropriate to the legal order of a state in which indigenous and non-indigenous peoples alike have a legitimate claim to autonomous lawmaking authority. At the core of this ideal is the thought that peoples as well as individuals are moral equals, and thus, in principle, they are all entitled to their own forms of lawmaking.

With this model of constitutional pluralism in view, we can now make sense of the way in which the Court in *Sarayaku* developed various pieces of the duty to consult. The Court explained that, in order for affected peoples to make an informed decision as to whether or not to approve any given project, the duty to consult must both occur early and inform indigenous peoples of the project's risks and benefits. In other words, having found an explicit FPIC duty of limited scope in *Saramaka People*, the Court in *Sarayaku* should be interpreted as having seized on the model of constitutional pluralism implicit to that FPIC duty and having woven an FPIC duty into the fabric of the wider duty to consult. But even if this interpretation of *Sarayaku* presses too far, it remains significant that the state-indigenous vertical relationship is regulated not only by a duty to consult, but by a further duty borne by the state to justify its action in compliance with a strict principle of proportionality that takes seriously the material requirements for the cultural survival of indigenous peoples. This international legal duty, and its supervision by the IACHR, helps ensure that decisions taken by the state that set back indigenous interests must still be defensible to them. This is a far cry from the Westphalian conception of sovereignty under which states could legislate at will within their territory. Properly understood, robust duties to consult and justify speak to the idea that the state is a trustee *vis-à-vis* indigenous peoples, and that their special vulnerability to state action brings with it special, international obligations. Let us consider now some of the ways this regime can address the worry that trusteeship invariably leads to paternalism.

Three features of the IACHR regime mitigate this concern. The most prominent is the explicit FPIC duty from *Saramaka People*, since this duty effectively distributes to indigenous peoples a limited sovereign power to co-legislate with respect to large-scale projects in their territories. The same is true regarding the constitutional pluralist reading of the duty to consult

set out in *Sarayaku*. Where an FPIC duty explicitly or implicitly lies, there is a sharing of state sovereignty rather than subjection to it. Second, where the duty to consult does not bring with it an FPIC duty, there still remains the state's duty to justify its actions in a way that satisfies the requirements of proportionality. Last, the question whether consent has been given or whether (non-FPIC) consultation and subsequent justification is adequate is ultimately reviewable by an independent, international body; namely, the IACHR. The possibility of independent review supplies impartial conditions of justice that allow the state and indigenous peoples to confront one another as international legal equals. This is not to say that international law treats indigenous sovereignty in the same way it treats state sovereignty — states plainly remain the primary legal actors in international law — but rather that when the state is brought into an international adjudicative forum by an indigenous people, both parties are treated as equals before the law.

These same considerations also belie the suggestion that the pluralist trusteeship model lends itself too readily to abuse. Were the model one that states with compliant courts could apply themselves, without the possibility of external review, this would indeed be a deep concern: such states would wield unilateral power over indigenous peoples and dominate them. Admittedly, the duty to consult and justify cedes greater authority to the state than it would retain were FPIC the clear norm across the board. If nothing else, FPIC empowers indigenous peoples to charge higher lease fees for the use of their lands, and similarly empowers them to impose more strict conditions related to environmental protection, labor and health standards, and other concerns. Nonetheless, the success of peoples such as the Saramaka and the Sarayaku suggests that even the enforcement of a robust duty to consult that falls short of FPIC can supply effective protection in a way that acknowledges their special claim to intrastate autonomy.

Conclusion

Ultimately, by understanding the development of the duty to consult and FPIC in international law as an implicit recognition of indigenous sovereignty, we see the limits of Macklem's assertion that "international indigenous rights vest in indigenous people because international law vests sovereignty in States."[116] There is equal limitation in James Anaya's lauding the IACHR decisions before 2005 as solely an expression of a realist human rights approach to international law, "both pragmatic and ethical," denying the presence of any

116 Macklem, *supra* note 32, at 203.

thread of sovereignty recognition within the evolution.[117] Properly construed, these more recent developments are a realist evolution in a sovereignty-based approach to international law, espousing a pragmatic and ethical sensibility that a fiduciary theory of the state is able to absorb but which a Westphalian conception cannot. They represent an expansion and reconfiguring of international law, not a correction internal to its founding injustices.

