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Legitimacy in the International Order: The Continuing Relevance of Sovereign States

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Cover Page Footnote

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LEGITIMACY IN THE INTERNATIONAL ORDER: THE CONTINUING RELEVANCE OF SOVEREIGN STATES

BRAD R. ROTH*

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I. INTRODUCTION

International institutions are broadly experiencing, if not a legitimacy crisis, at least a legitimacy malaise. In much of the world, the centrist political elites identified with the core tenets of liberal internationalism face severe challenges that, while defying any simple categorization, all appear traceable to frustration with supra-national structures of authority. Although the immediate challengers may be doomed by their seeming incapacity to offer workable affirmative solutions—the Brexiteers supplying a prime illustration—the underlying frustration appears likely to persist and to have continuing consequences for the global order.

Broad though this topic is, and dubious though all attempts at parsimonious explanation are wont to be, a common denominator of the malaise is the widespread sense that decision-making authority is out of reach: that the structural conditions of social life increasingly defy political (and plausibly “democratic”) regulation. The local champions of international institutions—easily identified with economic and cultural elites who count among globalization’s “winners”—convey a message akin to Margaret Thatcher’s notorious expression, “There is no alternative” (or “TINA,” as it has been derisively dubbed).¹ The revolt against (the multifarious variations on) that message has both left-wing and right-wing elements. It is not united by any

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¹ The same insensitivity is pithily captured in a phrase used by both Barack Obama and Hillary Clinton in addressing the post-industrial heartland’s protectionist supporters of successful 2016 U.S. President candidate Donald J. Trump: “Those jobs aren’t coming back.” Whatever may have been intended, the expression effectively denigrated the political objective of restoring or maintaining material conditions enjoyed by the current generation’s parents and grandparents, and thus was widely heard to deny that the jobs in question represented a way of life worth protecting.

common conception of justice, let alone a common program.² It does, however, reflect a common yearning for a palpable sense of membership in a political community, the responsible agents of which can exert control over the material conditions that undergird the pursuit of a favored way of life. It thus represents a coherent—even though not a cohesive—political project: reassertion of the state’s status as, if nothing else, a site of struggle over the direction of social life.

The point of this essay is not to defend “populism,”³ whether of the Left or Right, nor to cast doubt on the role of international institutions in addressing the myriad twenty-first century challenges that defy resolution within the confines of territorial political communities. It is, rather, to illuminate what is irreplaceable about the state *qua* political community. The state—not the governmental apparatus, but the territorial political community on behalf of which that apparatus notionally acts—is the only entity within which individuals’ interests and attitudes may (when aggregated with those of others similarly situated) have palpable weight in decisions affecting the economic, social, and cultural conditions within which they pursue their life plans. Whatever “democracy” might be taken to mean, the properties unique to the state constitute the essence of what one can plausibly be democratic *about*.

In turn, if international institutions are to be bearers of legitimate authority, states must play a central role in conferring that legitimation. Whatever may be said for “global civil society,” the international order remains primarily an inter-state order—a system of coordination among the governmental apparatuses that authoritatively coordinate activity within territorially-bounded political communities.

There is thus reason for international institutions to be cautious about seeking to negate state prerogatives. International legal doctrines have traditionally acknowledged and accommodated reserved domains of domestic legal authority. State sovereignty thus plays a role within international law. Should exertions of doctrinal ingenuity encroach too boldly on state

2 See, e.g., James McAuley, *Low Visibility*, 66 N.Y. REV. BOOKS 5 (Mar. 21, 2019), <https://www.nybooks.com/articles/2019/03/21/low-visibility-france-gilet-jaunes/> (essay on the French *gilets jaunes* movement in light of Christophe Guilluy’s *Twilight of the Elites*).

3 There is no consensus definition of this term, and there is reason to question whether right- and left-wing variants are properly placed under the same heading. A common element, though, is “a discourse or worldview that celebrates the people’s will and its unmediated expression as the ultimate repository of goodness.” KIRK HAWKINS, *VENEZUELA’S CHAVISMO AND POPULISM IN COMPARATIVE PERSPECTIVE* 247 (Cambridge Univ. Press, 2010). This discourse entails a mobilization against usurping “elites” and a disposition to bypass institutional processes (which are perceived to be rigged in favor of entrenched special interests) in favor of reliance on a perceived inter-subjective bond between the movement’s base and its leadership. Adverse commentators tend to impute additional elements, often for the sake of discrediting such movements and minimizing the distinctions between leftist and rightist variants. See, e.g., JAVIER CORRALES & MICHAEL PENFOLD, *DRAGON IN THE TROPICS: HUGO CHÁVEZ AND THE POLITICAL ECONOMY OF REVOLUTION IN VENEZUELA* 144–49 (Brookings Inst. Press, 2011) (characterizing the unprincipled favoritism that results from de-institutionalization as the quintessence of populist politics); JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 4 (Univ. of Pa. Press, 2016), (populists in power are distinguished by their efforts “to hijack the state apparatus,” to trade “material benefits or bureaucratic favors for political support by citizens who become the populists’ ‘clients,’” and “to suppress civil society,” while “claiming that they alone represent the people”).

prerogatives, international law's reach may come to exceed its grasp: domestic authority, denied its place *within* international law, can be expected to reassert itself *against* international law, and to draw substantial popular support for so doing.

The discussion below will address the requisites of legitimacy in the international system. It will first defend the enduring normative significance of the state amid ever-increasing globalization. It will go on to speak to the multifaceted (and much-maligned) concept of state "sovereignty"—the jurisprudential significance of which, in the United Nations Charter-based order, centers on the legal inviolabilities of weak states. Finally, it will tie legal methodology to political legitimacy: international law's political impact depends on maintaining respect for sovereignty considerations in the process of discerning the legal validity of putative norms, whereas the urge to doctrinal innovation poses a risk of compromising the legitimacy of international legal obligations in the eyes of important actors.

II. THE NORMATIVE SIGNIFICANCE OF THE STATE

The primary bearers of international legal personality are, not states *qua* governmental apparatuses, but states *qua* territorially-based political communities on whose behalf the governmental apparatuses are said to act. Indeed, the United Nations Charter is notionally authored by the "Peoples" of the member states through their "respective Governments."⁴ The Charter asserts a premier "Principle": the "sovereign equality" of states (art. 2(1)), from which is deduced the system's default peace and security norms. That Principle is itself grounded in the "Purpose" of developing "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (art. 1(2)).⁵ Thus, the expectation that states manifest the self-determination of their permanent territorial populations underlies the document's operative state-protective norms against "the threat or use of force against the territorial integrity or political independence of any state" (art. 2(4)) and against intervention "in matters which are essentially within the domestic jurisdiction of any state" (art. 2(7)).⁶ Although this invocation of popular self-

4 U.N. Charter pmb., 1 U.N.T.S. XVI.

5 See also G.A. Res. 2625 (1970), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) (hereafter Friendly Relations Declaration), (adopted without a vote: territorial integrity upheld for any state "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"); G.A. Res. 50/6 (Nov. 9, 1995); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ I.2 (June 25, 1993) ("without distinction of any kind").

6 Contrary to what is often imagined, the more recent Responsibility to Protect (R2P) doctrine is by no means novel in its affirmation that states bear international legal responsibilities toward their own nationals or that their fulfillment of those responsibilities is subject to external scrutiny and judgment. The novelty lies in empowering decision makers external to the state to authorize recourse to coercive and even forcible cross-border measures for the putative purpose of vindicating the breached obligations. Whereas the Charter scheme provides for sovereignty *and* responsibility, the R2P doctrine

determination is transparent hypocrisy—the effective authority of governmental apparatuses is rationalized as a manifestation of the will of respective peoples in the absence of the slightest indication of accountability—the felt need for hypocrisy evidences the principle’s normative significance.⁷

The centrality of the territorially-based political community to the organization of social life can scarcely be overstated. In order for us to accomplish anything on a large scale—material or moral, good or bad, internal or external—there must first be an “us.” Virtually all major undertakings presuppose a capacity to resolve collective action problems through the centralized taking of decisions that will be broadly perceived as binding on the whole.⁸ Moreover, social solidarity is the foundation of the pursuit of social justice. John Rawls speaks of justice as “the first virtue of social institutions,”⁹ but the pursuit of justice itself presupposes interdependent members of a scheme of cooperation who are “all in this together.”

Indeed, the more extensive the scheme of distributive justice, the more intensive the needed sense of community. A mutual commitment to resisting economic inequality, material insecurity, and social stratification—to establishing a common space that manifestly belongs to all of its inhabitants equally—presupposes systematic, weighty, and unchosen mutual responsibilities, which in turn presuppose a bounded political community that forges a sense of collective identity.

The inability of supra-national configurations to fulfill this set of functions has less to do with diversity of heritage, culture, history, or language than with the very lack of ambition on the part of such configurations to become a super-state, in which inhabitants are to be regarded as “all in this together.” Notwithstanding policy coordination and even a modicum of redistribution and collective funding of social projects, the ultimate logic of such arrangements among states is “every tub on its own bottom,” rather than an ethos that the well-

speaks of sovereignty as responsibility. Int’l Comm’n on Intervention and State Sovereignty, *The Responsibility to Protect* § 2.14 (2001). The implication is that respect for sovereign prerogative is conditional upon fulfillment—to the satisfaction of some external authority—of those responsibilities inherent in statehood as the manifestation of the self-determination of the territorial population as a whole. The innovation, and the potential danger, of the doctrine lies in assigning to presumed representatives of the international community the legal capacity to suspend the state’s sovereign inviolabilities.

7 As La Rochefoucauld famously teaches: “Hypocrisy is the tribute that vice pays to virtue.” Brian Vickers, *Shakespeare’s Hypocrites*, 108 *Daedalus* 45, 83 n.1 (1979) (quoting FRANÇOIS DE LA ROCHEFOUCAULD, *LES MAXIMES* 218 (1665)).

