Part III Structural Principles, Ch.16 Sovereignty
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Chapter 16  Sovereignty

In 1933, when the League of Nations questioned the treatment of Jews in Germany, Joseph Goebbels, who was to become the Reich Minister of Propaganda, responded: ‘A man is master in his own home.’1 By 1949, the world appeared transformed, as the International Law Commission (ILC) proclaimed in its Draft Declaration on Rights and Duties of States that: ‘Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.’2

Today, the contents of that supreme body of international law undoubtedly include respect for human rights. Recently, Lord Millet succinctly affirmed this in the British House of Lords, with reference to atrocities that Chile’s President Pinochet committed toward the end of the twentieth century: ‘[T]he way in which a state treat[s] its own citizens within its own borders ha[s] become a matter of legitimate concern to the entire international community.’3 The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) similarly and passionately avowed that: ‘It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.’4

Goebbels’s firm assertion of state sovereignty still echoes today, however; some political leaders express it, and the constitutional systems of many countries affirm it. Zimbabwe, for example, adopted a constitutional amendment in 2005, authorizing the compulsory acquisition by the government of farms owned by white farmers only, without compensation, and without granting the farmers access to the courts of law to contest the taking of their property.5 The Southern African Development Community (SADC) Tribunal condemned the government for (a) depriving the farmers of their property without compensation, (b) taking these lands in a racially discriminatory manner, and (c) denying the landowners access to a court of law to contest the expropriation, in each instance in violation of the Treaty of the Southern African Development Community, to which Zimbabwe is a party.6 The High Court of Zimbabwe declined to enforce the judgment of the SADC Tribunal, because in Zimbabwe, the Constitution is the supreme law of the land,7 the Supreme Court of Zimbabwe had upheld the constitutionality of the ‘land reform program’ at issue,8 and ‘notwithstanding the international obligations of the Government,...registration and consequent enforcement of that judgment would be fundamentally contrary to the public policy of this country’.9

The ‘international obligations of the Government’, given second place in this judgment, are proclaimed as superior in Article 27 of the Vienna Convention on the Law of Treaties, which provides that a party to a treaty ‘may not invoke provisions of its own internal law as justification for failure to carry out an international agreement’. In turn, the agreement in question, the Protocol to the Treaty of the Southern African Development Community, through which the SADC Tribunal was established, is explicit in Article 32 that: ‘Decisions of the Tribunal shall be binding upon the parties to the dispute...and enforceable within the territories of the States concerned.’10 It imposes on member states the obligation to ‘take forthwith all measures necessary to ensure execution of the decisions of the Tribunal’.11

The United States, too, has subordinated its international legal obligations to domestic law, as evidenced by the judgment of the Supreme Court of the United States (SCOTUS) in the case of Medellin v Texas.12 The International Court of Justice (ICJ)13 and the Inter-American Commission on Human Rights (p. 381) (IACHR)14 have held against the United States several times for its failure to comply with the commitments contained in Article 36 of the Vienna Convention on Consular Relations to inform foreigners that it arrested or detained, in prison or in custody in the United States, of their right to consular assistance.15 In
Medellín, SCOTUS declined to use judicial action to implement an ICJ instruction that the United States remedy, ‘by means of its own choosing’, the consequences of non-compliance with Article 36. SCOTUS also held that President George W Bush acted unconstitutionally when he instructed state Attorneys General to give effect to the ICJ judgment in the case of Mexico v The United States of America. This occurred despite the President’s duty under Article II, Section 3 of the Constitution to ‘take Care that the Laws be faithfully executed’, where ‘laws’ include the treaties that the United States enters into, as they are designated as part of the supreme law of the land. The result left the US in violation, at least temporarily, of Article 94(1) of the Charter of the United Nations, pursuant (p. 382) to which every member state ‘undertakes to comply with the decision of the International Court of Justice in any case to which it is a party’. The reasoning of the US Supreme Court has relevance to the discussion of sovereignty because of its references to Article 94(2) of the UN Charter. That article addresses the possible consequences should a party to a case before the ICJ fail to comply with the Court’s judgment. It affords to the Security Council the power to ‘make recommendations or decide upon measures to be taken to give effect to the judgment’. The plurality observed that the President and the Senate ‘were undoubtedly aware’ of this ‘diplomatic—that is, nonjudicial—remedy’ when they ratified the Optional Protocol to the Vienna Convention on Consular Relations. The so-called ‘diplomatic remedy’ affords to the United States ‘the unqualified right to exercise its veto of any Security Council resolution’. SCOTUS appears to be saying that the United States, through actions of the President and the Senate, submitted to the compulsory ipso jure jurisdiction of the ICJ, with the knowledge and upon the deliberate understanding that the United States—and presumably other permanent members of the Security Council who hold a veto—can disregard judgments of the Court at will and without adverse consequences. If true, this elevates considerations of sovereignty to a level of profound cynicism.

1. The Concept of Sovereignty

Jean Bodin (1530–95) is commonly regarded as ‘the founder of the modern doctrine of sovereignty’. Attempts to create a unitary national state in France following the Hundred Years War (1350–1450), triggered the first theoretical exposition of the concept of sovereignty in Bodin’s Six Livres de la République. The gist of Bodin’s concept of sovereignty is reflected in the adage: Summa in cives ac subditos legibusque solute potest (‘[sovereignty is] the supreme power over citizens and subordinates, which [supreme power] is not subject to the law’). Wolfgang Friedmann tells us that Bodin’s theory ‘was mainly concerned with securing and consolidating the legislative power of the monarch in France against the rival claims of estates, (p. 383) corporations, and the Church’. The contemporary meaning and significance of sovereignty goes well beyond this, of course.