In our opinion, to suggest that these new developments either hinge upon "the normative grounds of the Sovereign power of the States in which [indigenous peoples] are located" (Macklem[118]) or are operating only as an interpretation of human rights (Anaya[119]) serves to reenact, in a way, Koskenniemi's "exclusion-inclusion" discourse. It permits indigenous peoples into international law only to exclude them from sovereignty, and buries them in states under the power of potential busybodies. The duty to consult and FPIC are tangible steps towards a pluralist fiduciary theory of sovereignty, one that discerns and ousts the paternalistic abuses of past fiduciary conceptions. These duties should be received and celebrated as such.

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117 S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Land and Resources: Towards a Realist Trend*, 16 Colo. J. Int'l Envtl. L. & Pol'y 237, 258 (2005). It should be noted that Anaya wrote this piece before the *Saramaka People* and *Sarayaku* cases.

118 Macklem, *supra* note 32, at 209.

119 Anaya, *supra* note 117, at 256.

The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks

*Eyal Benvenisti**

Introduction

This issue of *Theoretical Inquiries in Law* critically explores efforts to address the paradoxes of sovereignty. One paradox is internal, and was formulated by David Dyzenhaus in his contribution to this issue: "if the sovereign is the highest authority, and hence not answerable to any other authority, how can the sovereign be subject to law?"[1] The second paradox is external, and could perhaps be phrased, along Dyzenhaus's lines, as follows: "if the sovereign is independent, and hence not answerable to any other authority, how can the sovereign be subject to the duty to recognize and respect the independence of other sovereigns?"[2] Responses to both types of paradoxes have been reflected in states' claims to legitimacy from within, through, for example, their commitment to the rule of law; and to legitimacy from without, through their assertion of "statehood" as understood by the contemporaneous international

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1 David Dyzenhaus, *Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought*, 16 Theoretical Inquiries L. 337, 343 (2015); *see also* Michel Troper, *Sovereignty and Natural Law in the Legal Discourse of the* Ancien Régime, 16 Theoretical Inquiries L. 315, 317 (2015).

2 On the external and internal constraints on sovereigns, see F.H. Hinsley, Sovereignty 126-213 (2d ed. Cambridge Univ. Press 1986) (1966); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791, 1796 (2009).

legal order and their demand for external recognition.[3] These two parallel commitments to rules entail limitations on the exercise of authority.

While the sovereign's way of addressing the domestic paradox could be shaped by indigenous sensitivities (some communities would more appreciate a religious source of constraint on sovereigns, while others would prefer a liberal constitution), to gain external legitimacy, the sovereign has been required to signal its acceptance of a set of ground norms that has developed without much input from any distinct state. New states had to accept the external bounds as given. This external paradox is captured by the assertion of the Israeli Supreme Court that "[t]he independence of the State of Israel directly subjected it to the rules of international law."[4] We can appreciate this "direct subjection" to international law when we contrast the ubiquitous declaration of statehood that invariably endorses the inter-state normative sphere, to the recent claims made by the so called Islamic State that regards itself as a caliphate subject only to its vision of Islam while eschewing international law as a relevant source of authority.[5] It is the very lack of acceptance of the community norms which deprives that "state" of the legal standing of a state.

My motivation for convening the conference for which the articles in this issue were written was to explore both paradoxes and examine whether they permit an understanding of "sovereignty" as entailing responsibilities and obligations of states not only to their own citizens but also toward others who are directly or indirectly influenced by their acts and omissions. I framed the threshold questions as being whether the concept of sovereignty can be reconciled with obligations to others; what are the reasons — and, perhaps, moral duties — for attempting such reconciliation; and finally, what are these obligations and how are they to be operationalized. In my concluding remarks, I wish to outline a response to the threshold questions and reflect on the perils of emphasizing the duty toward "others."

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3 As David Armitage and others have shown, declarations of statehood are aimed invariably also at foreign audiences, seeking to obtain their recognition. *See* David Armitage, The Declaration of Independence: A Global History (2009); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010); Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 Suffolk U. L. Rev. 759 (2014).

4 HCJ 174/54 Stampfer v. Attorney Gen. 10(1) PD 5, 15 [1956] (Isr.).

5 Andrew F. March & Mara Revkin, *Caliphate of Law: ISIS' Ground Rules*, Foreign Aff. (Apr. 15, 2015), http://www.foreignaffairs.com/articles/143679/andrew-f-march-and-mara-revkin/caliphate-of-law.