8 For that reason, Rawls, following Kant, ascribed to individuals “a natural duty . . . to support and to comply with just institutions that exist and apply to us,” and further qualified the justness proviso to stipulate only that the institutions be “as just as it is reasonable to expect in the circumstances.” JOHN RAWLS, *A THEORY OF JUSTICE* 115 (Harv. U. Press, 1971); see also IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* § 42, at 71 (John Ladd trans., Bobbs-Merrill, 1965) (“If you are so situated as to be unavoidably side by side with others, you ought to abandon the state of nature and enter, with all others, a juridical state of affairs . . .”); see generally Jeremy Waldron, *Special Ties and Natural Duties*, 22 *PHIL. & PUB. AFF.* 3, 4–5, 14–15 (1993).

9 Rawls, *supra* note 8, at 3.

being of each inhabitant of the transnational space is the responsibility of all, irrespective of national boundaries.¹⁰

Territorial boundaries establish the context of a practical political project of substantive equality. To be sure, material inequality across humankind is morally significant, but material inequality within boundaries matters in a special way—not only psychologically, but concretely. The distinctive outrage of poverty amid plenty lies not merely in its cruel irony or even in its patent avoidability; poverty is, far beyond an absolute dearth of resources, a relationship of subordination, marginalization, and exclusion.¹¹ And this is true of relative deprivation more generally, not exclusively of poverty. Material resources, in addition to their intrinsic value, play the role of “positional goods.”¹² Although positional goods are most frequently discussed as goods that owe their value to the advantage of possessing them while others do not (for example, a degree from an elite university), the obverse is more plainly relevant: many goods are disadvantageous to be without, principally because they are requisites to interaction on equal terms (or even at all) with those who already possess them (for example, professional attire to wear to a job interview).¹³ Consequently, being deprived relative to others in the same social space has special moral relevance, putting a premium on the mitigation of material inequality within the boundaries of a political community.

To acknowledge this special role of the territorial political community is by no means to say that political responsibilities are limited to those owed to that community’s own members. Responsibilities *erga omnes* include, first and foremost, negative duties to avoid undue impositions on—let alone predations

10 Should the European Union genuinely move in the latter direction, it will become a state in the relevant sense.

11 John Locke was for this reason (putting aside all of the other egregious aspects of his amateur anthropology) deeply mistaken in attributing greater well-being to the poorest Englishman than to the wealthiest Native American:

There cannot be a clearer demonstration of any thing, than several nations of the Americans are of this, who are rich in land, and poor in all the comforts of life; whom nature having furnished as liberally as any other people, with the materials of plenty, i.e. a fruitful soil, apt to produce in abundance, what might serve for food, raiment, and delight; yet for want of improving it by labour, have not one hundredth part of the conveniences we enjoy: and a king of a large and fruitful territory there, feeds, lodges, and is clad worse than a day-labourer in England.

JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. 5, § 41 (1690). Robert Nozick made a related error in dismissing the negative social effects of inequality by reference to the one-off financial success of a star basketball player. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 161–64 (Basic Books, 1974) (the well-known “Wilt Chamberlain” example). The primary problem lies not in the unfairness of any individual’s acquisition of wealth *per se*, but in the systemic tendency toward social stratification, with consequences for private power relations and differential capacities to participate meaningfully in all aspects of social life.

12 See Michael Schneider, *The Nature, History and Significance of the Concept of Positional Goods*, 45:1 *HIST. OF ECON. REV.* 60, 76 (2007) (“many, if not most, goods are desired not only because of their intrinsic qualities, but also because of their position in a social hierarchy”).

13 A nowadays-intuitive illustration is the imperative to continually update one’s communication technology: failing to do so will leave one *less* able to interact with other individuals and institutions than prior to the advent of the new technology, thereby causing one to be closed out of relationships and opportunities.

against—non-members of the collectivity. They also include affirmative duties, not only episodically to assist human beings anywhere who are in acute need (such as by accepting refugees and providing disaster relief funds), but also systemically to contribute a fair share in addressing long-term global problems (for example, climate change and pandemics) and in redressing historic distortions in the global distribution of resources.¹⁴

But neither uncoordinated voluntarism nor an unregulated market can meet these challenges. In order to fulfill those external responsibilities effectively—and to allocate the associated burdens fairly among internal sectors—the territorial community needs to coordinate its efforts through a power of compulsory collective decision. That distinctive power, in turn, is the focal point of the quest for political accountability.

It follows from the above that the territorial unit's permanent population has an unshared stake in struggles over the terms of public order in that territory. It therefore has unique standing to participate in the processes that set those terms, free of interference from outside. Accordingly, as affirmed in the Friendly Relations Declaration—the UN General Assembly's 1970 consensually-adopted gloss on the Charter's fundamental principles—“[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”¹⁵

One might object that whatever the political community's interest in self-government, even the most participatory process of arriving at internal norms must comply with objective and universal human rights standards. Thus, according to Jamie Mayerfeld, “Deriving human rights from public deliberation is the death of human rights. Human rights are the precondition of any healthy form of public deliberation.”¹⁶ Mayerfeld elaborates as follows:

There is no limitation of public autonomy worth complaining about if we insist, in advance of public deliberation, that people have the right to be free from religious persecution, censorship, arbitrary imprisonment, unfair trials, capital punishment, slavery, and cruel and degrading treatment, especially torture; and that they have the right to education, economic subsistence, health care, and dignified conditions of labor.¹⁷

Mayerfeld makes express that this list of items that “should be kept off the legislative table” is derived, not from actual consensus or from respect for the

14 Invocations of community that repudiate such responsibilities—in particular, fascistic appeals for a single-minded commitment to an organic social whole—are wrong not because they are communitarian, but because they cynically distort the nature and functions of political community. And to be sure, it is barely plausible in the present day in familiar places to find “total war” circumstances, in which acknowledging responsibilities on the basis of the common humanity of the Other is fatally debilitating to the struggle for communal survival.

15 Friendly Relations Declaration, *supra* note 5.

16 JAMIE MAYERFELD, *THE PROMISE OF HUMAN RIGHTS: CONSTITUTIONAL GOVERNMENT, DEMOCRATIC LEGITIMACY, AND INTERNATIONAL LAW 202* (Univ. of Pa. Press, 2016).

17 *Id.* at 198.

outcome of a particular collective decision-making process, but from the moral truth of the proposition.¹⁸

Mayerfeld's assertion makes sense as a justification of an individual's political stance. Yet each of his listed items, even insofar as they may be widely accepted in the abstract, remains highly controverted in its details—as well as with respect to the question of whether and under what conditions emergent considerations might override a presumptive imperative. Although the authentic resolution of these questions may be as objective a matter as Mayerfeld imagines, and as discernible through the exercise of cultivated reason, disagreement inevitably persists,¹⁹ and the project of politics is to establish a system of cooperation among the non-like-minded. The objective fact of moral disagreement has objective consequences—including objective moral consequences (given the social harms that can arise from the breakdown of cooperation). For norms to be authoritative, they must emanate from processes possessing a legitimacy that transcends disagreement as to the norms' substantive merits. Positive law, whether right or wrong as an objective matter, operates as an indispensable working resolution of that disagreement for a particular time and place.²⁰

As will be discussed below, insofar as territorial political communities acknowledge constraints on the authoritativeness of decisions emanating from their internal processes, it is through the operation of positive international law, established in accordance with recognized methods for binding sovereign states to international commitments. These methods predictably emphasize the role of sovereign consent (even though meaningful consent is far from being a *sine qua non* of international legal obligation).

In the present historical moment, international institutions face challenges from populists, of both the Left and the Right, who see a combination of local and transnational elites as having usurped popular self-government. These populists call for re-establishing domestic political processes as the sites of struggle over the fundamental questions—economic, social, and cultural—facing territorial political communities. Paul Blokker describes the dynamic as follows:

In the domestic domain, democratic politics appears . . . to be torn between technocratic, expert approaches, often focusing on legal, economic and technological progress grounded in the idea of “open statehood” and international legal integration, on the one hand, and populist approaches, frequently claiming the retrieval of some idea of self-government and collective self-representation, on the other The populist understanding of politics . . . has emerged in a more visible manner in recent

18 *Id.* at 199.

19 For an explanation of the ineluctable nature of disagreement about fundamental political principles and their application, see BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER 103-131 (Oxford Univ. Press, 2011).

20 See Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996). (explaining and defending Immanuel Kant's widely underappreciated emphasis on the duty to obey positive law).

times, not least in the wake of the 2007–2008 global financial crisis, and appears to be grounded in a specific, in some ways radical, interpretation of a democratic imaginary of constitutionalism.²¹

The global financial crisis, among other tumultuous short-term and long-term economic disruptions, laid bare an inability of ordinary people, through political participation, to influence the changing—and in many cases, deteriorating—conditions of their lives. In particular countries, international institutions were assigned blame for placing the relevant decisions out of reach of democratic processes. The Brexiteer slogan, “Take Back Control,” encapsulates the animating sentiment. As Tim Haughton explains:

“Take back control” effectively combined not just a sense of a positive future albeit never defined or elaborated, but also suggested a sense of rightful ownership. Moreover, it helped to mobilize the anti-establishment support of voters who felt let down by their politicians. The Brexit referendum, as referendums are so often, was only driven in part by the question on the ballot paper. Frustrated by the sense that the political class had failed them, many ordinary citizens took the opportunity to vent their fury.²²

However manipulative one may consider the Leave campaign’s invocation of this slogan to have been, there can be little doubt that the slogan addressed a ground of political legitimacy that international institutions ignore at their peril.

III. THE CONCEPTUAL SIGNIFICANCE OF STATE SOVEREIGNTY

A. WHY SOVEREIGNTY?

The term “sovereignty” is extraordinarily unpopular in international law scholarship. In that discourse, sovereignty tends to be conceptualized (at least implicitly) as a realm of lawlessness that incrementally contracts as international legality expands, and that is slated (aspirationally) for eradication, as state actors everywhere come to be made effectively subject to legal accountability. Moreover, because the term is so frequently invoked in political discourse to justify resistance to international cooperation, many scholars have suggested adopting alternative language to capture any legitimate residual functions

21 Paul Blokker, *Populist Governments and International Law: A Reply to Heike Krieger*, 30 *EURO. J. INT’L L.* 1009, 1015 (2019); see also Heike Krieger, *Populist Governments and International Law*, 30 *EURO. J. INT’L L.* 971 (2019).