Sovereignty operates in at least three quite distinct venues in human society. In international law, it primarily denotes ‘the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation’ or ‘the right of a state to pursue whatever policies it wishes within its own borders’. In constitutional law, sovereignty denotes the ‘supreme political authority’ within the body politic, or ‘[t]he supreme, absolute, and uncontrollable power by which any independent state is governed’, or ‘the power and authority of the State over all persons, things, and territory within its reach’, and which includes ‘powers of the...government in respect of foreign or external affairs and those in respect of domestic or internal affairs’. Social entities other than the state (for example, church institutions) can also lay claim to sovereign powers to regulate their internal affairs, without interference by the power base.
of other social institutions that are of a different kind (for example, the state). Here, we are primarily concerned with the sovereignty of states as governed by international law.

The sovereignty of states has several dimensions, including (a) political independence; (b) exclusive control of the sovereign state over the persons and objects within its territory and under its control; (c) territorial integrity, or the inviolability of national borders; and (d) immunity of the sovereign state and certain high-ranking state officials from the exercise of jurisdiction by the courts of other states or international tribunals.

1.1 Political independence

Sovereignty in the international context means, in part, ‘an autonomous state in no way subordinate to any other country’. An influential line of thought, reflected in a statement by Judge Huber in the Island of Palmas Case of 1928, and the separate (p. 384) opinion of Judge Anzilotti in the Austro-German Customs Case of 1931, identified ‘sovereignty’ with the ‘internal and domestic power’ of the state and defined sovereignty in the international context as ‘independence’. Judge Huber explained that ‘[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State’. Judge Anzilotti, in a statement described by James Crawford as the locus classicus on the subject, proclaimed that: ‘Independence...may also be described as sovereignty (suprema potestas), or external sovereignty, by which is meant that the State has over it no other authority than that of international law.’ James Fawcett likewise identified sovereignty in the external and international context as ‘independence’, defining an independent state as ‘a community of people, living together in a defined territory under an organized government not subordinate to any other government’. Clive Parry argued that sovereignty in international law ‘no longer conveys the idea of supremacy but rather that of independence’ and that in a secondary sense, sovereignty denotes ‘the authority of the state over its territory or its citizens’.

A trend emerged in international law in the twentieth century to promote the national independence of subordinated entities by creating new states. This first became evident at the peace negotiations following the First World War (1914–18). In his Fourteen Points Address of 8 January 1918, President Woodrow Wilson contemplated:

\[\text{[a] free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the population concerned must have equal weight with the equitable claims of government whose title is to be determined.}\]

Wilson’s statement has come to be regarded as the basis of the mandate system under which the League of Nations regulated the future political (p. 385) dispensation of nation-states that had been part of the Ottoman, German, Russian, and Austro-Hungarian empires, eventually ‘transforming self-determination into a universal right’. Following the Second World War (1935–45), the aim of the international community with respect to self-determination expanded to include ‘bringing all colonial situations to a speedy end’. Colonized peoples thus acquired the right to self-determination, substantively denoting political independence. The United Nations Millennium Declaration reaffirmed the principle of decolonization as ‘the right to self-determination of peoples which remain under...foreign occupation’.

It should be emphasized at the outset that the concept of ‘self-determination’ is not confined to communities subject to colonial rule or foreign occupation, but is also attributed to ethnic, religious, and linguistic minorities within the body politic. Here, the substance of the right is not a matter of political independence, but is confined to the entitlement of an ethnic community to promote its culture, of a religious community to practice its religion,
and of a linguistic community to speak its language, without undue state interference or legal restrictions. The International Covenant on Civil and Political Rights (ICCPR) thus provides: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’

1.2 Exclusive control within national borders

The 1970 United Nations Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (‘the 1970 Declaration’) contains an impressive exposition of ‘[t]he principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter’. The principle includes the following directives:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state...

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

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

The Declaration also included under the ‘[p]rinciple of sovereign equality of States’, the right of each state ‘freely to choose and develop its political, social, economic and cultural systems’.

Although the Declaration makes no attempt—nor does any other international instrument—to define what constitutes the internal affairs of a state, one aspect of internal sovereignty has received explicit recognition: exclusive control of the state over its natural wealth and resources. The United Nations has repeatedly proclaimed the ‘inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests’, with occasional reminders that developing countries are in need of encouragement ‘in the proper use and exploitation of their natural wealth and resources’.

Article 1(2) common to the human rights covenants of 1966 goes further, by adding that the right has to be exercised ‘without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and internationals law’.

The inclusion of this principle in the Covenants could be seen as limited to the colonial context or as a grant of the right to peoples (indigenous and tribal) existing within a state. In either case, it marks a shift away from designating the right over natural resources as an integral part of state sovereignty, and toward proclaiming it more specifically as a component of the human right of peoples to self-determination. As early as 1958, the General Assembly, in the Resolution establishing the Commission on Permanent Sovereignty over Natural Resources, stated that the ‘permanent sovereignty over natural wealth and resources’ of states is ‘a basic constituent of the right to self-determination’. In the colonial context, the General Assembly decided in 1967 that the ‘inalienable right’ to natural resources, and the right to dispose of those resources in territories subject to colonial rule, belonged to the peoples of the colonized territories, adding:
[The colonial Powers which deprive the colonial peoples of the exercise and the full enjoyment of those rights, or which subordinate them to the economic or financial interests of their own nationals or of nationals of other countries, are violating the obligations they have assumed under...the Charter of the United Nations].

At the regional level, Article 21(1) of the African Charter on Human and Peoples’ Rights provides: ‘All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.’