I. Sovereignty Subdued: A Brief Survey of the External and Internal Limits on the Concept

Some of the contributions to this issue explore potential grounds for explaining why sovereigns are bound by morality or by law: theories about morality, the nature of law, human solidarity, the rule of law and human rights. They can be grouped into two groups: those who begin their analysis from outside the state (the external view, responding to the external paradox of sovereignty) and those whose starting point is the state itself (and who therefore address the internal paradox). For example, two contributions to this issue, by Benjamin Straumann and by Evan Criddle, explore Hugo Grotius's "external" approach, which saw human nature as a source of moral and legal obligations that provides a framework for imputing some immanent obligations to sovereigns, and have referred to states as temporary "guardians" of foreign nationals abroad who have suffered intolerable cruelties at the hands of their own state.[6] On the other hand, Lorenzo Zucca draws on Spinoza's "internal" view, according to which it is the self-interest in preservation and flourishing that requires states to contribute to a political community where peace and security is maintained.[7] Below is an attempt to outline the evolution of the idea of sovereignty as inherently subject to external or internal limitations.

A. Sovereignty and the External Paradox

The fundamental idea — that sovereignty functions as part of a system that assigns global resources among states and hence is subject to the rules of that system — can be found already in Greek thinking. Grotius refers in his *De jure belli ac pacis* to Cicero's metaphor of the globe as a theater where sovereigns' right to exclusive title resembles the right of theater goers to occupy their seats for the duration of the show.[8] Also for Christian Wolff and Emer de Vattel, sovereignty has a cosmopolitan purpose.[9] In Vattel's view, the

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6 Evan J. Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 Theoretical Inquiries L. 473 (2015); Benjamin Straumann, *Early Modern Sovereignty and Its Limits*, 16 Theoretical Inquiries L. 423 (2015).

7 Lorenzo Zucca, *A Genealogy of State Sovereignty*, 16 Theoretical Inquiries L. 399 (2015).

8 *See* Hugo Grotius, De Jure Belli ac Pacis [On the Law of War and Peace] (1625), *reprinted in* 2 Classics of International Law 186 (James Brown Scott ed., Francis W. Kelsey trans., 1925).

9 *See generally* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295, 307, 309, 317 (2013).

"earth belongs to mankind in general" and therefore sovereigns are obligated toward humankind to use the resources under their control efficiently and sustainably.[10] More generally, Vattel stipulates a duty of fraternity: "one state owes to another state whatever it owes to itself, so far as that other stands in real need of its assistance, and the former can grant it without neglecting the duties it owes to itself."[11] Kant offered a secular basis for the same proposition, referring to the globe as the space in which all inhabitants must "tolerate one another as neighbors" based on equal entitlement to the surface of the earth.[12]

Even during the nineteenth century that saw the crystallization of the unfettered sovereign, some regarded sovereignty as "freedom that is organised by international law and committed to it."[13] International law itself was grounded by some not on state consent, but instead on an existing society of states,[14] a "community of states,"[15] or on a sense of "international solidarity,"[16] on state practice,[17] or on logical inference from "pure theory" that regarded the

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10 1 Emer de Vattel, The Law of Nations or the Principles of Natural Law § 203 (1758). For Wolff's view, see 2 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum §§ 156-189 (Joseph H. Drake trans., 1934) (1749).

11 2 Emer de Vattel, The Law of Nations or the Principles of Natural Law § 3 (1758).

12 Immanuel Kant, Toward Perpetual Peace and Other Writings on Politics, Peace, and History 82 (Pauline Kleingeld ed., 2006) ("[O]riginally no one has more of a right to be at a given place on earth than anyone else" due to "the right of common possession of the surface of the earth.").

13 1 Ferdinand Von Martitz, Internationale Rechtshilfe in Strafsachen 416 (1888) (cited by the German Constitutional Court with regard to the Lisbon Treaty judgment in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08 ¶ 223 (Ger.)).

14 August Wilhelm Heffter wrote about a European society of states that was bound by a shared legal order, as translated by Henry Wheaton, Elements of International Law pt. I § 11 (Richard Henry Dana ed., 8th ed. 1866) ("A Nation associating itself with the general society of nations, thereby recognizes a law common to all nations by which its international relations are to be regulated.").