22 Tim Haughton, *Perspectives: It’s the Slogan, Stupid: The Brexit Referendum*, UNIV. OF BIRMINGHAM (last visited Dec. 1, 2020), <https://www.birmingham.ac.uk/research/perspective/eu-ref-haughton.aspx>.

hitherto associated with sovereignty considerations; the term itself—almost always essentially a metaphor rather than a literal reference to an “uncommanded commander”—can be left behind.²³

Don Herzog’s recent book (informatively entitled, *Sovereignty, RIP*) states the case most starkly. As he puts it, “The classic theory of sovereignty . . . holds that every political community must have a locus of authority that is unlimited, undivided, and unaccountable to any higher authority.”²⁴ After convincingly—and indeed, without much difficulty—demonstrating these properties to be without any appealing historical pedigree or conceptual merit as a general matter, he asserts that invocations of sovereignty are either “noxious” (if they stubbornly adhere to those criteria) or “vacuous or nonsensical” (if they disavow these criteria).²⁵ Denying any awareness of a viable reinterpretation of the concept, he repudiates any need for such reinterpretation: “[W]e can get by just fine with the concepts of *state*, *jurisdiction*, and *authority*.”²⁶ The concept, he affirms, fails to “orient us toward our problems and possibilities.”²⁷

Notwithstanding the seeming force of such objections, the term “sovereignty” adverts to a cluster of distinctive phenomena that are difficult to capture in other language. Rejection of the concept draws on the long-standing project of constitutionalism, which seeks to reduce sovereignty to the operation of a set of established norms (emanating from customary practice, a foundational document, or some combination of these). But sovereignty may be seen as having an irreducible core that withstands such developments, because whereas constitutionalism is an attribute of a *pouvoir constitué*, sovereignty is an attribute of a *pouvoir constituant*: the underlying authority to make, and the latent underlying authority to un-make, the *pouvoir constitué*.²⁸ The peculiar complexities of this legal relationship are difficult to illuminate without reference to the term.

Moreover, sovereignty’s most important role in the contemporary international legal order is to establish the irreducible legal entitlements of *weak* states. Strong states can protect their vital interests without invoking these distinctive legal properties. The most profound development in the international order of the mid- to late twentieth century was the repudiation of both colonialism and neo-colonialism: the concretization of the U.N. Charter’s foundational “principle of equal rights and self-determination of peoples” as a right of the populations of Non-Self-Governing and Trust Territories to opt for independent statehood, and the affirmation of the right of each (newly emergent, as well as pre-existing) state to be free of dictatorial impositions. These developments were reflected most prominently in the General Assembly’s 1970

23 See, e.g., Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT’L & COMP. L. 31 (1995). (asserting that “‘sovereignty’ is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology”).

24 DON HERZOG, *SOVEREIGNTY, RIP*, at xi (Yale Univ. Press 2020).

25 *Id.* at 290.

26 *Id.*

27 *Id.* at 291.

28 For more on this distinction, see, e.g., Niels Petersen, *The Principle of Democratic Teleology in International Law*, 34 BROOK. J. INT’L L. 33, 51, 59-60 (2008); GEORGE SCHWAB, *THE CHALLENGE OF THE EXCEPTION* 32–33 (Greenwood Press 2d ed. 1989).

Friendly Relations Declaration and in the International Court of Justice's 1986 *Nicaragua v. United States* decision.²⁹ It may not be an accident that sovereignty started to be called into question at just the moment when it (perhaps inconveniently) ceased to be monopolized by the hegemonic powers.

B. CONFUSIONS: SOVEREIGNTY AS PART OF DIFFERENT CONVERSATIONS

Part of the difficulty in defining sovereignty is that the term refers, not to a singular concept, but to set of interrelated concepts, each of which pertains to a different conversation. Sovereignty invariably refers to the authority to render an ultimate decision about the terms of public order, but its more particular meaning depends on the subject matter of the conversation in which this authority arises.

The term "sovereignty" pertains to no less than four discrete topics: (1) the extent of a state's empirical capacity to control its internal affairs, or to determine its own internal or external policies, without regard to external influences (that is, a social science discourse); (2) the desirability *vel non* of policies directed toward establishing, maintaining, or restoring a state's unilateral control over some range of activities (that is, a policy or partisan-politics discourse); (3) the existence *vel non*, within a particular political order, of a unitary bearer of the last word on what counts as public order (that is, a domestic-law discourse); (4) the irreducible legal prerogatives and inviolabilities of statehood in the international system (that is, an international-law discourse).

The former two, non-judicial topics are of only peripheral significance to the latter two, juridical topics, and their association does little more than to sow confusion. And indeed, in the former contexts, other terms could, as is so often suggested, be substituted for "sovereignty" without any loss of distinctive meaning.

Concededly, were political realities to be so far transformed as to render the former two topics thoroughly irrelevant to international relations and public policy, the latter two might be reduced to an historical curiosity. But although individual states' empirical capacities—long overstated—have undoubtedly been diminishing over time,³⁰ and although some states altogether fail to fulfill governmental functions within much or most of their national territories,³¹ the

29 See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 262–64 (June 27) [hereinafter *Nicar. v. U.S.*] (the Charter and its official glosses "envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies;" and thus for the Court to hold a state's adherence to any particular governmental doctrine a violation of customary international law "would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State").

30 See, e.g., STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (Princeton Univ. Press 1999).

31 See, e.g., ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* (Cambridge Univ. Press 1990).

state system as a whole remains remarkably intact.³² And while many supposed policy imperatives to “take back control” can be shown to be illusory or self-defeating, there remain realms in which unilateral decision-making authority continues to be jealously guarded, more or less across the political spectrum,³³ as a *sine qua non* of a political community’s self-government. Thus, the question of ultimate juridical authority, both within domestic legal orders and in moments of contestation between an internal order and external sources of authority, has hardly become moot.

C. THE QUESTION OF SOVEREIGNTY’S PERSISTENCE WITHIN DOMESTIC LEGAL ORDERS

The domestic-juridical topic to which sovereignty pertains is the question of ultimate authority with the legal order. This is the significance of Herzog’s ascription to “the classic theory of sovereignty” the idea of “unlimited, undivided, and unaccountable” authority.³⁴ That idea is associated with Jean Bodin and Thomas Hobbes,³⁵ and with John Austin’s Hobbesian reduction of law to a command backed by a threat.³⁶ As the absolutism of Bodin and Hobbes has few remaining adherents, and as Austin’s nineteenth-century version of legal positivism has been superseded by H.L.A. Hart’s conception of a legal order as a union of primary and secondary rules, sovereignty theory appears at first glance to be fully outmoded. In a developed legal order (even one observing the principle of parliamentary supremacy), “where the sovereign is not identifiable independently of the rules, . . . [t]he rules are *constitutive* of the sovereign.”³⁷

But a closer look calls into question whether the matter is so fully settled. Lying beneath any given *pouvoir constitué* is the *pouvoir constituant* that is deemed to have established it. The governmental order (whether or not predicated on a written constitution) owes its legitimation to some process by which the political community was heard to have conferred authorization, and its positivistic validity is owing to widespread acquiescence in the public order that it institutes. For Hart, as for Hans Kelsen, the law of any given system

32 See, e.g., Robert H. Jackson, *Sovereignty and its Presuppositions: Before 9/11 and After*, 55 POLITICAL STUDIES 297 (2007) (arguing that disparagement of the contemporary significance of the state is largely unwarranted).

33 Even within the European Union, the German Constitutional Court interposes its own judgment as to the propriety of applying European Union norms where doing so would conflict with fundamental values expressed in German jurisprudence. See Elisa Uría Gavilán, *Solange III? The German Federal Constitutional Court Strikes Again*, 1 EUR. PAPERS 367, 368 (2016) (in refusing the application of a European Arrest Warrant in 2015, the Court showed its determination to “remain as the ultimate watchdog concerning the protection of fundamental rights”).

34 Herzog, *supra* note 24, at xi.

35 JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* (M.J. Tooley trans., Basil Blackwell 1955) (1576); THOMAS HOBBS, *LEVIATHAN: PARTS I AND II* (Bobbs-Merrill Co., 1958) (1651).

36 JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 143 (Hackett Publishing 1998) (1832) (“a so called law . . . is not a law in the proper signification of the term . . . [where] it is not armed with a sanction,” defined as “an evil annexed to a command.”).

37 H.L.A. HART, *THE CONCEPT OF LAW* 75 (Oxford Univ. Press 1961).

presupposes an initial political resolution, the validity of which is itself beyond the scope of the legal inquiry.³⁸

This relationship raises at least two questions. The first concerns the *pouvoir constituant*'s re-emergence to rationalize the overthrow of an existing legal order. The second concerns whether, short of this, the *pouvoir constituant* retains a latent presence underlying the *pouvoir constitué*. In the first case, the constitutional order may be unconstitutionally superseded: "Successful revolution sooner or later begets its own legality."³⁹ In the second case, the established order either expressly or impliedly leaves room for a designated agent – operating in the name of an uncodified and unilaterally discerned communal will – to suspend, in times of crisis, the terms of that order in whole or in part. Norms apply in normal times, but in moments of existential threat, give way to an ultimate power of decision; in the classic words of Carl Schmitt: "Sovereign is he who decides on the exception."⁴⁰

Although jolting to the rule-of-law sensibility, there is nothing concretely novel about Schmitt's insistence that even a scrupulously constitutionalist legal order must end up licensing a provisional suspension of compliance with legality.⁴¹ John Locke, so naturally counterposed to Hobbes in inveighing against "extemporary arbitrary decrees,"⁴² nonetheless reserved to the monarch the prerogative power: "This power to act according to discretion, for the public

38 See Leslie Green, *Legal Positivism*, STAN. ENCYCLOPEDIA OF PHIL. (2019), <https://plato.stanford.edu/entries/legal-positivism/> (comparing Kelsen, for whom the validity of the "basic norm" is presupposed "transcendentally," with Hart, for whom "the ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually practiced:").

39 STANLEY A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 66 (Penguin Books, 3d ed. 1977).

40 CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., The MIT Press 1985) (1922). Although the bearer of sovereignty "stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety." *Id.* at 7.