In the 2001 Ogoni decision, the African Commission on Human and Peoples’ Rights (ACHPR) traced the historical basis of this provision to colonialism, ‘during which the human and material resources of Africa were largely exploited for the benefit of outside powers’. The decision made clear, however, that the peoples’ rights in the African Charter are no longer coextensive with the state or limited to the colonial context, but extend to all ‘peoples’ within the states of Africa. In a recent path-breaking decision, the ACHPR decided that an indigenous community that had been displaced from their ancestral land in Kenya almost half a century ago (the Endorois), still constitute a distinct people within the meaning of Article 21(1) and that their right to ‘freely dispose of their wealth and natural resources’ has been violated. The Inter-American system has similar jurisprudence with respect to the rights of indigenous and tribal peoples over their ancestral lands and natural resources.

The right of indigenous peoples to their ancestral lands or territories, and in particular in connection with the development of mineral, water, or other resources, have been afforded prominence in the United Nations Declaration on the Rights of Indigenous Peoples, and in several other human rights instruments. These rights evidently place a damper on state sovereignty over such territories and resources, based on human rights concerns.

1.3 Territorial integrity

International law has been adamant in proclaiming the sanctity of post-Second World War national borders. The Organization of African Unity (now the African Union), sensitive to the chaotic situation that might emerge with any effort to redraw the (quite irrational) national borders that colonial powers established in Africa, played a leading role in emphasizing the salience of the existing frontiers. Its Charter of 1963 prompted member states to ‘solemnly affirm and declare’ their ‘respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence’. A Resolution of the Assembly of Heads of State and Government adopted at its first ordinary session, held in Cairo in 1964, called on all member states ‘to respect the borders existing on their achievement of national independence’.

The principle of upholding the territorial integrity of states has been emphatically endorsed in other international instruments, including the 1970 Declaration, which proclaimed that, ‘any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter [of the United Nations]’, without exception. The Helsinki Final Act likewise endorsed the principle of ‘respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence’. It has now come to be accepted that ‘the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations’. The principle of territorial integrity of states has two elements, one strictly prohibiting the acquisition of territory by force, and the second generally denouncing secession from the territory of an existing state.
1.3.1 The forceful acquisition of a territory

During much of history, military invasions, conquest, annexation, and occupation established and modified national borders, almost at random. Today, the acquisition of a territory by force is inadmissible in international law and its inadmissibility is often asserted to be a *jus cogens* norm. The UN Charter places predominant emphasis on the maintenance of international peace and security, through the peaceful settlement of disputes and the obligation of member states to refrain from the threat or use of force. The 1970 Declaration endorsed and further specified this central theme of international relations and coexistence.

The General Assembly confirmed the unconditional proscription on the acquisition of territory by force in its definition of aggression. Aggression includes ‘[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof’. The Resolution further provides: ‘No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression’ and, ‘[n]o territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful’. General agreement during the 2010 Review Conference of the International Criminal Court (ICC), held in Kampala, Uganda, endorsed this definition of aggression.

States responsible for the invasion of any other state are liable for human rights violations committed in the occupied territory. Following the invasion of Northern Cyprus by Turkey, the European Court of Human Rights decided that Turkey’s responsibility for human rights violations in Cyprus derived from its effective control of the occupied territory and was not dependent on the legality or illegality of such control. Following the attempted annexation of Kuwait by Iraq on 2 August 1990, the Security Council likewise demanded that Iraq accept ‘in principle its liability under international law for any loss, damage or injury arising in regard to (p. 390) Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq’.

1.3.2 Secession

International law is also, in principle, not favourably disposed toward the dismemberment of existing states, particularly if the purpose of the separation is to establish homogenous ethnic, religious, or linguistic communities. The international community of states has thus censured attempts at secession by Katanga, Biafara, and the Turkish Republic of Northern Cyprus. As explained by Vernon van Dyke, ‘the United Nations would be in an extremely difficult position if it were to interpret the right to self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members’. It must be emphasized that the right to self-determination of ethnic, religious, and linguistic communities is confined to the right of such communities to promote and protect their culture, to practise their religion, and to speak their language, without undue state restrictions. It does not include a right to secession. The 1992 Declaration expressly states that its provisions must not be taken to contradict the principles of the United Nations pertaining to, inter alia, ‘sovereign equality, territorial integrity and political independence of States’. The 2007 United Nations Declaration on the Rights of Indigenous Peoples reiterated that, by virtue of their right to self-determination, indigenous peoples are entitled to ‘freely determine their political status and freely pursue their economic, social and cultural development’. Lest this provision be interpreted to denote political independence, the Declaration stipulates that ‘[n]othing in this Declaration may be...construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States’. The 1995
Framework Convention for the Protection of National Minorities of the Council of Europe fixes the same outer limit:

Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.\(^{86}\)

Secession is sanctioned by international law in two instances only: (i) if a decision to secede is ‘freely determined by a people’\(^{87}\)—that is, it is submitted, a cross section of the entire population of the state to be divided, and not only to the inhabitants of the region wishing to secede;\(^{88}\) and (ii) if, following an armed conflict, national boundaries are redrawn as part of a peace settlement.\(^{89}\) The reunification of Germany, the break-up of the Soviet Union, the parting of constitutional ways of the Czech Republic and Slovakia, and the recent secession of Southern Sudan,\(^{90}\) exemplify the first of these two principles, while the secession of Eritrea from Ethiopia exemplifies the second. The disintegration of the former Yugoslavia represents a complicated conglomeration of both principles.