15 Georg Jellinek, Die Lehre von den Staatenverbindungen [Theory of International Federations] 92-96 (1882) (as lucidly explained in Jochen von Bernstorf, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law*, 4 Goettingen J. Int'l L. 659, 672-73 (2012)).

16 On "solidarity" as the basis of obligations toward others, see Sergio Dellavalle, *On Sovereignty, Legitimacy, and Solidarity Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?*, 16 Theoretical Inquiries L. 367 (2015). *See also infra* notes 19-21.

17 Hedley Bull, Justice in International Relations: The 1983-1984 Hagey Lectures 11-12 (1984) ("The rights of sovereign states, and of sovereign peoples

state's legal order as necessarily derived from the international legal order.[18]

The devastating experiences of the two world wars dented the walls of sovereignty as promising human security and prosperity. Instead, faith in global processes to secure human flourishing slowly gained ground. In the interwar era, French scholars advanced the idea of solidarity,[19] probably born from the concept of *fraternité*,[20] which referred not only to fraternity within the French people but also to fraternity with all peoples.[21] And while during the interwar era the assertion that "the legal consciousness of the civilized world demands the recognition for the individual of rights that are immune from any interference on the part of the State"[22] remained the province mainly

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or nations, derive from and are limited by them.").

18 Hans Kelsen, Reine Rechtslehre (1st ed. 1934), *translated in* Hans Kelsen, Introduction to the Problems of Legal Theory (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992). In his second edition he revised his argument, suggesting that hierarchy between the two systems must exist, but his pure theory cannot resolve which system is superior to the other. *See* Hans Kelsen, Pure Theory of Law (Max Knight trans., 1960).

19 *See, e.g.*, Tourme-Jouannet Emmanuelle, What Is a Fair International Society? (2013); Nicolas Politis, *le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux Recueil des Cours* [*The Problems of the Limitations on Sovereignty and the Theory on the Abuse of Rights in International Relations*], *in* Collected Courses of the Hague Academy of International Law 1 (1925).

20 Danio Companelli, *Solidarity, Principle of*, Max Planck Encyclopedia of Public International Law, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2072?rskey=MaPoJK&result=1&prd=EPIL (last updated Mar. 2011) (by subscription).

21 In 1792 the French National Convention declared fraternity and assistance to all peoples who shall wish to recover their liberty, and promulgated a Decree Proclaiming the Liberty and Sovereignty of All Peoples (Dec. 15, 1792), which asserted that "In the countries which are or shall be occupied by the armies of the Republic, the generals shall proclaim immediately, in the name of the French nation, the sovereignty of the people . . . ."). *See* 2 John Debritt, A Collection of State Papers Relative to the War Against France (1794).

22 Institut de Droit international, Déclaration des droits internationaux de l'homme [Declaration on the International Rights of Man] (1929), *available at* http://www.idi-iil.org/idiF/resolutionsF/1929_nyork_03_fr.pdf. Article 1 of the Declaration stated: "Il est du devoir de tout Etat de reconnaître à tout individu le droit égal à la vie, à la liberté . . . ." ("*It is the duty of every State* to recognize to everyone the equal right to life, liberty . . . .") (emphasis added). André Mandelstam argued that "human rights exist, and it is the duty of each state to respect them." André Mandelstam, speech at the Inst. of Int'l Law (Oct. 8, 1921),

of thinkers and "civilizers,"[23] the Universal Declaration of Human Rights finally set a "common standard of achievement for all peoples of all nations."[24] It was then that the primacy of the individual as preceding the sovereignty of the state and serving as its purpose was invoked as the basis for external ties on states.[25] In 1955 Hans Kelsen presents a vision of sovereignty that derives its authority not only from the human beings forming the state, but from the whole of humanity:

> [T]he state is not a mysterious substance different from its members, i.e., the human beings forming the state, and hence a transcendental reality beyond rational, empirical cognition but a specific normative order regulating the mutual behavior of men. . . . By demonstrating that absolute sovereignty is not and cannot be an essential quality of the state existing side by side with other states, it removes one of the most stubborn prejudices which prevent political and legal science from recognizing the possibility of an international legal order constituting an international community of which the state is a member, just as corporations are members of the state.[26]

B. Sovereignty and the Internal Paradox

The thought of internal sources that bind the sovereign immediately brings to mind Ulysses tying himself to the mast. But as Michel Troper points out in his contribution to this issue, "self-limitations are not real limitation."[27] Ulysses could safely expect that he would eventually be released from his chains,

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quoted in Bruno Cabanes, The Great War and the Origins of Humanitarianism, 1918-1924, at 313 (2014); *see also* Helmut Philipp Aust, *From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights*, 25 Eur. J. Int'l L. 1105 (2014).