41 Such suspensions are to be distinguished from routine statutory delegations of "emergency" powers to executive organs. See, e.g., BRENNAN CENTER FOR JUSTICE, *A GUIDE TO EMERGENCY POWERS AND THEIR USE* (NYU School of Law, 2019), <https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use>. These statutory schemes merely substitute one legal regime for another in moments deemed to meet particular statutory criteria. They entail a sometimes-dramatic enhancement of legislatively delegated discretion, but the rule of law only ever purports to bridle, and not to eliminate, executive discretion. See, e.g., William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1224 (1983) ("There is a law of conservation of discretion: one limits the discretion of one set of actors only by increasing that of others."). Conversely, in a true state of exception, an expressly or impliedly designated actor's unilateral judgment of necessity overrides legal considerations generally. See Schmitt, *supra* note 40, at 7 ("The precondition as well as the content of jurisdictional competence in such a case must necessarily be unlimited. . . . The most guidance the constitution can provide is to indicate who can act in such a case."). Machiavelli's tract on republicanism advocated for this purpose an express institution of "dictatorship," or emergency rule, on the ground that "when a like mode is lacking in a republic, it is necessary either that it be ruined by observing the orders or that it break them so as not to be ruined." Niccolò Machiavelli, *DISCOURSES ON LIVY*, bk. I, ch. 34, <https://www.nlnrac.org/critics/machiavelli/primary-source-documents/discourses-on-livy-book-i>.

42 Locke, *supra* note 11, at ch. 11, sect. 136.

good, without the prescription of the law, and sometimes even against it.”⁴³ Less abstractly, Abraham Lincoln, in justifying what most understand to have been an unconstitutional suspension of habeas corpus in 1861, posed this rhetorical question about his duty to faithfully execute the laws: “Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?”⁴⁴

The distinctiveness of Schmitt’s analysis lies in inverting the significance of the exception and the rule. For Schmitt, the answer to the question of ultimate authority is revealed only in the borderline case.⁴⁵ This is precisely why Bodinian sovereignty withstands the advent of constitutionalism. Bodin himself was writing against his sixteenth-century contemporary, François Hotman, who emphasized the French monarchy’s embeddedness in customary practice, marked by a coordinate role for the Estates, that the monarch was bound by covenant to respect.⁴⁶ Bodin’s assertion of monarchical sovereignty did not deny the binding nature of the monarchy’s covenants with the Estates, but rather reserved to the monarch the unchallengeable authority to contravene them when, in his unilateral judgment, “they no longer satisfy the requirements of justice.”⁴⁷

Schmitt thus invokes Bodin for the ultimate authority “to violate such commitments, to change laws or to suspend them entirely according to the requirements of a situation, a time, and a people.”⁴⁸ For Schmitt, “[T]he authority to suspend valid law—be it in general or in a specific case—is . . . the actual mark of sovereignty.”⁴⁹

Although constitutionalists may rebut Schmitt’s characterization of the challenge of existential emergency,⁵⁰ the greater significance of his point lies in the nuanced understanding of the concept of sovereignty: it is an authority that does not negate, but that rather withstands, legal obligation. Norms constraining governmental conduct remain presumptively valid and binding. There nonetheless remains a bearer of a latent authority to suspend their operation, upon a unilateral judgment that conditions are “exceptional” rather than

43 Locke, *supra* note 11, at ch. 14, sect. 160; *see also* Clement Fatovic, *Emergency Action as Jurisprudential Miracle: Liberalism’s Political Theology of Prerogative*, 6 PERSPECTIVES ON POLITICS 487, 491–94 (Sept. 2008) (comparing and contrasting Locke and Schmitt on this point).

44 President Abraham Lincoln, July 4th Message to Congress (July 4, 1861) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/july-4-1861-july-4th-message-congress>).

45 Schmitt, *supra* note 40, at 15 (“The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception.”).

46 FRANÇOIS HOTMAN, *FRANCO-GALLIA*, (1574), *reprinted in* CONSTITUTIONALISM AND RESISTANCE IN THE SIXTEENTH CENTURY 53, 90–91 (Julian H. Franklin, ed., New York: Western Publishing Co. Inc. 1969) (French kings had historically been and, therefore by custom were, “bound by definite laws and compacts”).

47 Bodin, *supra* note 35, at 30.

48 Schmitt, *supra* note 40, at 9.

49 Schmitt, *supra* note 40, at 9.

50 *See, e.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 112 YALE L.J. 1011, 1124 (2003) (proposing an “Extra-Legal Measures” model that licenses public officials to violate existing law in emergencies, but subjects them to the risk of punishment under that law should they fail to obtain *ex post* ratification of their acts).

“normal.”⁵¹ It is only this purported residual authority, rather than the government in its ordinary operation,⁵² that conforms to Herzog’s characterization: “unlimited, undivided, and unaccountable to any higher authority.”⁵³

D. SOVEREIGNTY IN INTERNATIONAL LAW

Whatever one may think about the claim that the *pouvoir constituant* inevitably retains a residual role (as a touchstone of at least quasi-judicial justification) within a given domestic order, there can be no question that in the international order, it is the *pouvoir constituant* that is the referent of the sovereign equality of states. Contrary to what is often imagined, the international legal order is not “a legal order of legal orders,” but rather a legal order of sovereign political communities. Each of these bears “an inalienable right to choose its political, economic, social and cultural systems, without interference in any form,”⁵⁴ from which can be deduced an inherent capacity to overthrow its established governmental system—provided, however, that the international order discerns the displacement of the internal political structure to be an authentic decision of the sovereign political community.⁵⁵

This relationship of *pouvoir constitué* to the underlying *pouvoir constituant* is reflected in the axiom that legal obligations incurred by a government (as agent) bind the state (as principal).⁵⁶ The latter—the actual bearer of international legal personality—is not imagined to be re-founded when there is constitutional discontinuity. Thus, in adjudicating the dispute between Hungary and Slovakia over the communist-era *Gabcikovo-Nagymaros* dam treaty, the International Court of Justice determined, not that democratic Hungary had succeeded to the international legal obligations of communist Hungary, but that the obligations incurred by Hungary’s communist government were and

51 Schmitt, *supra* note 40, at 13, 9–10. (“For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.” Sovereignty “resides . . . in determining definitively what constitutes public order and security, in determining when they are disturbed, and so on. Public order and security manifest themselves very differently in reality, depending on whether a militaristic bureaucracy, a self-governing body controlled by the spirit of commercialism, or a radical party organization decides when there is order and security and when it is threatened or disturbed.”).

52 Schmitt, *supra* note 40, at 12 (“A jurisprudence concerned with ordinary day-to-day questions has practically no interest in the concept of sovereignty.”).

53 Herzog, *supra* note 24, at xi.

54 *Friendly Relations Declaration*, *supra* note 5.

55 This leads to the fraught question of under what conditions a *de facto* regime establishing itself in effective control might nonetheless be denied recognition as the bearer of the state’s legal capacities. See BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* (1999).

56 See Vienna Convention on the Law of Treaties, art. 7, art. 46(1), May 23, 1969, 1155 U.N.T.S. 331 (officials of the state’s executive organ are presumed to have the capacity to bind their state. However, treaty law allows that a state’s consent may be vitiated if it “has been expressed in violation of a provision of its internal law regarding competence to conclude treaties” and “that violation was manifest and concerned a rule of its internal law of fundamental importance.”) [hereafter VCLT].

remained those of Hungary *tout court*.⁵⁷ The international rule of law is based on binding relationships, not among fixed institutional structures, but among the abstract entities understood to underlie those structures. Those abstract entities are conceptualized as exercising the sovereign will—through *coups d'état*, insurrections, negotiated settlements of civil conflicts, plebiscites, and so on—to make and un-make these institutional structures that from time to time represent the state's international legal personality.

Beyond this, the study of the international legal order relies on the concept of sovereignty, albeit metaphorically, to account for the inherent tensions between international and domestic legal authority. To be sure, “sovereign equality” is a semantically inept expression: not only does it demand by its terms a reciprocal renunciation of the same unlimited authority that it nominally proclaims, but it also entails corollaries that limit state authority still further, based on the express and implied purposes that animate the international system. That system does not merely acknowledge and respect, but actively protects and in some cases helps to usher into being, state authority; the project coheres only insofar as states can be generally assumed to fulfill certain pre-assigned roles, above all as vehicles for their respective territorial populations' self-government. But because the system encompasses unequally efficacious and mutually distrustful actors who can be expected to disagree about matters of legitimacy and justice in the exercise of power, “[r]estrictions upon the independence of States cannot . . . be presumed.”⁵⁸

What sovereignty represents concretely, then, is not the quality of an uncommanded commander, but rather a set of rebuttable presumptions about how binding norms are created and implemented in a system of co-equal states: (1) a state is presumed to be obligated only to the extent of its actual or constructive consent; (2) a state's obligations, while fully binding internationally on the state as a corporative entity, are presumed to have legal effect within the state only to the extent that domestic law has incorporated them; and (3) the inviolability of a state's territorial integrity and political independence, as against the threat or use of force or “extreme economic or political coercion,” is presumed to withstand even the state's violation of international legal norms.⁵⁹ The point is not that these presumptions cannot be overridden—they are, with some frequency—but rather that the proponent of the override in each case faces a substantial burden of methodological justification (for example, in deriving from *jus cogens* criteria the conclusion that a given state's persistent objection to a

57 Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgement, 1997 I.C.J. 7, 64, ¶ 104 (Sept. 1997) (“profound changes of a political nature”—the collapse of communism—did not amount to a “fundamental change of circumstances” affecting treaty obligations).

58 S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7, 1927).

59 See BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER (2011) (elaborating the legal foundations and moral justifications of these presumptions).

particular norm's emergence is ineffective in exempting that state from the norm's applicability).⁶⁰

The paradoxes that the concept of sovereignty helps to illuminate lie in the latter two presumptions: the barriers to the implementation of norms already established. The persistence of state sovereignty is manifested in the dualistic nature of the relationship of international and domestic orders, as well as in the non-intervention norm.

The relationship between domestic and international legal orders is not analogous to the relationship between state and federal legal orders in the United States. The latter relationship is governed by a Supremacy Clause: all enactments of the state governments that contravene federal authority (insofar as the federal government has remained within the scope of its constitutionally enumerated powers) are null and void.⁶¹ This is not generally true of the acts of sovereign states that contravene international law. Although a state "may not invoke the provisions of its internal law as justification for its failure to perform" its international legal obligations,⁶² states can and do enact internally authoritative policies in breach of their international legal obligations, dictating legal consequences within their own jurisdictions on their own terms, while choosing to accept whatever adverse legal consequences may follow on the international plane.⁶³ Incurring an international legal obligation does not, in itself, imply that the state has renounced ultimate authority over public order in its territory. The same act may thus be lawful and unlawful simultaneously, without any contradiction, as two separate legal systems may bear on the same conduct.