On 17 February 2008, a substantial majority of the Assembly of Kosovo adopted a unilateral declaration of independence from Serbia. The General Assembly followed this act by requesting an advisory opinion from the ICJ—a request, which the court noted did not call upon it ‘to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it’.\(^{91}\) Instead, the ICJ concluded that the Security Council Resolution which authorized the Secretary General to establish an interim administration for Kosovo with a view, inter alia, to oversee ‘the development of provisional democratic self-governing institutions’\(^{92}\) did not preclude this declaration of independence,\(^{93}\) and somewhat obscurely, that the declaration of independence did not violate general international law.\(^{94}\)

The United Nations’ 1993 World Conference on Human Rights, in its declaration on self-determination, reiterated that this right ‘shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States’, but seemingly only made this assertion applicable to states ‘conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to (p. 392) the territory without distinction of any kind’.\(^{95}\) Does this mean that secession would also be legitimate as a remedial right, founded on violations of the right of indigenous peoples to self-determination? Some years ago, the African Commission on Human and Peoples’ Rights suggested by way of obiter dictum that Katanga would have been entitled to secede from Zaire if ‘concrete evidence [existed] of violations of human rights to the point that the territorial integrity of Zaire should be called to question and...that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter’.\(^{96}\) The fallacy of this reasoning is that the right to self-determination belongs to a people while it is a territory that secedes. In the final analysis, a general agreement or a peace treaty must sanction secession. It is, of course, quite possible that gross human rights violations could culminate in a referendum or an armed conflict that would eventually constitute the basis of secession; however, the legality of secession will depend on the referendum or peace treaty,
and not on the human rights violations per se—at least not within the current confines of international law and state sovereignty.

There are indeed compelling reasons to avoid the disjunction of territorial frontiers. First, a multiplicity of economically non-viable states will further contribute to a decline in the living standards in the world community. Second, the belief that people sharing a common language, culture, or religion are inherently politically compatible is clearly a myth, and disillusionment after the event might provoke profound resentment and further conflict. A third reason lies in the fact that the migration of people across territorial divides has largely dismantled any previously existing homogeneity in the population of all regions, rendering impossible any demarcation of borders based on specific demography. Fourth, affording such political relevance to ethnic, cultural, or religious affiliations carries with it the potential for the repression of minority groups within the nation, and excludes political standing for persons who, on account of mixed parentage or marriage, do not and cannot be identified with any particular faction of the group-conscious community, as well as those who, for whatever reason, do not wish to be identified under any particular ethnic, religious, or cultural label. In consequence of the above, an ethnically, culturally, or religiously defined state would, more often than not, create its own ‘minorities problem’, and secession based on ethnicity, culture, or religion, would almost invariably result in profound discrimination against those who do not belong, or worse still, in a strategy of ethnic cleansing.

(p. 393) 1.4 Sovereign immunity

Foreign sovereign immunity, derived from the norm of sovereign equality, has several dimensions. First, under the act of state doctrine, the courts of one country will not inquire into the validity of public acts of another recognized, foreign sovereign, when committed within that first sovereign’s territory.97 The act of state doctrine is a principle of international comity, based on respect for the sovereignty of foreign nations on their own territory and a desire to avoid embarrassing the executive branch of government in its conduct of foreign relations.98 It has been held in the United States that the act of state doctrine is confined to declaring invalid the official acts of the foreign sovereign power within its own territory and will not preclude the exercise of jurisdiction to pronounce upon certain unlawful transactions, such as receiving bribes in the performance of an official act—at least when Congress directs the Courts to decide.99 State immunity, which legislation regulates in many states,100 applies to preclude the exercise of jurisdiction by national courts over foreign states. As discussed in the chapter on immunities, such laws often contain a ‘commercial activities exception’, which provides no jurisdictional immunity to a foreign state in respect of a commercial activity the foreign state carries out while acting as would a private actor.101 Most states now accept that sovereign immunity is limited in this respect. Other exceptions are more controversial, including the ‘territorial tort exception’, which excludes the jurisdictional immunity of a foreign state in instances of tortious conduct, attributable to the state, being committed in the state exercising jurisdiction.102

In the case of Germany v Italy: Greece Intervening, the ICJ considered the existence and scope of a ‘territorial tort exception’ under the rules of customary international law applicable to state immunity. The ICJ affirmed that state immunity ‘derives from the principle of sovereign equality of States’ and ‘occupies an important place in international law and international relations’.103 As have many national courts, the ICJ determined that the immunity is ‘essentially procedural in nature’104 and that it applies only to acta jure imperii (the exercise of sovereign powers) of a state.105(p. 394) Under the rules of customary international law, acta jure imperii includes acts of a state’s armed forces,106 and the law thus entitles the state to immunity despite claims of a territorial tort exception.107
Moreover, since the immunity is procedural in nature, the gravity of the offence is irrelevant.\textsuperscript{108}

As to state officials, the immunity from foreign jurisdiction is an inherent part of state sovereignty and, accordingly, vests in the state and not in a state official. It can therefore be waived by the state, in which event the state official concerned can be sued or brought to trial in the courts of a foreign state.\textsuperscript{109}

2. Sovereignty and Human Rights

In \textit{Prosecutor v Tadi}, the ICTY pointed to a development in international law whereby ‘[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach’.\textsuperscript{110} Bruce Broomhall has highlighted a certain tension in contemporary international law between the Nuremberg legacy, with its ‘sovereignty-limiting rationale’ (rule of law), and the Westphalian tradition, with its emphasis on ‘the sovereignty-based control [of national states] over enforcement’.\textsuperscript{111} It was accordingly decided in the Lotus Case that state jurisdiction to prosecute a crime is to be presumed, and the other state, claiming that a rule of customary international law restricts the prosecuting state’s competence to do so, bears the burden of proof to establish such a rule.\textsuperscript{112}\textsuperscript{(p. 395)}

The United Nations, established in 1945 on the basis of ‘faith in fundamental human rights’,\textsuperscript{113} committed itself to promoting ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.\textsuperscript{114} Member states solemnly pledged themselves to take joint and separate action in cooperation with the Organization for the achievement of that commitment.\textsuperscript{115} The Universal Declaration of Human Rights afforded substance to the concept of human rights and fundamental freedoms, and served as the basis for defining the exact meaning of those concepts. In retrospect, it is fair to conclude that, in those formative years, the Organization succeeded in mustering universal support for the affirmation of faith in human rights.

