

# INTERNATIONAL HUMAN RIGHTS AND GLOBAL GOVERNANCE: THE END OF NATIONAL SOVEREIGNTY AND THE EMERGENCE OF A SUZERAIN WORLD POLITY?

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What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but 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.

—Francis Fukuyama<sup>1</sup>

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1. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 1 (1992).

Few today deny the value of human rights as an idea. But equally, few would deny that the reality of human rights has disappointed in many ways; and it is this sense of disappointment which inspires the deeper intellectual critiques of rights, and human rights in particular. What is clear, above all, is that, if we are to reinvest our conceptions of human rights, if we are indeed to take the idea of human rights seriously, we will need to use our imagination. We will need to focus once again upon what the relation between humanity and rights should be.

—Ian Ward<sup>2</sup>

## INTRODUCTION

Suzerainty is an international legal concept and practice, perhaps now rarefied in the Western world, in which “a nation . . . exercises control over another nation’s foreign relations.”<sup>3</sup> While the term historically has been applied to the acquisition of territorial lands of a nation-state by another,<sup>4</sup> and has somewhat of a colonial or malevolent theme, it remains a powerful word and idea that endures in meaning because, in a larger legal-philosophic context, it has the potential to encapsulate and describe the changing and contemporary nature of national sovereignty among the nation-states of the world.<sup>5</sup> Power politicians or international relations theory realists might plainly argue that suzerainty has been in part achieved with the creation of the International Monetary Fund (“IMF”), the World Bank, the International Criminal Court (“ICC”), or the increased participation of the U.N. Security Council “as a principal actor in the human rights field.”<sup>6</sup>

Conceptually, however, “suzerainty” also fosters in the present Author’s mind, the skeptical contemplation of a homogenous global governance scheme in which a pseudo-autocratic single governmental entity might one day emerge (such as those envisioned by New World Order conspiracy theorists)<sup>7</sup>, to rule all nation-states on earth in order to enforce and effect the

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2. IAN WARD, *JUSTICE, HUMANITY AND THE NEW WORLD ORDER* 121 (2003).

3. BLACK’S LAW DICTIONARY 1488 (8th ed. 2004); see, e.g., James Bacchus, *A Few Thoughts on Legitimacy, Democracy, and the WTO*, 7 J. INT’L ECON. L. 667, 668 (2004) (“The truth is, the WTO is not some ‘illegitimate’, self-aggrandizing global suzerain that seeks in some sinister and mysterious fashion to impose its arbitrary will on the sovereign nations of the world.”).

4. See *Island of Palmas Case (U.S. v. Neth.)*, 2 R.I.A.A. 829, 838, 867 (Perm. Ct. Arb. 1928).

5. See John Alan Cohan, *Sovereignty in a Post Sovereign World*, 18 FLA. J. INT’L L. 907, 909 (2006).

6. See DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* xxxi-xxxii (2009).

7. See Angela P. Harris, *Vultures in Eagles’ Clothing: Conspiracy and Racial Fantasy in Populist Legal Thought*, 10 MICH. J. RACE & L. 269, 307 (2005); David C.

full *respect* or *realization* of human rights (rather than deny them). Full respect or realization of human rights in this Note denotes a world situation where flagrant or gross human rights abuses and violations are absent on a pervasive scale.<sup>8</sup> Global governance in relation to human rights<sup>9</sup> and changing concepts of national sovereignty accompanying it therefore continue to deserve serious consideration.<sup>10</sup>

As the hallmark or cornerstone of international law,<sup>11</sup> national sovereignty has dominated the international legal landscape<sup>12</sup> since Hobbes wrote of the Leviathan,<sup>13</sup> since Locke offered his justifications for government,<sup>14</sup> since Western Europe adopted the Westphalia treaty of 1648 and gave birth to the idea of Westphalian sovereignty.<sup>15</sup> Conceptually speaking, however, Westphalian national sovereignty, and sovereignty itself, has never truly been absolute or static—neither in concept nor practice.<sup>16</sup> Neither has it been a benevolent creature or even

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Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 931 (1996).

8. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 875 (1990).

It is no longer politically feasible or morally acceptable to suspend the operation of human rights norms until every constitutive problem is solved. In the interim, new criteria for unilateral human rights actions must be established. In addition, more refined techniques for their legal appraisal and more effective means for their condemnation when such actions are themselves unlawful must be developed.

*Id.* Minor violations on pervasive scale are therefore intolerable as well.

9. For some of the economic effects the changing nature of globalization has on national sovereignty, see Martin Wolf, *Will the Nation-State Survive Globalization*, 80 FOREIGN AFF. 178, 189 (2001) (“For example, the assumption that most governments are benevolent welfare-maximizers is naïve. International economic integration creates competition among governments—even countries that fiercely resist integration cannot survive with uncompetitive economies, as shown by the fate of the Soviet Union.”).

10. Timothy W. Waters, *The Momentous Gravity of the State of Things Now Obtaining: Annoying Westphalian Objections to the Idea of Global Governance*, 16 IND. J. GLOBAL LEGAL STUD. 25, 27 (2009).

11. Ivan Simonovic, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 GA. J. INT'L & COMP. L. 381, 383 (2000).

12. John A. Cohan, *Sovereignty in a Post Sovereign World*, 18 FLA. J. INT'L L. 907, 910 (2006) (“Despite difficulty of understanding the term, sovereignty is a central concept in international law.”).

13. See THOMAS HOBBS, *LEVIATHAN: PARTS ONE AND TWO* (Herbert W. Schneider ed., 1958).

14. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 2004).

15. Treaty of Westphalia, Oct. 24, 1648, 1 Parry 271; 1 Parry 119, available at [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp).

16. Waters, *supra* note 10, at 34.

consciousness.<sup>17</sup> Nevertheless, the lengths to which nation-states have gone to protect “national security,” for example, even in the last eight years since 9/11 and the rise of Islamofascism<sup>18</sup> which threatens it, is indicative of the enduring significance and longevity the legal model retains.<sup>19</sup> “Sovereignty,” writes Stanford legal scholar Helen Stacy “has become the new obsession in international law, in international relations, in political science, and in sociology scholarship.”<sup>20</sup> Renowned international legal scholar Louis Henkin scornfully adds: “I don’t like the ‘S’ word. Its birth is illegitimate, and it has not aged well. The meaning of ‘sovereignty’ is confused and its uses are various, some of them unworthy, some even destructive of human values.”<sup>21</sup>

Nevertheless, while there are certain fundamental standards established in international law by which the sovereignty of each nation-state is now generally recognized in and by the world,<sup>22</sup> the metanarrative<sup>23</sup> of national sovereignty and the prevention of encroachments upon it have enduringly been viewed as key elements in the history and basis of international law.<sup>24</sup> In other words, countless international legal dilemmas have often centered on questions of asserting or protecting national-sovereignty. But since the middle part of the twentieth century “international law has increasingly dealt with other entities, notably including the individual as bearer of human rights.”<sup>25</sup>

Thus, since the end of World War II, the atrocities of the Holocaust, the Nuremberg trials, and more contemporaneously, following the atrocities that took place in Darfur, East Timor, Kosovo, Rwanda, and Somalia, among other global regions, international human rights have surfaced as perhaps the greatest modern challenge to nation-states’ continued exercise

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17. See generally Matthew Olmsted, *Are Things Falling Apart?: Rethinking The Purpose and Function of International Law*, 27 LOY. L.A. INT’L & COMP. L. REV. 401 (2005).

18. See Charles W. Collier, *Terrorism as an Intellectual Problem*, 55 BUFF. L. REV. 815 (2007).

19. See WEISSBRODT, *supra* note 6, at 2.

20. Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2039 (2003) [hereinafter *Relational Sovereignty*].

21. Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera* (Feb. 23, 1999), in 68 FORDHAM L. REV. 1, 1 (1999) [hereinafter *Henkin Lecture*].

22. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097; Treaty Series 881, 165 LNTS 19, available at [http://avalon.law.yale.edu/20th\\_century/intam03.asp](http://avalon.law.yale.edu/20th_century/intam03.asp) [hereinafter *Montevideo*].

23. Olmsted, *supra* note 17, at 411 (“Whether classified as positivists, naturalists, liberals or realists, international legal scholars overwhelmingly support the universalistic narrative of international law.”).

24. See INTERNATIONAL LAW: CASE AND MATERIALS xv (Lori Fidler Damrosch et. al. eds., 5th ed. 2009) [hereinafter *Damrosch*].

25. *Id.*

of Westphalian-style national sovereignty.<sup>26</sup> It might thus be argued that national sovereignty and international human rights exist on a spectrum of sorts, with each in a sense being polar opposites; in another, more homogenous sense, it might be argued that they are each complementary parts of the *whole* of international law. Furthermore, it might even be argued that human rights strengthen the viability of national sovereignty by providing a sense of quasi-democratic legitimization to its survival.

Despite these possibilities, however, in some cases, some political and international relations theory realists<sup>27</sup> might say that human rights “frustrate” the autonomy implicit in national sovereignty and have now come to exceed in importance issues of asserting and protecting national sovereignty such as to dominate international legal dialogue;<sup>28</sup> others might not.<sup>29</sup> Yet even some others, natural law theorists among them for example, would say that international human rights are beginning to gain the true and full guarantees and protections enshrined in various international instruments that construe them, despite the prevalence of national sovereignty assertions that aim to preempt them.<sup>30</sup> Many international observers and legal scholars have not only questioned the traditional Westphalian notion of sovereignty and what legal meaning it retains for the

26. Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT’L L. 417, 417 (2000) (“[These examples] have led to revived debates in the United Nations General Assembly about the principle of national sovereignty and the prevention of humanitarian disasters.”).

27. See Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789 (2003).

28. See Thomas M. Franck, *Are Human Rights Universal?*, 80 FOREIGN AFF. 191, 195 (2001); see also Eric A. Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23, 32 (2007) (“Realism sees the world as a struggle for power—essentially, a zero sum game. Norms, for realists, are enforced for practical reasons of state.”); see also Damrosch, *supra* note 24, at 7 (“‘Realists’ of international relations theory, who are inclined to see international law as simply a set of moral rules, object to the efforts of others to elevate the field to a higher status, as well as the imposition of “do-gooder” sentiments on the conduct of states operating in a dangerous world.”).

29. See Wolf, *supra* note 9, at 179.

30. See Henkin Lecture, *supra* note 21, at 4.

The international human rights movement, born during the Second World War, has represented a significant erosion of state sovereignty. And it took Hitler and the Holocaust to achieve that. Since 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics, and of international law.

*Id.*; see also Damrosch, *supra* note 24, at xv-xvi (“The influence of the international human rights movement on the system of international law has been profound, to the point that it is no longer accurate to think of international law as strictly an interstate system.”); Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 1937–39 (2002); Simonovic, *supra* note 12, at 397.

international system,<sup>31</sup> i.e. the idea of post-Westphalian sovereignty,<sup>32</sup> but also whether the full realization of international human rights would result in unendurable encroachments, legal or otherwise, upon such national sovereignty.<sup>33</sup>

Broadly speaking, these concerns illustrate the tension that exists in recent history between assertions of national sovereignty and the full achievement of international human rights guarantees and protections by nation-states.<sup>34</sup> This Note therefore aims to examine from a legal perspective whether full *respect* for (or *realization* of)<sup>35</sup> human rights may be achieved with limited inroads upon national sovereignty. This Note interrogates the changing realities of national-sovereignty as well as its putative demise,<sup>36</sup> and in support of making an argument for the full respect of international human rights (as well as guarantees and protections) universally throughout the world, contemplates the unlikely possibility of an affirmative “one world government” (or “supranational” sovereign and body of laws<sup>37</sup>) exercising “suzerainty” over the existing nation-states of the world in order to do so. This Note argues that while perhaps an idyllic and utopian legal formation, it is politically *unlikely* that true and full respect for international human rights will at some point—even far into future—result

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31. Cohan, *supra* note 5, at 909.