Furthermore, a state's breaching act, even though incurring liability on the international plane, may nonetheless generate legal facts cognizable in the international order. Certain international law doctrines—including permanent sovereignty over natural resources, *nullum crimen sine lege*, immunity *ratione materiae*, and privileged belligerency—require (at least presumptive) regard for governmental acts that, irrespective of their international unlawfulness, have internal legal validity.⁶⁴ Only with respect to extraordinary norms—international crimes—have states renounced, not only the practice itself, but also the very capacity to authorize and immunize the practice. Much attention though these penal norms receive, they represent the exception, not the rule.

60 See, e.g., Michael Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. 1, ¶ 913 (2002) (whereas "customary international law rests on the consent of nations, [and therefore] a state that persistently objects to a norm of customary international law is not bound by that norm," peremptory norms "bind the international community as a whole, irrespective of protest, recognition or acquiescence.").

61 U.S. CONST. art. VI, cl. 2; see, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 30–31 (1824).

62 VCLT, *supra* note 56, at art. 27. The provision applies expressly to treaty obligations, but the same principle applies to customary obligations.

63 See LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 168 (1972) (international law "recognizes the power—though not the right—to break a treaty and abide the international consequences.").

64 See, e.g., Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 250 (1972–73) ("it would be a breach of international law for a court of one State to address an order to another State or to annul an act of another State.").

In addition to the barrier to norm implementation posed by the essentially dualistic relationship of international to domestic legal orders, international law by its own terms constrains intervention in “matters . . . essentially within the domestic jurisdiction.”⁶⁵ This is a limitation, not on the permissible subject matter of international legal obligations—which nowadays pertain to every aspect of internal governance—but on the permissible extent of cross-border exercises of power,⁶⁶ *including* on the recourse that can lawfully be taken in response to the breach of valid obligations.⁶⁷ This latter limitation befits a horizontal order where coercive implementation of established norms depends principally on untrusted implementers: individual states and coalitions of the willing. Retaliations against wrongdoing are, as a practical matter, available only to the relatively powerful, and impositions favored for ulterior purposes can be dressed up as responses to legal injury. Consequently, self-help is legally disfavored, with non-forcible countermeasures subjected to strict limitations and forcible responses allowed only in cases of armed attack.

Enforcement of international legal norms is thus constrained not merely by practical impediments, but also by legal inviolabilities. Whereas obligation in a domestic legal order characteristically entails an authorization to a centralized entity to undertake however much coercion may be necessary to compel compliance, international legal norms tend to be *obligatory* without being, even in principle, *compulsory*.⁶⁸

The Security Council, of course, is the principal repository of collective compulsory authority. Yet Chapter VII of the UN Charter is less akin to a mandate for law enforcement than to a state-of-exception provision (akin to Schmitt’s beloved Article 48 of the Weimar Constitution)—a reserve of discretionary authority in derogation of otherwise-applicable legal constraints

65 U.N. CHARTER, *supra* note 4, at art. 2(7).

66 See *Friendly Relations Declaration*, *supra* note 5 (“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.”); see also G.A. RES. 74/200, at 5 (Dec. 6, 2019) (adopted 122-2-51, calling on “the international community to adopt urgent and effective measures to eliminate the use of unilateral economic, financial or trade measures that are not authorized by relevant organs of the United Nations, that are inconsistent with the principles of international law or the Charter of the United Nations or that contravene the basic principles of the multilateral trading system and that affect, in particular, but not exclusively, developing countries”).

67 The 1996 version of the International Law Commission’s Draft Articles on State Responsibility included an express prohibition on the use, as a countermeasure, of “extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act.” International Law Commission, Draft Articles on State Responsibility with Commentaries Thereto, 1996, art. 50 The final version, submitted to the General Assembly for its consideration in 2001, omitted this clause, but retained restrictions to more or less the same effect. Report of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), arts. 48–54 [hereinafter 2001 ILC Articles on State Responsibility]; see also David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817, 831 (2002) (noting ILC Special Rapporteur James Crawford’s assertion that the principle of proportionality sufficed to address the concern).

68 This is a *fortiori* so in cases involving the direct or indirect use of force. See, e.g., *Nicar. v. U.S.*, *supra* note 29, at ¶ 262 (noting that even were Nicaragua to be regarded as legally obligated to conform its electoral processes to particular standards, “a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.”).

on cross-border exercises of power. The Article 39 trigger is a political judgment of a “threat to the peace,” not a legal judgment of a violation of international law, and the licensed measures (non-forcible under Article 41 and forcible under Article 42) are adopted in pursuit of *ad hoc* policy objectives that may or may not pertain to the implementation of pre-existing legal norms.⁶⁹ The requirement of a near-consensus—nine votes out of fifteen, with no vetoes from among the Permanent Five—reflects the exceptional nature of this suspension of ordinary norms, and reinforces the default position: an international rule of law upholding states’ territorial inviolability.

The concept of sovereignty thus plays a significant role in accounting for the complexities of the international legal order. Moreover, it refers to aspects of that legal order that are of differential significance to weak states. It represents, not an impediment to international cooperation or to shared responsibility for addressing global problems, but rather a bulwark against empowered righteousness—a limitation on untrusted unilateral implementers of supposed universal values. Those who wish to disparage sovereignty considerations within international law need to direct that disparagement precisely at this aspect of sovereignty discourse, and to demonstrate that what they have in mind is not actually a new brand of neo-colonialism.

IV. LEGITIMATION THROUGH ADHERENCE TO METHODOLOGICAL RIGOR

A. *THE DRAWBACKS OF PURSUING “UNIVERSAL” JUSTICE IN THE NAME OF INTERNATIONAL LAW*

States retain their centrality to international affairs, and their cooperation continues to require the bridging of conflicting interests and values. The international legal order therefore plays a crucial role in supplying a framework of accommodation. Its terms reflect a long-term collective commitment to the containment of clashes and the coordination of problem-solving. The foundational legal doctrines associated with the principle of sovereign equality, as reflected in the UN Charter and the Friendly Relations Declaration, manifest a continuing tension between international and domestic authority. That tension should be understood as a feature, not a flaw. International law cannot be markedly better, fairer, or more elegant than the actual conditions of global society permit; it can fulfill its functions only by appealing to such common interests and values with which the global system’s efficacious actors perceive a political need to align.⁷⁰ The roles of jurists and legal scholars are properly distinguished from those of visionaries and ethicists (which exist independently and need not be replicated).

⁶⁹ See UN CHARTER, *supra* note 4, at arts. 39, 40–41.

⁷⁰ See Oscar Schachter, *Just War and Human Rights*, 1 PACE Y.B. INT’L L 1, 18 (1989) (describing “a world of diversity, incorrigibly plural, where perceptions of freedom, well-being and self rule [sic] vary and often conflict in specific cases.”).

Given the diversity of interests and values, the international system's efficacy depends on a shared acceptance of the legitimacy of the overall process by which states are understood to be bound. Three decades ago, Thomas M. Franck explicated the concept of legitimacy as follows:

Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.⁷¹

Franck listed “[d]eterminacy, symbolic validation, coherence, and adherence” as “the building blocks of this right process,” but pointedly excluded “justice.”⁷² The global system, Franck explained:

accommodates differing moral values within one functioning secular community . . . by *de-emphasizing* the importance of diverse precepts of right. Iranian Shiite fundamentalists, Irish Catholics, Orthodox Israelis, Indian Hindu secularists, American Episcopalians, and West African Animists may share a world of states and secular rules, but not a common system of values, a globalized understanding of fairness, or a shared canon of justice principles. . . . The co-existence of radically different concepts of right within an emergent global secular system often is made possible by emphasizing the manifest *legitimacy* of secular rules while deliberately postponing to another day considerations of justice.⁷³

Yet the immediate post-Cold War era brought to the forefront a different sensibility among legal scholars. Few went so far as openly to assert, with Francis Fukuyama, that we had arrived at “the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”⁷⁴ But international legal norms came less and less to be interpreted in light of the ideological pluralism that marked the global system of the late 1950s to the late 1980s—the era in which the liberal-democratic West and revolutionary socialist East practiced a notional “peaceful coexistence,” while needing to engage with an emergent “Non-Aligned” South. Instead, the post-Cold War era unleashed juridical creativity in the purported service of a project of universal justice. Innovative interpretive approaches were employed to break down barriers, not only to the recognition of international legal norms oriented toward distinctively

71 THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

72 *Id.* at 235.

73 *Id.* at 235–36 (emphasis in original).

74 Francis Fukuyama, *The End of History?* *THE NATIONAL INTEREST* 4 (Summer 1989).

liberal-democratic values, but also to the implementation of those norms through cross-border exercises of power,⁷⁵ in forms ranging from extraterritorial criminal prosecution to regime change.⁷⁶

Although departures from standard juridical methods may comport with a keenly felt sense of justice,⁷⁷ the effort to transcend the limitations of state consent can be self-defeating. As Bruno Simma and Andreas Paulus have explained, “it is precisely this need to get our legal message through to other people, especially representatives of states who might not share our individual moral or religious sensibilities, that constitutes one of the main reasons for the adoption of a positivist view of international law.”⁷⁸ That positivist view stresses the role of formal sources of legal authority that are manifestly accorded acceptance in the international community of states. Law must “preserve a balance between its transformative force, which does not accept reality as it is, and its roots in social reality.”⁷⁹ Accordingly, if adjudicators, as delegates of the legal order, “exceed the discretion inherent in the delegation, they act *ultra vires* and are prone to lose not only their legal authority but also their political influence.”⁸⁰

Attempts to substitute the moral wisdom of scholars and judges for the consent of states invite backlash. Such backlash is exemplified in the 2020 report of the U.S. State Department’s Commission on Unalienable Rights, which seeks

75 For a sophisticated elaboration of the rationale for unilateral enforcement of supposedly universal norms, authored by the surviving founder of the anti-positivist “New Haven” approach to legal interpretation, see W. Michael Reisman, *Unilateral Actions and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 *EURO. J. INT’L L.* 3 (2000). For a critique of Reisman’s work and its relationship to U.S. foreign policy, see James C. Hathaway, *America, Defender of Democratic Legitimacy?* 11 *EURO. J. INT’L L.* 121 (2000).