23 Term borrowed from Martii Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (2004).

24 Eleanor Roosevelt, U.S. Delegate, U.N. Gen. Assembly, On the Adoption of the Universal Declaration of Human Rights (Dec. 9, 1948).

25 Hersch Lauterpacht grounded the primacy of international law on its reflection of "the universal law of humanity in which the individual human being, as the ultimate unit of all law, rises sovereign over the limited province of the State." Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 Brit. Y.B. Int'l L. 1, 47 (1946); *see* Roman Kwiecień, *Sir Hersch Lauterpacht's Idea of State Sovereignty — Is It Still Alive?*, 13 Int'l Community L. Rev. 23 (2011).

26 Hans Kelsen, *Foundations of Democracy*, 66 Ethics 1, 34 (1955).

27 Troper, *supra* note 1, at 317.

and peoples retain the "supreme power" to retract their consent to be bound.[28] As both Troper and Dyzenhaus show, the way to overcome this pitfall is to ground the internal ties not in a metaphor of consent,[29] but in a conceptual understanding of sovereignty as a claim not to sheer power, but to authority.

As Troper explains, the idea of limited sovereignty was reconcilable even in the monarchy. In 1610, Sir Edward Coke, then the Chief Justice of the Court of Common Pleas, handed down two judgments that contested King James's assertion that the "[e]state of the monarchy is the supremest thing upon earth," equating kings with gods, because "they exercise a manner or resemblance of divine power upon earth.[30] In Coke's view, "the King cannot change any part of the common law . . . without Parliament,"[31] and even Parliament is not supreme but "controlled" by the common law.[32] In France, Troper explains, the *Parlements* claimed the right to refuse the registration of the King's laws when they conflicted with the fundamental laws of the realm.[33] But as Troper emphasizes, this limitation came from within: they decided "in the name of the people,"[34] or grounded their authority in the common law.[35]

Dyzenhaus explores another move that imposes inherent limits on any sovereign authority. Dyzenhaus follows Hermann Heller's refined treatment of the concept of the democratic *Rechtsstaat*. This is the idea that states are inherently bound by the concept of the rule of law — "the immanent legal rationality" that is "constitutive of the state, so that the sovereign is legally

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28 John Locke, Two Treatises of Government ¶ 149, at 366 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690):

> [Y]et the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end.

29 *See also* Eyal Benvenisti & Alon Harel, *Embracing the Tension Between National and International Human Rights Law: The Case for Parity* (Tel Aviv Univ., Global Trust Working Paper Series, Working Paper No. 2015/04, 2015), *available at* http://globaltrust.tau.ac.il/wp-content/uploads/2015/04/Benvenisti-and-Harel-Discordant-Parity-WPS-04-15.pdf.

30 2 James Harvey Robinson, Readings in European History 219-20 (1906).

31 The Case of Proclamations, 12 Co. Rep. 74, 75 (1611).

32 Dr. Bonham's Case, 8 Co. Rep. 113b, 118a-b (1610).

33 Troper, *supra* note 1, at 330-33.

34 *See id.* at 334; *see also* Armin von Bogdandy & Indo Venzke, In Whose Name? (2014).

35 *See* David Dyzenhaus, *Formalism's Hollow Victory*, N.Z. L. Rev. 525 (2002) (discussing the common law as a source of substantive norms and guarantee of freedoms).

bound to fundamental legal principles."[36] Dyzenhaus identifies in Heller's paradigm "a principle of humanity . . . [that] is about the obligations that attend any exercise of sovereign power that affects important individual interests. A claim to exercise sovereign power is a claim to authority over the person affected by the exercise."[37] And that authority, like any other exercise of authority, is subject to the requirements of the rule of law. Along similar lines of seeking a conceptual, internal limitation on sovereignty, Sergio Dellavalle offers an original argument for the inherent commitment of sovereign authority to "communication which occurs when individuals interact within the most general horizon . . . ."[38]