Louis Henkin correctly affirmed that, ‘[t]he idea of human rights is accepted in principle by all governments regardless of other ideology, regardless of political, economic, or social condition’.\textsuperscript{116} The fact is, though, that state sovereignty has remained the basic norm of international law and international relations. The UN Charter prohibits the United Nations from ‘interven[ing] in matters which are essentially within the domestic jurisdiction of any state’.\textsuperscript{117} Thus, while through its creation, the UN embarked on a programme of standard-setting for the protection of human rights, states remained free to accept or refrain from contracting binding obligations through voluntary ratification of the conventions and covenants that the United Nations sponsored. The Vienna Convention on the Law of Treaties provides further scope for state discretion; in the exercise of their sovereignty, states have the right to add reservations, understandings, and declarations (RUDs) to their instruments of ratification to exclude the binding effect of certain provisions, or to attach to provisions a special meaning, according to their own subjective interests. The freedom to make reservations is subject only to any restrictions the states themselves write into the specific treaty or to a general test that precludes reservations contrary to the object and purpose of an agreement.\textsuperscript{118} States can also avoid the binding force of human rights norms that have matured into rules of customary international law (short of \textit{jus cogens}), by entering into a treaty with another state or states that deviate from the customary law provision. Their agreement will prevail \textit{inter se}, although it cannot affect the rights and duties vis-à-vis third party states. Customary international law itself, being based on the conduct and will of a cross section of the international community of states, is therefore not at odds with the notion of state sovereignty.
Like the issue of ratifying or acceding to human rights treaties, the issue of incorporating international human rights norms into the municipal law of a state is, to (p. 396) a large extent, conditional upon historical, cultural, and religious specificity. The South African Constitution of 1996 affords protection to almost the entire range of internationally proclaimed human rights and fundamental freedoms. The United States is often commended for being the primary entrepreneur as far as the constitutional protection of human rights is concerned, but its Federal Bill of Rights affords protection to civil and political rights only, to the exclusion of the most fundamental natural rights of the individual, of economic and social rights, and of solidarity rights. Social and economic rights are included in the 1937 Constitutions of the Republic of Ireland and the 1949 Constitution of India as (unenforceable) Directive Principles of Social Policy (Ireland) or Directive Principles of State Policy (India). In general, how a state chooses to implement its human rights obligations is a matter of its own choice.

State consent—a vital component of sovereignty—remains the most fundamental condition for subjecting a state to internationally proclaimed human rights and fundamental freedoms. State consent is also required for the exercise of jurisdiction in interstate disputes by the ICJ and other (regional) international tribunals and arbitration bodies. With the establishment of the UN, however, the requirement of state consent as a precondition for imposing binding obligations on states has changed quite radically. The UN Charter subjects the principle of sovereign equality of all member states to several mandatory rules, which the overall purpose of the United Nations of maintaining international peace and security, dictates. Member states must ‘settle their international disputes by peaceful means’ and must ‘refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state’. Member states agree ‘to accept and carry out the decisions of the Security Council’.

In executing its ‘primary responsibility for the maintenance of international peace and security’, the Security Council has been entrusted with wide powers under Chapter VII of the UN Charter to determine that a situation in any part of the world constitutes a threat to the peace, a breach of the peace, or an act of aggression. It can then impose punitive measures against the culprit state, in order to bring an end to the threat or breach of the peace or the act of aggression, including sanctions of various kinds and, in extreme cases, even armed intervention. In the ‘Uniting for Peace Resolution’ of 1950, the General Assembly took upon itself the power to take action in cases where a situation constitutes a breach of the peace or an act of aggression. UN bodies, mostly the Security Council, have thus far invoked the Resolution on ten occasions, to authorize ‘Emergency Special Sessions’ of the General Assembly to deal with a variety of crisis situations involving human rights violations.

What might seem to be the most radical intervention in state sovereignty for the protection of human rights is the power vested in the ICC to prosecute ‘the most serious crimes of concern to the international community as a whole’. The power of the ICC to prosecute sitting heads of state or government, and other state officials who might be entitled to immunity against prosecution under the rules of national or international law, implicates state sovereignty. In the Arrest Warrant Case, the ICJ stated that state officials with sovereign immunity may be subject to criminal prosecution in certain international criminal courts, such as the ICC. The Appeals Chamber of the Special Court for Sierra Leone (SCSL) gave this cautious assessment definitive substance in the case against Charles Taylor. Taylor, a former President of neighbouring Liberia, claimed sovereign immunity. The SCSL noted that the Arrest Warrant Case, affording immunity to the minister of foreign affairs of the Democratic Republic of the Congo, applied to prosecutions of an official of state A in state B; that the SCSL is not a national court of Sierra Leone but an international criminal court; and that the principle of sovereign immunity ‘derives from the equality of
sovereign states and therefore has no relevance to international criminal tribunals which are (p. 398) not organs of a state but derive their mandate from the international community'.

The Rome Statute of the ICC expressly provides that the normal immunities attaching to the official capacity of sitting heads of state and other government officials do not bar the ICC from exercising jurisdiction over such persons.