76 See BRAD R. ROTH, HOW INTERNATIONAL CRIMINAL LAW’S INTERACTION WITH THE RESPONSIBILITY TO PROTECT JEOPARDIZES LEGAL STRICTURES ON THE USE OF FORCE, in ARE WE ‘MANIFESTLY FAILING’ R2P 133, 147–48 (Vasilka Sancin, ed., University of Ljubljana Faculty of Law 2017) (exploring at length the inherent tendency for doctrines of extraterritorial penal liability to validate extraterritorial uses of force and discussing the 2011 Libya intervention); cf. Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 *SANTA CLARA J. INT’L L.* 231, 276–77 (2010) (“a legal attribution of criminality to adverse regimes may tend to present international institutions with enforcement demands that such institutions, dependent on consensus among non-like-minded states, characteristically cannot fulfill,” whereupon “violations of use-of-force norms can be rationalized as implementing the true spirit of international law”). Treating a foreign government as an outlaw within one’s own state’s courts does not augur well for acceptance of the outlaw’s international legal prerogatives as a constraint on more direct, and likely the sole potentially effective, efforts to redress the grievance—in other words, transboundary exertions of coercion and force.

77 Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *AUSTL. Y.B. INT’L L.* 82, 83 (1992) (identifying that “[g]iven the fundamental importance of the human rights component of a just world order, the temptation to adapt or re-interpret the concept of customary law in such a way as to ensure that it provides the ‘right’ answers is strong, and at least to some, irresistible. It is thus unsurprising that some of the recent literature in this field, especially but not exclusively that coming out of the United States, is moving with increasing enthusiasm in that direction.”).

78 Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 *AM. J. INT’L L.* 302, 303 (1999).

79 *Id.* at 307.

80 *Id.* at 305.

to truncate the human rights project in the name of the respect owed to states' political processes. According to the Commission:

the role of sovereign consent in international law links the idea of democratic self-government with participation in universal principles embraced by the international community. New claims of rights that circumvent domestic constitutional processes and democratic politics – for instance, standards emanating from international commissions and committees, individual experts, and advocacy groups – may be useful sources of reflection about the appropriate scope of human rights, but they lack the formal authority of law.⁸¹

The Commission thus expresses skepticism about purported human rights standards that are “drawn up by . . . self-appointed elites” and that thus “fail to benefit from the give-and-take of negotiated provisions among the nation-states that would be subject to them.”⁸²

The purpose here of citing the Commission's rhetoric is not to exonerate that body's project of moving the international human rights conversation backwards. The purpose, rather, is to acknowledge the onus of delivering a sound methodological response to the Commission's complaint, one that distinguishes between *lex lata* and *lex ferenda* and resists the temptation to trade on the former to defend what is really the latter. Such an approach concedes that within the boundaries set by established international legal obligation, distinct political communities remain legally entitled to self-government, even in matters where their conduct is properly subject to moral criticism. Governmental conduct can be morally condemnable without being subject to the additional criticism that it violates a norm that the state is—whatever might be the ground of its moral dissidence—*honor-bound* to observe, and for that reason subject to distinctively legal sanctions for transgression.⁸³

A cost of failing to observe this distinction is to jeopardize the standing of firmly established legal norms, and to invite skepticism about whether any such norms have a fixity that withstands residual moral disagreement among state actors (who represent, in turn, political factions provisionally victorious in ideologically-charged conflicts taking place within states). The danger lies in lending undue plausibility to the claim that all international law, irrespective of

81 U.S. DEPT. OF STATE, REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS 39–40 (2020), <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf>.

82 *Id.* at 41.

83 The distinctive value of demands that public officials uphold positive law as such should not be understated. For example, the condemnation of the Bush Administration “torture lawyers” rests more conclusively on methodological rather than the strictly moralistic grounds, as the breach of professional responsibility withstands any controversy over situational ethics. As W. Bradley Wendel put it, “The last thing lawyers like Jay Bybee and John Yoo should be encouraged to do is to act on their sincere moral convictions in violation of the requirements of law.” Wendel, *Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)*, 104 NW. U. L. REV. COLLOQUY 58, 60 (2009).

its grounding in traditional source doctrines, is inherently malleable in accordance with objectives that proponents regard as righteous.⁸⁴

Such claims of malleability might be imagined to be “progressive,” but in reality, they are extraordinarily useful to the most powerful actors. For hegemonic powers, it often suffices that they be seen as having grounds to contend that their actions are *not clearly unlawful*; that way, nothing is “off the table.”⁸⁵

Nowhere is the explosion of judicial creativity more apparent than in the area of *jus cogens*.⁸⁶ Although it has long been recognized that some core set of unquestionable norms is indispensable to the project of international legal order,⁸⁷ the derivation, content, and effects of such “peremptory” norms remain highly controverted. The concept’s most prominent international codification remains that found in the 1969 Vienna Convention on the Law of Treaties (VCLT),⁸⁸ as an international law counterpart to the typical domestic law provision that renders unenforceable contract provisions incompatible with the forum state’s public policy.⁸⁹ The treaty text identifies a norm “from which no derogation is permitted” by reference to recognition as such by “the international community of States as a whole,”⁹⁰ thus seeming to render an insistent near-consensus of states (as an exception to the principle of “persistent objection” that

84 For a recent exemplar of mainstream scholarship that comes remarkably close to making such a claim, see Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1487, 1530-34 (2020) (challenging CIL’s status as a “rulebook”). Hakimi contends that “[l]aw best fosters justification and debate by staying elastic and contestable—such that people can use it to advance different positions—not by establishing clear rules that are mechanically applied,” though she concedes that “[i]n some circumstances, constraining official discretion through settled conduct rules is both possible and important.” *Id.* at 1534. There is merit to both points, but it is instructive that her overall interest is in loosening what many scholars continue to regard as fixed legal constraints on the use of force by the United States and its allies. See *id.* at 1530 (asserting, quite controversially, that “the contest on defensive force against nonstate actors . . . has not produced stable, consistently applied conduct rules.”).

85 For illustrations of the usefulness to great powers of insinuations of ambiguity in regard to norms properly regarded as settled, see Paulo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT’L L. 503 (2001). For a prime example of how the unlawfulness of a use of force can be obfuscated by presenting clear norms as ambiguous, see Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT’L L. 576 (2003). But see Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607 (2003) (clarifying the matter).

86 See, e.g., Jean d’Aspremont, *Jus Cogens as a Social Construct Without Pedigree*, 46 NETH. Y.B. INT’L L. 85 (2015).

87 See, e.g., Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT’L L. 946, 949 (1967).

88 VCLT, *supra* note 56, at art. 53 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

89 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) (a contract term “is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).

90 VCLT, *supra* note 56.

exempts individual non-consenting states from emergent norms)⁹¹ both a necessary and sufficient condition of the norm's enhanced status.⁹² Yet there were indications even then that this status derived, at least in part, from content rather than mere pedigree. The *travaux préparatoires* identify *jus cogens* with, in the words of Mexico's representative, "rules which derive from principles that the legal conscience of mankind deemed absolutely essential to co-existence in the international community at a given stage of its historical development."⁹³

Initially, the VCLT provision appears to have been contemplated as, above all, an effort to bolster the sovereign equality of weak states in the face of the continued admissibility of disparate leverage (other than the unlawful threat or use of force) in treaty negotiation. The imbalance of bargaining power among treaty parties—especially in regard to the newly independent states—appeared to call for some hedge against the imposition of egregious treaty terms that could perpetuate colonialism by other means.⁹⁴ States from the global East and South welcomed the provision as consistent with their far broader campaign to invalidate "unequal treaties" associated with neo-colonialism.⁹⁵

In recent literature, however, *jus cogens* has lost all connection to the project of bolstering the sovereign prerogatives and inviolabilities of weak states, instead becoming associated almost exclusively with human rights.⁹⁶ Not only

91 See, e.g., *Michael Domingues v. U.S.*, *supra* note 60, at ¶ 41, ¶ 49 (peremptory norms, unlike ordinary norms, "bind the international community as a whole, irrespective of protest, recognition or acquiescence.").

92 See Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, in *MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* 595 (Lal Chand Vohrah, et al., eds., 2003) (characterizing *jus cogens* as a category of positive law).

93 G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 153 (1983).

94 Probably the most prominent controversial treaty during the lead-up to the Vienna Convention was the 1960 Treaty of Guarantee that subordinated Cypriot independence to a right of unilateral armed intervention by any of the treaty parties—the United Kingdom, Greece, and Turkey—should the inter-communal balance fixed in the state's original constitution be disturbed. Cyprus's denunciation of the treaty, as inconsistent with the UN Charter's prohibition of the use of force, had received considerable but not overwhelming support in the international community. Schwelb, *supra* note 87, at 953, citing G.A. Res. 2077 (XX) (Dec. 18, 1965), which indirectly condemned the treaty by a less than rousing vote of 47 to 5 with 54 abstentions; see also Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 *BRIT. Y.B. INT'L L.* 189, 246–47 (1986) (detailing the Cypriot government's early objection to the Treaty of Guarantee); R. St. J. MacDonald, *International Law and the Conflict in Cyprus*, 19 *CAN. Y.B. INT'L L.* 3, 17 (1981) (posing the question of whether the treaty was void because a state cannot contract out sovereignty and at the same time keep it). The Treaty of Guarantee also potentially ran afoul of Article 103 of the UN Charter, but the *jus cogens* provision of the Vienna Convention is stronger, voiding an incompatible treaty entirely. For other examples of treaties called into question, though not officially challenged, see Wladislaw Czaplinski, *Jus Cogens and the Law of Treaties*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES* 83 (Christian Tomuschat & Jean-Marc Thouvenin, eds., 2006).