II. External/Internal Limits also Towards Outsiders?

The above outline suggests that there is nothing new in conceiving the sovereign as inherently limited. What is distinct in this issue is the focus on the limitations of the *sovereign in relation to foreigners who are not subject to its authority*. Obviously, the external approach is quite readily amenable to exploring such questions (e.g., Wolff, Vattel, Kant, and obviously Kelsen and Lauterpacht). The internal approach to such a concept is by definition more resistant to this move because the claim to internal legitimacy refers by definition to the internal stakeholders. But this doesn't mean that an internal, conceptual approach is irreconcilable with obligations toward outsiders, as both Dellavalle and Zucca show in their philosophical elaboration of the concept of sovereignty. Constitutional lawyers have also subscribed to such a vision. For example, as Jochen von Bernstorff elaborates, Georg Jellinek's theory viewed the will of the state as subject to a "logically inherent limitation" that is a reflection of the state's internally-based "elementary purposes," which are "to engage in relations with other States in an ever more interdependent international community."[39]

In my own research I have invoked the metaphor of "States as Trustees of Humanity." The main thrust of my project is not to explore how to improve the global protection of human rights or to examine whether and how equitable and sustainable exploitation of global resources can be ensured. Mine is not another articulation of the global justice debate. The project responds to the waning political power of the individual who is left with muted voice and no

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36 Dyzenhaus, *supra* note 1, at 349.
37 *Id.* at 361.
38 Dellavalle, *supra* note 16, at 394.
39 *See supra* note 15.

exit options, in the face of powerful foreign states, multinational corporations and global governance bodies. Its motivation is to explore the likelihood of providing more effective voice for and accountability to the diffuse voters, and thereby to allow them to mobilize for the sake of ensuring better respect of their rights and welfare. Global taxes that reallocate resources from the rich to the poor, or extraterritorially imposed human rights protection, continue to treat the poor, the outsiders, as objects rather than as agents. In this context, Evan Fox-Decent and Ian Dahlman cite C.S. Lewis's admonition:

> Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . to be put on a level of those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals.[40]

The admonition is apt when contemplating how to promote global justice. It reminds us that the key is effective voice in and meaningful accountability of both national and transnational decision-making processes.

III. In Defense of the Trusteeship Concept: A Response to the Critique

Even if sovereignty can be reconciled with inherent (external or internal) obligations toward outsiders, this does not mean that such a commitment is necessarily beneficial to the disadvantaged stakeholders. Indeed, several contributions have expressed deep concerns about such an approach, and particularly about my use of the trusteeship metaphor.

Andrew Fitzmaurice examines in his contribution whether the legacy of the history of empire sullies the concept of sovereign trusteeship beyond redemption.[41] He shows that the idea of humanitarian trusteeship served the economic interests of the imperial powers. In fact, the first time that Vattel invokes this concept he uses it to justify colonialism.[42] Dyzenhaus points to Schmitt's claim that there can be no other outcome because whoever invokes humanity has already a firm idea of what "humanity" requires.[43] Fox-Decent and Dahlman also take a critical look when they examine the history of the

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40 C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, 228 (1953); *see* Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 Theoretical Inquiries L. 507, 508 (2015).

41 Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inquiries L. 447 (2015).

42 Benvenisti, *supra* note 9, at 328.

43 Dyzenhaus, *supra* note 1.

trusteeship concept as applied to the domination of indigenous peoples by European powers.[44]

These are serious concerns. They betray a lack of faith in those who invoke them. It was after all Vattel, the one who invoked this term, who used it as justification for empire when he stated that "the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies."[45] Similarly, the 1885 Conference of Berlin, which formalized the allocation of African lands among European powers, invoked the desire to create the "conditions most favorable to the development of commerce and of civilization in certain regions of Africa, [while being] preoccupied with the means of increasing the moral and material well-being of the indigenous populations."[46] Later, the League of Nations used trusteeship to justify a new form of colonialism,[47] and the United States invoked its "right to protect" Central and South American republics from the aggression of European powers, thereby exercising its "obligation of civilization to ensure that right and justice are done by these republics."[48] Also the problematic relationship between occupier and occupied during armed conflicts has been referred to as trusteeship.[49]

Are these serious concerns about using the "trusteeship" concept fatal? My motivation for using the term "trusteeship" despite the historic baggage begins where the use of this term — originally a private-law concept — enters domestic public law. Trusteeship was the basis for John Austin's definition of administrative law, long before Dicey's approach gained prominence: "Administrative law determines the ends and modes to and in which the sovereign powers shall be exercised: shall be exercised directly by the monarch or sovereign number, or shall be exercised directly by the subordinate political superiors to whom portions of those powers are *delegated or committed in trust*."[50]

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44 Fox Decent & Dahlman, *supra* note 40.