In the final analysis, drafters of the ICC Statute were fully sensitive to the principle of state sovereignty. Cooperation of states with the ICC in bringing perpetrators of crimes within the jurisdiction of the Court to justice is, as a matter of principle, based on state consent. Except in cases deriving from a Security Council referral, the ICC’s exercise of jurisdiction is conditional upon the consent of the national state of the suspect or of the state where the crime was allegedly committed. In all cases, the exercise of jurisdiction by the ICC is complementary to investigations and prosecutions in a nation-state with a special interest in the matter. The ICC will only exercise jurisdiction if the nation-state fails to take action, or if it did, the ICC will only investigate or prosecute if the investigation or prosecution of the nation-state turned out to be a sham.

The ICC has gone beyond the above deference to state sovereignty by endorsing a strategy of ‘positive complementarity’, defined by the Assembly of States Parties as:

all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.

Positive complementarity promotes, through capacity building, a national infrastructure that empowers nation-states, and not the ICC, to bring perpetrators of crimes within the subject-matter jurisdiction of the ICC, to justice. As ICC Prosecutor Luis Moreno-Ocampo stated, the success of the ICC is not dependent on the number of cases that reach the Court: ‘On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.’

3. Conclusion

In our day and age, human rights have come to be accepted worldwide as a basic norm of commendable state–subject relations; and although state sovereignty may still be an obstacle to the implementation of human rights and fundamental freedoms within many municipal legal systems, governments engaging in serious violations of the internationally accepted human rights norms will inevitably bear the brunt of their unbecoming laws and practices. Leaving aside the instances of human rights violations that might provoke Security Council interventions, individual complaints under international human rights instruments and in regional institutions for the promotion of human rights, or criminal prosecutions of perpetrators of gross violations of human rights, the major deterrent remains decisive condemnation by (a) institutions established for the promotion or protection of human rights, and (b) the international community of states. Reprobation might seem quite ineffective in bringing about change in the short term, but persistent condemnation will bear fruit in the long run; no state likes to be seen as a perpetrator of institutionalized practices that are at odds with international perceptions of good governance.
Apartheid South Africa is a case in point. The South African racial policies had been on the agenda of the General Assembly since its first session in 1946; initial support for the South African defences, based on state sovereignty as guaranteed under Article 2(7) of the UN Charter, declined over time; international condemnation (p. 400) persisted and escalated; and in the end, South Africa capitulated—albeit almost half a century later—and through peaceful means transformed itself into ‘an open and democratic society based on human dignity, equality and freedom’.145

State sovereignty is thus no longer an absolute right. Even insofar as it remains a prominent principle in international relations, its implementation has, at least de facto if not de jure, become subordinate to the values embedded in the human rights doctrine.

Further Reading

Cassese A, Self-Determination of Peoples: A Legal Reappraisal (Grotius 1995)
Friedmann W, Legal Theory (5th edn, Columbia UP 1967)
—— ‘Statehood in International Law’ (1991) 5 Emory Int’l L Rev 9
—— ‘Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory of Church-State Relations’ in Gerhard Robbers (ed), Church Autonomy (Peter Lang 2001)
Van Dyke V, Human Rights, the United States, and World Community (OUP 1970)

Footnotes:


3 R v Bow Street Metropolitan Stipendiary Magistrate & Others 177.

4 Prosecutor v Duško Tadi, para 58.


6 Campbell (Pvt) Ltd and Others v The Republic of Zimbabwe.


8 Campbell (Pvt) Ltd and Another v Minister of National Security Responsible for Land, Land Reform and Resettlement.

9 Gramara (Pvt) Ltd and Another v Government of the Republic of Zimbabwe and Others 16.


11 SADC ‘Protocol on Tribunal’ (n 10) art 32(2).

12 Medellín v Texas. See also Johan D van der Vyver, Implementation of International Law in the United States (Peter Lang GmbH 2010) 129–58.
Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States); LaGrand Case (Germany v US); Avena and Other Mexican Nationals (Mexico v United States).

Case of Ramón Martínez Villareal. See also Case of Cesar Fierro, noting that executing the convicted individual would constitute an arbitrary deprivation of his right to life.

Vienna Convention on Consular Relations, Art 36 (placing an obligation on the state concerned: (a) upon the request of the detainee, to inform the consular post of the state of nationality of the person arrested, in prison, custody, or detention, without delay, of the arrest or detention of that person; (b) to forward, without delay, any correspondence addressed by the person arrested, in prison, custody, or detention, to the consular post of his or her national state; and most importantly, (c) to inform the person arrested, in prison, custody or detention, without delay, of his or her rights under this provision).

Memorandum for the Attorney General (28 February 2005) 44 ILM 964, with reference to Avena (n 13). An undertaking of the United States in an earlier case to, in the future, comply with Art 36 of the Vienna Convention on Consular Relations clearly prompted the President’s instruction. See LaGrand Case (n 13) para 124.


Louis Henkin, ‘International Law as Law in the United States’ (1984) 82 Mich L Rev 1555, 1567 (‘There can be little doubt that the President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed’); Jules Lobel, ‘The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law’ (1985) 71 Va L Rev 1071, 1119 (‘The President has a constitutional obligation to execute international law because it is the law of the land’); Arthur S Miller, ‘The President and Faithful Execution of the Laws’ (1987) 40 Vand L Rev 389, 405 (referring to the President’s duty ‘to faithfully execute the laws—in this instance, international law’); Newcomer (n 17) 1045 (noting that the ‘faith execution’ Clause empowered the President to enforce the treaty); Jordan J Paust, ‘Medellín, Avena, the Supremacy of Treaties and Relevant Executive Authority’ (2008) 31 Suffolk Transnat’l L Rev 301, 311 (referring to the constitutionally-based mandate under which ‘the President must faithfully execute...treaties of the United States’).