95 Schwelb, *supra* note 87, at 961–62, 966.

96 See, e.g., Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 *EUR. J. INT'L L.* 491, 491–92 (2008) ("more revealing is that students, whenever they are asked to come up with examples of peremptory norms, invariably answer either 'human rights,' without any further qualification, or refer to particular human rights obligations like the prohibition of genocide or torture."). Schwelb's study of the deliberations on the Vienna Convention notes the irony of the Ecuadorean representative's effort to list as *jus cogens* norms both respect for human rights and "the prohibition of intervention in matters which are essentially within the domestic jurisdiction of states." Schwelb, *supra* note 87, at 965.

has this development entailed the imputation of unconsented-to obligations, but—far more troublingly—*jus cogens* is increasingly invoked to expand, in the name of human rights implementation, exceptions to the limitations on unilateral cross-border exercises of power.⁹⁷

As W. Michael Reisman reported two decades ago (with no indication of either endorsement or disavowal):

In human rights discourse, *jus cogens* has acquired a much more radical meaning [than that contained in the Vienna Convention on the Law of Treaties], evolving into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity. This new understanding of *jus cogens* renders national law that is inconsistent with it devoid of international and national legal effect, such that national officials who purport to act on the putative authority of that national law may now incur direct international responsibility.⁹⁸

Ascriptions of such effects to *jus cogens* norms, although commonplace, thus far outrun actual practice. Although the term “*jus cogens* crime” has come into usage,⁹⁹ the International Law Commission has cautioned that “the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime.”¹⁰⁰ Moreover, although it is often imagined that a prohibition’s *jus cogens* status entails a similar status for measures purporting to enforce the prohibition, thereby overriding the limitations on enforcement posed by mere *jus dispositivum* norms such as immunities, that conclusion is by no means logically compelled.¹⁰¹ As it happens, the great bulk of juridical authority, both on state immunity and on the immunities *ratione personae* and *ratione materiae* of state officials, reaffirms that immunities continue to apply as a general matter against measures intended to redress *jus cogens* violations.¹⁰²

97 For a thorough explication of this point, see Brad R. Roth, *Sovereign Equality and Non-Liberal Regimes*, 43 NETH. Y.B. INT’L L. 25, 41–44 (2012).

98 Reisman, *Unilateral Actions*, *supra* note 75, at 15 n. 29.

99 See, e.g., M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996); Leila Nadya Sadat, *Exile, Amnesty, and International Law*, 81 NOTRE DAME L. REV. 955, 966 & n.31 (2006).

100 ILC 1996 Commentary to the Draft Articles on State Responsibility, *supra* note 67, at 130.

101 WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 182 (2006); Yuval Shany, *The Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?* 56 CATH. U. L. REV. 837, 867 (2007). Indeed, the International Criminal Court Statute seems to counterindicate *jus cogens* status for such prosecutorial obligations, because its call for surrender of suspects expressly yields to states parties’ contrary treaty obligations to non-parties. Rome Statute of the International Criminal Court art. 98, July 1, 2002, 2187 U.N.T.S. 90.

102 On the persistence of state immunity, see *Jurisdictional Immunities of the State* (Ger. v. It.; Greece Intervening), Judgment, 2012 I.C.J. 99 ¶¶ 93–94 (Feb. 3 2012) (“The rules of State immunity are

Indeed, “in most . . . cases where peremptory norms have been recognized, the legal consequences of this classification were essentially imperceptible.”¹⁰³ Most often, there is no persistent objector to be bound against its will, no offending treaty provision to be voided, no exorbitant countermeasure (or other claim of “circumstance precluding wrongfulness”) to be condemned as a wrongful derogation,¹⁰⁴ and, given the turn away from sovereign equality concerns, no “illegal situation” (such as a pretended exercise of sovereignty in violation of norms on the use of force or self-determination) to be denied recognition.¹⁰⁵

More often than not, *jus cogens* is invoked without any regard for its materiality to the legal outcome, but merely for the sake of rendering an otherwise sufficient legal claim more emphatic. A cost of such rhetorical inflation, however, is that it tends to debase the currency of legal obligation, with *jus cogens* coming to be identified with norms that genuinely require compliance, and *jus dispositivum* with norms that are somehow routinely “derogable.”

Worse, supra-positive assertions about *jus cogens* tend to imply that whereas norms reflecting coordination of states’ interests derive their validity from the will of states, by virtue of which they are mere *jus dispositivum*, moral norms of the international order derive their validity from a higher source, and are therefore peremptory.¹⁰⁶ But moral questions are no less subject to disagreement than other questions; they find provisional resolution, for a particular legal community at a particular time, in the form of positive law.¹⁰⁷ And not all of the international legal community’s answers to moral questions come in the form of the insistent near-consensus that overrides the principle of persistent objection.

procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State,” and therefore hold even in the face of—because they are uncontradicted by—both *jus cogens* violations and the duty to make reparation). In *Al-Adsani v. United Kingdom*, 34 Eur. Ct. H.R. 273 (2001), a closely divided Grand Chamber of the European Court of Human Rights held that human rights law does not require a state court to void foreign state immunity in civil suits for torture. The dissent insisted that “the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions.” *Id.* at 298–99 (italization added). Also instructive is *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26 (appeal taken from Eng.), in which a U.K. House of Lords panel unanimously declined to withhold immunity *ratione materiae* in a civil suit alleging torture against current or former foreign state officials who acted within the scope of official capacity, notwithstanding the non-applicability of immunity in criminal prosecutions falling within the Convention Against Torture.

103 Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 306 (2006).

104 2001 ILC Articles on State Responsibility art. 50(1)(d), *supra* note 67, at 131–32.

105 2001 ILC Articles on State Responsibility art. 41(2), *supra* note 67, at 114.

106 See, e.g., *Michael Domingues v. U.S.*, *supra* note 60, ¶ 49 (*jus cogens* norms, unlike consent-based norms, “derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind . . .”).

107 For an elaboration of law’s essential role in providing a way forward in a society beset by moral disagreement, see JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 37 (1999) (“the Rule of Law is . . . the principle that an official or citizen should [apply and obey the law] even when the law is—in their confident opinion—unjust, morally wrong, or misguided as a matter of policy”); see generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) (further exploring law’s functioning in the absence of a moral consensus).

The international legal order should be understood as a framework of accommodation, reconciling bearers of an irreducible plurality of interests and values. As such, it needs to resist methodologies that facilitate parochialism in the name of a pretended universality.¹⁰⁸

B. DISTINGUISHING METHODOLOGICAL RIGOR FROM FORMALISM

Contrary to what is sometimes imagined, the rejection of a parochial moralism in no way entails embrace of an arid formalism. International law is a purposive project; as such, it is properly subject to teleological interpretation.

Law's social sources do not constitute a coherent set of emanations from a single legislative mind that a society acknowledges as authoritative. Far from speaking for themselves, the fragments that comprise law's source material (all the more so in a decentralized international legal order) need to be actively configured into a coherent account, an explanation superimposed upon—not self-evidently flowing forth from—social facts. The application of old source material to new facts necessarily entails a creative element.¹⁰⁹ Law, then, is not so much something that one *finds* as something that one *does*, whether well or badly.¹¹⁰

Moreover, the interpretive project inevitably contains a moral component, grounded in the inherent nature of a distinctively *legal* order, as opposed to order *tout court*. One does not ask simply how the fragments of source material might

108 What Prosper Weil asserted in 1983 remains largely valid today:

At a time when international society needs more than ever a normative order capable of ensuring the peaceful coexistence, and cooperation in diversity, of equal and equally sovereign entities, the waning of voluntarism in favor of the ascendancy of some, neutrality in favor of ideology, positivity in favor of ill-defined values might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.

Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 423 (1983).

109 Legal positivists acknowledge the need for gap-filling, but account for it as interstitial lawmaking rather than as interpretation of existing law. See, e.g., JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE 121 (2011) (contending, with Kelsen, that all subsumption is inherently legislative in nature). H.L.A. Hart pointedly insisted on distinguishing between a legal rule and "the various aims and policies in the light of which its penumbral cases are decided," believing that if judicial exercises of moral and policy judgment were to be conflated with the application of law as such, there would remain "nothing in the nature of a legal rule inconsistent with all questions being open to reconsideration in the light of social policy." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614–15 (1958). As a practical matter, little of substance hinges on the choice between these competing characterizations.

110 Construing the crime of torture not to encompass waterboarding is a notorious example of doing it badly. JAY S. BYBEE, ASSISTANT ATTORNEY GENERAL, MEMORANDUM FOR JOHN RIZZO, ACTING GENERAL COUNSEL OF THE CENTRAL INTELLIGENCE AGENCY: INTERROGATION OF AL QAEDA OPERATIVE (August 1, 2002); see, e.g., Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2006); Jose A. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006). But even here, waterboarding's status as torture is not best understood as following ineluctably from a legal rule. Rather, the conclusion derives from an assessment of how pre-existing manifestations of a community's legal authority can most judiciously be said to relate to a particular set of facts not previously subjected to authoritative judgment. Of course, many such assessments generate a conclusion that no qualified lawyer would deny.

be configured so as most closely to cohere in the furtherance of any end that a single mind might set for itself (whether or not purely aesthetic, gratuitously sadistic, or otherwise); one rather asks how the fragments might be configured so as most closely to cohere in the furtherance of *governance by law*. Consequently, doubts need to be resolved against an interpretation that cannot be reconciled with what Lon Fuller called law's "inner morality"—essentially, a general orientation toward predictability and accountability in the exercise of power.¹¹¹

According to Ronald Dworkin, "constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."¹¹² For Dworkin, legal interpretation properly entails a "moral reading" of the source material that, "all things considered, makes the community's legal record the best it can be from the point of view of political morality."¹¹³

Yet the practical implications of Dworkin's departure from positivistic premises are mitigated by his emphasis on the need for any new conclusion to "fit" within the overall account of past authoritative practice. He therefore acknowledged the frequent need to uphold one party's "right to a consistent application of the public order," notwithstanding the other party's "right to a better public order."¹¹⁴

111 Fuller identified "the basic difference between law and managerial direction" as follows:

[L]aw is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.