45 Vattel, *supra* note 10, § 209.

46 General Act of the Conference of Berlin Concerning the Congo, Feb. 26, 1885, 3(1) AJIL Supplement: Official Documents 7 (1909).

47 League of Nations Covenant art. 22.

48 Elihu Root, Roosevelt's secretary of state, expressed these principles in terms of sovereign responsibilities: all sovereignty in this world is held upon the condition of performing the duties of sovereignty. Luke Glanville, Sovereignty and the Responsibility to Protect: A New History loc. 2532-2541 (2013) (ebook).

49 Eyal Benvenisti, The International Law of Occupation 6 (2d ed. 2012). For a critique of this term in this context, see *id.* at 71.

50 John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law 465 (Robert Campbell ed., 5th ed. 1885) (emphasis added).

Austin's view reflected a long-established practice of common-law judges who since the early seventeenth century invoked and refined the concept of trust to limit the authority of officeholders.[51] This traditional concept informed also the democratic vision of state authority as deriving from the people and therefore requiring the state to act as its trustee, as exemplified in the writings of John Locke,[52] as well as James Madison in *The Federalist*.[53] Similarly, the Virginia Declaration of Rights (1776) asserted that "all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants and at all times amenable to them."[54] As Troper writes in his contribution to this issue, even monarchic France recognized the concept of trusteeship which limited the authority of the King.[55]

The trusteeship vision continued to inform the evolution of the domestic administrative law of several countries. Conceptualizing the government as a trustee offered courts grounds for extending the scope of administrative law obligations to encompass also the management of property owned by the state or other public agencies. In the United States, the "Public Trust Doctrine" provided a rationale for developing the law on environmental protection.[56] The Israeli Supreme Court reasoned in 1962 that administrative agencies must manage their property as trustees of the citizens.[57] The same concept explained

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51 E. Mabry Rogers & Stephen B. Young, *Public Office as a Public Trust: A Suggestion That Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 Geo. L.J. 1025, 1028-30 (1975) (citing English cases from as early as 1592 which "embraced the private law concept of trust and extended its application even further in regulating public offices"). Note that Dicey also emphasized delegation, but from the law, as being embedded in the logic of delegation. *See* Albert Venn Dicey, Introduction to the Study of the Law of the Constitution 384-85 (8th ed. 1915) ("[A]uthority given him by the law.").

52 Locke, *supra* note 28.

53 The Federalist No. 46, at 294 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people."); *see also* The Federalist No. 65, at 397 (Alexander Hamilton) ("The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs speak for themselves.").

54 The Virginia Declaration of Rights of June 12, 1776, § 2.

55 Troper, *supra* note 1.

56 Joseph Sax, *The Public Trust Doctrine*, 68 Mich. L. Rev. 471, 521 (1970) ("[T]he PT has no life of its own and no intrinsic content. It is no more — and no less — than a name courts give to their concerns about the insufficiencies of the democratic process.").

57 HCJ 262/62 Israel Peretz v. The Municipality of Kfar Shmariahu, 16 PD 2101, 2115 [1962] (Isr.) (Justice Sussman).

why an agency could not irrevocably bind its own discretion, and why it had to exercise it "for the common good."[58] Interestingly, the concept of trusteeship as the basic concept of administrative law has garnered renewed attention in recent years from domestic administrative and constitutional law scholars.[59]

It should also be mentioned that there is nothing "Western" in the use of the trusteeship concept (although its main abusers have been Western). Gandhi invoked the concept of trusteeship to justify redistribution of resources between the rich and the poor, including between rich and poor states. In his rendition, trusteeship meant that "[t]hose who own money now, are asked to behave like trustees holding their riches on behalf of the poor."[60] As R. Neethu pointed out,

> per Gandhian trust philosophy, right holders must place a restriction on self-interest by finding a way to discharge the fiduciary obligation they have. The equitable distribution system under his philosophy requires "what is essential," no more and no less. A more concrete application of this approach would suggest that individual right holders should be required to limit self-interest in acting as a trustee.[61]

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58 Stone v. Mississippi, 101 U.S. 814, 820 (1879) ("The power of governing is a trust committed by the people to the government . . . . The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights."); Black River Regulating Dist. v. Adirondack League Club, 121 N.E.2d 428, 433 (N.Y. 1954) (approving "the theory that the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee but for the common good").