On 7 March 2005, the United States withdrew from the Protocol to the Vienna Convention on Consular Relations, under which disputes emanating from the Convention must be submitted to the ICJ. A bill ‘[t]o facilitate compliance with Article 36 of the Vienna Convention on Consular Relations’ is currently pending before Congress and will, if enacted, afford to federal courts ‘jurisdiction to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention on Consular relations...or a comparable provision of a bilateral international agreement addressing consular notification and access’. Consular Notification Compliance Act of 2011, s 1194, 112th Cong (2011) s 4(a)(1).

Charter of the United Nations, Art 94 (UN Charter).

UN Charter, Art 94(2).

Medellín (n 12) 509.

Medellín (n 12) 510. See also David J Bederman, ‘Medellín’s New Paradigm for Treaty Interpretation’ (2008) 102 AJIL 529, 534 (noting that applying ‘the probative impact of Senate ratification debates and understandings in creating a “legislative history” for
international agreements’ was unprecedented and in itself ‘the most astonishing interpretative move in Medellin’).

26 Friedmann (n 24) 573–74.
29 Black (n 27). As to political sovereignty in the constitutional context, see Van der Vyver, ‘Sovereignty and Human Rights’ (n 28) 355–92.
31 United States v Curtiss-Wright Export Corp 315 (Sutherland, J, delivering the opinion of the Court).
33 Harris v Minister of the Interior (Centlivres, CJ, delivering the judgment of the Court).
34 Island of Palmas Case (United States v The Netherlands).
35 Customs Régime between Germany and Austria.
36 Island of Palmas Case (n 34) 838. See also p 839 (‘[t]erritorial sovereignty...involves the exclusive right to display the activities of a State’).
38 Customs Régime between Germany and Austria (n 35) 57 (individual opinion by Anzilotti, J).
39 Fawcett, Law of Nations (n 30) 41.
40 Fawcett, Law of Nations (n 30) 46. See also JES Fawcett, ‘General Course on Public International Law’ (1971) 132 RCADI 363, 381 (maintaining that ‘[i]ndependence and sovereignty can be seen as the external and internal aspects of the State’).
43 Vernon van Dyke, Human Rights, the United States, and World Community (OUP 1970) 86.
45 Western Sahara, para 55. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), para 52 (in which the Court holds that the right to self-determination was applicable to ‘territories under colonial rule’ and that it ‘embraces all peoples and territories which “have not yet attained independence”’).


48 ICCPR, Art 27.

49 The 1970 Declaration.

50 The 1970 Declaration.

51 See eg UNGA Res 626 (21 December 1952) UN Doc A/2361; UNGA Res 1515 (15 December 1960) UN Doc A/4648; UNGA Res 1803 (14 December 1962) UN Doc A/5217; UNGA Res 2158 (25 November 1966) UN Doc A/6316; UNGA Res 3016 (18 December 1972) UN Doc A/8730; UNGA Res 3171 (17 December 1973) UN Doc A/9030. See also Trade and Development Board, Res 88 on Permanent Sovereignty over Natural Resources (19 October 1972) UN Doc A/8715/?/Rev.1, endorsed by the General Assembly in UNGA Res 3041 (19 December 1972) UN Doc A/8730, para 16. There was up to date reaffirmation in the 1992 Convention on Biological Diversity, at least insofar as biological resources are concerned.


53 ICCPR, Art 1(2); International Covenant on Economic, Social and Cultural Rights, Art 1(2).

54 UNGA Res 1314 (12 December 1958) UN Doc A/4090.

55 See also United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, para 2; United Nations Declaration on the Right to Development, para 1.2. See also UNGA Res 2288 (7 December 1967) UN Doc A/6716.

56 UNGA Res 2288 (n 55) para 2.

57 UNGA Res 2288 (n 55) para 3.

58 The African Charter on Human and Peoples’ Rights, Art 21(1).

59 Social and Economic Rights Action Center (SERAC) v Nigeria, para 58.

60 Centre for Minority Rights Development (Kenya) and Minority Rights Group International v Kenya. See also Margaret Beukes, ‘The Recognition of “Indigenous Peoples” and Their Rights as “a People”: An African First’ (2010) 35 South Afr YB Int’l L 216.

61 See eg Case of the Indigenous Community Yakye Axa v Paraguay, para 137; Case of the Indigenous Community Sawhoyamaxa v Paraguay, para 118; Case of the Saramaka People v Suriname, para 121.
62 UN Declaration on the Rights of Indigenous Peoples, Art 32.
64 Charter of the Organization of African Unity, Art III(3).
65 Organization of African Unity (1964) AHG/Res. 16(I), para 2.
66 The 1970 Declaration, preamble.
67 Final Act of the Conference on Security and Co-operation in Europe, Art III.
68 UN Charter, Art III(3).
69 Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, para 80 (Kosovo Case).
71 UN Charter, Art 1(1).
72 UN Charter, Art 2(3).
73 UN Charter, Art 4.
74 UNGA Res 3314 (14 December 1974) UN Doc A/9631.
75 UNGA Res 3314 (n 81) Art 3(a).
76 UNGA Res 3314 (n 81) Art 5(1).
77 UNGA Res 3314 (n 81) Art 5(3). See also the UNGA ‘Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and The Protection of Their Independence and Sovereignty’ (21 December 1965) UN Doc A/Res/20/2131, para 3.
79 Loizidou v Turkey, paras 54–57.
82 Van Dyke (n 43) 102.
83 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art 8(4).
84 Declaration on the Rights of Indigenous Peoples, Art 3.
Declaration on the Rights of Indigenous Peoples, Art 46(1).