LON L. FULLER, *THE MORALITY OF LAW* 210 (Yale U. Press, rev. ed. 1969); *see also* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). To paraphrase, what essentially distinguishes legality from its opposite—from what Locke referred to as "rule by extemporary arbitrary decree"—is an overall orientation toward predictability and accountability in the exercise of power. Locke, *supra* note 11, at ch. 11, § 136. Although Fuller's positivist antagonist, H.L.A. Hart, insisted that the principles of "legality" and "the rule of law" were distinct from "law" as such, Hart's understanding of the former was essentially identical to Fuller's. *See* Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1145 (2008), (citing H.L.A. Hart, *Problems of the Philosophy of Law*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 264 (Paul Edwards ed., 1967)).

112 RONALD DWORKIN, *LAW'S EMPIRE* 52 (1986).

113 *Id.* at 411. Başak Çali articulates Dworkin's critique of legal positivism as follows:

[A]nyone who is involved in the practice of identifying the law does not merely describe the practice, its texts, and conventions, but states that he or she engages in a justification of it by identifying the object and the purpose of the practice. This is why interpretation, from the perspectives of its participants, has a constructive quality. Justification, as opposed to description, is necessary because a group of interpreters of law disagree about what the practice really requires. Even in the case of full agreement on the empirical facts of a situation, there is disagreement about what the law says. This disagreement, however, is constrained by the history of law.

Başak Çali, *On Interpretivism and International Law*, 20 EUR. J. INT'L L. 805, 808 (2009) (emphasis removed).

114 Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 186 (1982).

Thus, on the one hand, what counts as law is open to creative efforts to attribute to the society's processes of political decision a normative scheme that is coherent and that has a presumptive orientation toward values inherent to legal order as a distinctive project.¹¹⁵ Because the balance of principles and policies underlying the international legal order is susceptible of substantially differing characterizations, international law will always lend itself to a range of conflicting claims that are plausible to varying extents.

Yet, on the other hand, creativity in legal interpretation is bounded by professional standards that condition the plausibility of the account of any given society's governing norms. Whatever its arguable shortcomings, the legal positivist tradition—marked by the “social thesis” and the “separability thesis”¹¹⁶—properly poses at least three constraints, breach of which would vitiate the credibility of any purported legal interpretation: (1) all methodologically respectable inquiry into a given society's laws begins by discerning sources of law immanent in patterns of social behavior; (2) claims for the existence of a legal norm are conclusively refuted where they can be shown to lack all grounding in the society's expressly or impliedly acknowledged sources of law; (3) a norm shown to have undeniable pedigree does not lose the status of a legal norm by virtue of being objectively unjust.¹¹⁷ International law's traditional

115 To invoke the word “law” is implicitly to trade on the values that Fuller identifies, such that to use the word to describe an ordering process with the opposite orientation would violate conventional understandings of the language and thereby confuse one's audience. Jeremy Waldron reveals the point vividly as follows:

A word like “hospital” provides a good analogy. One of the meanings given for hospital in the *Oxford English Dictionary* is “[a]ny institution or establishment for the care of the sick or wounded, or of those who require medical treatment.” No one understands the term “hospital” unless he understands what hospitals are *for*. To describe one's establishment as a hospital is to hold out the promise of healing and care—even though it might turn out that the procedures actually used in a given institution making this promise are in fact harmful or hurtful to the patients. Now, if their harmfulness or hurtfulness is known and intended, that belies the sincerity of the description; we assume that Dr. Mengele is being ironic when he talks about his clinic at Auschwitz as a “hospital.” But we do not withdraw the term the instant harmfulness is discovered if we are sure that the institution in question has the treatment of the sick and the wounded as its aim. So this is a case in which the analytic separability of “hospital” and “actual non-harmfulness” conceals a deeper aspirational connection between the two.

Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 760–61 (2001) (citation omitted). Waldron goes on to concede that “the promise of justice is not conveyed semantically by the word ‘law,’” *id.* at 767, but that concession seems undue in regard to the more modest promise of an orientation toward predictability and accountability in the exercise of power.

116 See, e.g., Wilfrid Waluchow, *Legal Positivism, Inclusive versus Exclusive*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (E. Craig ed., 2001), <http://www.rep.routledge.com.libaccess.lib.mcmaster.ca/article/T064>.

117 This proposition appears superficially to contradict Dr. King's often-repeated quotation from St. Augustine that “an unjust law is no law at all.” MARTIN LUTHER KING, JR., LETTER FROM A BIRMINGHAM JAIL (1963), (citing ST. AUGUSTINE, DE LIBERO ARBITRIO, I, v. 11). King's “Letter” appears to say just this, but to invoke it for that proposition is doubly misleading. First, King was concerned, not with questions of analytical or normative jurisprudence, but exclusively with those of political obligation; King was denying only that unjust laws were morally binding on the citizen. ; cf. Philip Soper, *In Defense of Classical Natural Law Theory: Why Unjust Law is No Law at All*, 20

source doctrines do not alone specify the path to legal conclusions,¹¹⁸ but they do work to exclude particular outcomes from the range of legitimate possibilities.

C. INTERPRETIVE METHODS AND POLITICAL LEGITIMACY

The potential legitimacy problem for juridical and quasi-juridical authorities who invoke international law lies not in the adoption of teleological interpretation, but in a skewed approach to international law's animating purposes. The interpretive method must take account of the overall balance of considerations underlying the international legal order. These considerations include not only such "overlapping consensus" as can be found within the international community on questions of justice,¹¹⁹ but also a concern to maintain self-government of distinct political communities and to guard against the exertions of untrusted (and untrustworthy) would-be implementers of universal principles, as well as to ensure that adherence to the international order's fundamentals remains a long-term "win-win" for variously situated constituents. A single-minded pursuit of a universal justice, even where validly expressing an objective moral truth, is an inadequate guide to the logic of the international legal system.

The principal dangers are two-fold. First, at a moment in which out-groups (whether leftist, rightist, or defying of ready classification) are mobilizing to assert some semblance of popular control over the decisions that affect their lives, appeals to international law that fail to respect the state as a relevant site of political struggle come to be viewed as a kind of forum shopping; elites who cannot win elections at home may seek to override local political outcomes with the aid of like-minded external elites who staff international institutions. This dynamic has the potential to delegitimize, not merely undue extensions of international legal obligations, but international law and institutions more broadly. Second, where untoward legal ingenuity applies not merely to the identification of international legal obligations, but also to the licensing of coercive (and ultimately, perhaps, forcible) unilateral measures taken in the name of norm implementation, international law becomes transmogrified into a weapon most predictably employable against weak states. Rather than impeding empowered righteousness, international law comes to play the role of

CAN. J.L. & JURIS. 201, 202 (2007) (acknowledging that most theorists now interpret the maxim "as a claim in political or moral theory, not legal theory"). Second, King was not really calling for individuals to second-guess the justice of every enactment; he sought disobedience only to a specific subset of unjust laws, and then only in circumscribed ways. John Finnis has characterized the maxim as an overdramatization and distortion even of Augustine's actual meaning. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 363-66 (1980).

118 For a roughly compatible approach, see Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 336 (1999) (citing the canonical work of Henry M. Hart, Jr. and Albert Sacks for the need to consider "legal doctrine in light of the law's purposes and the polity's underlying principles.").

119 The term "overlapping consensus" is used in the work of John Rawls in contradiction to a mere "modus vivendi"—i.e., a shared moral commitment among bearers of different worldviews, rather than a negotiated compromise among them. JOHN RAWLS, POLITICAL LIBERALISM 144-50 (1992).

handmaiden to it, thereby undermining the legal gains achieved in the Non-Aligned bloc's struggle against colonialism and neo-colonialism.

V. CONCLUSION

There is an almost irresistible incentive for “cutting edge” scholarship to emphasize what in the world has changed, at the expense of what has remained essentially the same. This is all the more true in the study of contemporary international relations, given such fast-moving realities as climate change, migration flows, and the revolution in communications technology.

But fundamental human interests continue to depend on the capacity of territorial communities to assert political control over the essential conditions of economic, social, and cultural life. Neither international nor sub-national institutions show any sign of offering a viable replacement for the state's functions, nor do they provide accessible sites of effective contestation over the direction of public order.

More darkly, as David Goodhart has recently reminded us,¹²⁰ the politics of “rootedness” retain their potency. To take that phenomenon seriously is not simply to indulge the forces of backlash; it is to recognize that the weakening of the state leaves real human problems—economic inequality, material insecurity, and social stratification—unaddressed.

Critics have tended not to think through to its logical conclusion their dismissal of the moral significance of the state. Absent a territorially bounded political community with the capacity of self-government, there can be no coherent project of democracy, and *a fortiori* no coherent project of social democracy. Social equality is vitiated even as an ideal, for social equality presupposes a political community whose members can interact on the basis of equality, and whose territorial space can be imagined to belong to each in equal measure. In the absence of the state, the only available device for the systematic coordination of economic decisions is the market, through which outcomes are determined according to empowered wants rather than according to considered needs; by undermining the state, critics undermine the sole instrument for exercising political control over economic forces.

The wholesale disparagement of state prerogatives and inviolabilities within international law is at least as likely to give rise to maleficent as to beneficent alternatives, as bad actors may be emboldened to flout international legal constraints outright. In the words of Joseph Raz:

State sovereignty may be eroding, but there are few if any
super-state organisations that are perceived as having more

¹²⁰ See generally DAVID GOODHART, *THE ROAD TO SOMEWHERE: THE POPULIST REVOLT AND THE FUTURE OF POLITICS* 19–47 (2017) (sympathetically explaining the Brexit and Trump phenomena in terms of the revolt of the “somewheres”—geographically (and socio-culturally) rooted lower middle class provincials—against the “anywhere” upwardly- and outwardly-mobile metropolitans).

than merely instrumental value. Therefore, few if any attract loyalty and solidarity. And therefore, even their instrumental success is in jeopardy. The problem affects all regional organisations like the EU, the African Union, and the UN. It also affects all human rights organisations. A revival of—not very attractive—nationalism embracing extensive state sovereignty is a real possibility [or has already emerged (for example, Ukip)]¹²¹

International institutions neglect the legitimating role (and the delegitimizing capacity) of sovereign states at their peril. Insistence on a rigorous methodology of international legal interpretation is not, in itself, a cure for what ails the international system. It would, however, avoid contributing to the exacerbation of international law's legitimacy malaise.

121 Joseph Raz, *The Future of State Sovereignty*, KING'S COLLEGE LONDON DICKSON POON SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER SERIES: PAPER NO. 2017-42. 19–20 (2018).