59 Evan Fox-Decent, Sovereignty's Promise: The State as Fiduciary (2012); Ethan J. Leib & David L. Ponet, *Fiduciary Representation and Deliberative Engagement with Children*, 20 J. Pol. Phil. 178 (2012); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699 (2013); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. Rev. 1249 (2011); D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 672 (2013); *see also* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 Tex. L. Rev. 441 (2010); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117 (2006).

60 M.K. Gandhi, Trusteeship 14, http://www.mkgandhi.org/ebks/trusteeship.pdf (last visited June 4, 2015) (compiled by Ravindra Kelkar).

61 *See* R. Neethu, *Gandhi, Trusteeship and Intellectual Property Law*, Global Trust Blog (Dec. 24, 2013), http://globaltrust.tau.ac.il/gandhi-trusteeship-and-intellectual-property-law/.

It is striking that Gandhi uses the term trusteeship, being fully aware of the devastating consequences of its invocation by its abusers over the years.

As Dyzenhaus is careful to point out,[62] the reference to the concept of "trust" refers to a "sense of trust" rather than to the doctrines of trust that can be found in domestic property laws of many countries, or to more specific doctrines such as the Special Trustee for American Indians,[63] the notorious Mandate System of the League of Nation,[64] or the United Nations' Trust Territories.[65] The concept of trusteeship does not venture to suggest that there should be an assumption that the trustee can be trusted. In fact, just the opposite is the case. It was Niklas Luhmann who elaborated on the fundamental difference between "trust" and "confidence" or "faith." He suggested that the concept of trusteeship has been invoked as a way to remedy the lost sense of confidence or of faith that people used to have in others. Once people have moved out of their closely-knit communities or become reliant on outsiders, they no longer have had direct information about those others, and cannot have confidence in their motives. The concept of trust therefore conveys that lack of confidence.[66] As Adam Seligman suggests, the concept of trust must be viewed as "an attempt to posit new bonds of general trust in societies where primordial attachments were no longer 'goods to think with.'"[67]

But these new bonds are grounded in deep suspicion. This remedial term is inherently suspect, because trust, as opposed to confidence or faith,

> involves one in a relation where the acts, character, or intentions of the other cannot be confirmed. . . . [O]ne trusts or is forced to trust — perhaps led to trust would be better — when one cannot know, when one has not the capabilities to apprehend or check on the other and so has no choice but to *trust*.[68]

Stated differently and poignantly, "[t]rust is most required exactly when we least know whether a person will or will not do an action."[69]

We should not trust our trustees; we have no confidence nor faith in them, and therefore we are entitled to an account from them because they are inherently

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62 Dyzenhaus, *supra* note 1, at 362 (referring to a "sense" of trusteeship).

63 *See* 25 U.S. Code § 4042 (Office of Special Trustee for American Indians).

64 League of Nations Covenant art. 22.

65 U.N. Charter ch. XIII (The Trusteeship Council).

66 Niklas Luhmann, Trust and Power (1979); *see also* Janne Jalava, *From Norms to Trust: The Luhmannian Connections Between Trust and System*, 6 Eur. J. Soc. Theory 173 (2003). I thank Neil Walker for elaborating on this point.

67 Adam B. Seligman, The Problem of Trust 15 (1997).

68 *Id.* at 21.

69 Virginia Held, *On the Meaning of Trust*, 78 Ethics 156, 157 (1968).

suspicious: "to trust is to take a risk."[70] Because trustees are inherently suspect, they carry the burden of proving that they serve our interest. Alternative terms such as "stewardship" or "fiduciary obligations" are even worse than trusteeship precisely because they do not carry the historic baggage that calls attention to potential abuse. The challenge is to come up with mechanisms that will effectively monitor the "trustees" and ensure that their discretionary authority is not abused, along the well-trodden path of administrative law[71] that now should extend to the international sphere as well, as noted by the emerging school of Global Administrative Law.[72] The promise of such an approach needs to be and will be tested in the coming years.

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70 Jalava, *supra* note 66, at 174.

71 Dyzenhaus, *supra* note 1, at 362.

72 Eyal Benvenisti, The Law of Global Governance (2014); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005).