The 1970 Declaration, proclaiming under the heading ‘The Principle of Equal Rights and Self-Determination of Peoples’ that: The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

See the Canadian case, Reference re: Secession of Quebec, para 93 (deciding that secession of Quebec from Canada will require ‘clear’ majorities on two fronts: the population of the province of Quebec and the population of Canada as a whole). See also the 1970 Declaration, para 152.

Cassese, Self-Determination of Peoples (n 46) 359-63.

The referendum that sanctioned the secession of Southern Sudan was confined to residents of that region, but the legislation of Sudan that authorized the referendum sanctioned it.

Kosovo Case (n 69) para 56.


Kosovo Case (n 69) paras 114, 119.

Kosovo Case (n 69) para 122.

Vienna Declaration and Programme of Action, Art I(2).


Kirkpatrick Co v Environmental Tectonics Corp International 408.

Kirkpatrick (n 98) 409–10.

See Jurisdictional Immunities of the State (Germany v Italy), para 70 (referring to legislation of nine states that includes a ‘tort exception’ in legislation regulating the act of state doctrine).


Jurisdictional Immunities of the State (n 100) para 57.

Jurisdictional Immunities of the State (n 100) para 58.

Jurisdictional Immunities of the State (n 100) para 59.

Jurisdictional Immunities of the State (n 100) para 72.

Jurisdictional Immunities of the State (n 100) para 75.

Jurisdictional Immunities of the State (n 100) para 84. In the European Court of Human Rights, Al-Adsani v United Kingdom, para 61 (upholding the immunity from civil suit in the courts of another state where acts of torture are alleged); Kalogeropoulou and Others v Greece and Germany 417 (upholding the immunity from civil suit in the courts of another
state, where crimes against humanity are alleged). See also, Erika de Wet’s chapter on *jus cogens* in this *Handbook*.

109 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, para 61.


112 *The Lotus Case (France v Turkey)*.

113 UN Charter, preamble.

114 UN Charter, Art 55(c) (emphasis added).

115 UN Charter, Art 56.


117 UN Charter, Art 2(7).

118 Article 19(c) of the Vienna Convention on the Law of Treaties prohibits reservations that are ‘incompatible with the object and purpose of the treaty’.

119 As to these different categories of human rights, see van der Vyver, *Leuven Lectures* (n 32) 91–99.

120 See eg Statute of the International Court of Justice, Art 36.

121 See UN Charter, Art 2(1).

122 See UN Charter, Art 2(3).

123 See UN Charter, Art 2(4).

124 See UN Charter, Art 25.

125 See UN Charter, Art 24(1).

126 See UN Charter, Art 39.

127 See UN Charter, Art 41.

128 See UN Charter, Art 42.

129 UNGA ‘Uniting for Peace Resolution’ (3 November 1950) UN Doc A/Res/377.

130 The first Emergency Special Session of the General Session was convened at the request of the Security Council on 1–10 November 1956, to deal with a crisis in the Middle East following Egypt’s annexation of the Suez Canal; the second Emergency Special Session of the General Session was convened at the request of the Security Council on 4–10 November 1956, to deal with a crisis in Hungary following the Soviet Union’s invasion; the third Emergency Special Session of the General Session was convened at the request of the Security Council on 8–21 August 1958, to deal with a crisis in the Middle East in consequence of the deployment of foreign troops in Lebanon and Jordan; the fourth Emergency Special Session of the General Session was convened at the request of the
Security Council on 17–19 September 1960, to deal with the situation in the Democratic Republic of the Congo; the fifth Emergency Special Session of the General Session was convened at the request of the Security Council on 17–18 June 1967, to deal with measures taken by Israel to change the status of east Jerusalem; the sixth Emergency Special Session of the General Session was convened at the request of the Security Council on 10–14 January 1980, to deal with a crisis in Afghanistan; the seventh Emergency Special Session of the General Session was convened at the request of Senegal on 22–29 July 1980, 20–28 April 1982, 25–26 June 1982, 16–19 August 1982, and 24 September 1982, to deal with the situation in Palestine; the eighth Emergency Special Session of the General Session was convened at the request of Zimbabwe on 13–14 September 1981, to deal with the situation in Namibia; the ninth Emergency Special Session of the General Session was convened at the request of the Security Council on 29 January–5 February 1982, to deal with the situation in occupied Arab territories; and the tenth Emergency Special Session of the General Session was convened at the request of Qatar for its first session in April 1997, to deal with illegal Israeli action in occupied East Jerusalem and the rest of the occupied territories.


132 Arrest Warrant Case (n 109) para 61. Also see para 36 (Van den Wyngaert, J, dissenting, holding that ‘[i]mmunity should never apply to crimes under international law, neither before international courts nor national courts’). See also John Dugard and Garth Abraham, ‘Public International Law’ (2002) ASSL 140, 165–66.

133 Prosecutor v Taylor.

134 Taylor (n 133) para 42.

135 Taylor (n 133) para 51.

136 Rome Statute, Art 27(2). As to the current dispute between the ICC and the African Union relating to the sovereign immunity of a sitting head of state, see Johan D van der Vyver, ‘Prosecuting the President of Sudan: A Dispute between the African Union and the International Criminal Court’ (2011) 11 Afr Hum Rts LJ 683–98.

137 Rome Statute, pt IX. See also Rome Statute, Art 12(3) (making provision for non-party states to agree to cooperate with the Court on an ad hoc basis).

138 Rome Statute, Art 12.

139 Rome Statute, Art 1.


Constitution of the Republic of South Africa (1996), s 36(1). See also s 7(1).