Today, sovereignty is anything but simple. There is disagreement as to the nature of sovereignty, whether it is a relevant sort of concept in geopolitics, and whether there is a one-size-fits all definition. Politics, economics, culture, human rights law, the advent of international institutions, the threat of nuclear annihilation, and the reality of globalization itself in a rapidly changing world—all these elements intersect to render sovereignty a complex subject.

*Id.*

32. Waters, *supra* note 10, at 34.

33. See Shen, *supra* note 26, at 419.

34. This includes the mechanisms in which national sovereignty is asserted to protect human rights. See Charles Sampford, *Challenges to the Concepts of ‘Sovereignty’ and ‘Intervention’*, in HUMAN RIGHTS IN PHILOSOPHY AND PRACTICE 335, 349 (Burton M. Leiser & Tom D. Campbell eds., 2001); see also See Immanuel Wallerstein, *The New World Disorder: If the States Collapse, Can the Nations be United?*, in BETWEEN SOVEREIGNTY AND GLOBAL GOVERNANCE: THE UNITED NATIONS, THE STATE AND CIVIL SOCIETY 172 (Albert J Paolini et. al. eds., 1998); Shen, *supra* note 26, at 446.

35. This Note will use the terms “respect” and “realization” interchangeably throughout.

36. Brad R. Roth, *The Enduring Significance of State Sovereignty*, 56 FLA. L. REV. 1017, 1018–19 (2004) (“Since the end of the Cold War era, there has been a proliferation of scholarly works devoted to state sovereignty. Most of these either approvingly announce the phenomenon’s decline, demise, or transformation, or else call into question whether the phenomenon ever existed or mattered in the first place.”).

37. Shen, *supra* note 26, at 438.

in or be achieved by the abolition of the nation-state and national sovereignty system (nor in a single “suzerain” governing world entity).<sup>38</sup>

Instead, while this Note argues from a radical point of view, that national-sovereignty itself is in a sense violative of international human rights and “destructive of human values,” a middle road may be reached, if indeed it has not already, with an aggregate of networked *legitimate* state and non-state actors and participants developing a less state-centric system in which human rights may be fully pursued through global governance.<sup>39</sup> In other words, a middle road may be achieved with greater-participation-than-exists-now of civil society in the democratization of international law and the creation of a global human rights governance scheme. The democratization of international law would include an evaluation of the legitimacy of national governments in the international sphere as well as revisions to the “undemocratic nature of classical international law” found in certain key principles such as non-intervention, recognition of the executive’s power to make binding commitments on behalf of the State, the use of force, and the absence of autonomous rights in respect of remedies.<sup>40</sup>

Furthermore, global governance would include the participation of organizations such as Human Rights Watch, Amnesty International, and the Red Cross<sup>41</sup> as well as other regional entities in some sort of unifying body of voice that, for example, has membership status at the United Nations.<sup>42</sup> Implicit in this notion of a global governance scheme is the need for better legal state-responsibility<sup>43</sup> enforcement mechanisms<sup>44</sup> and for a *sua sponte*

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38. It is not the aim of the Note to give credence to any of the conspiracy theories that various politicians, for example, espouse. Rather, the aim is to treat the possibility as a legal concept. See Benjamin Sarlin, *Ron Paul’s Mini-Me*, THE DAILY BEAST, Aug. 21, 2009, <http://www.thedailybeast.com/blogs-and-stories/2009-08-21/ron-pauls-mini-me/full/>.

39. See, e.g., Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10 IND. J. GLOBAL LEGAL STUD. 5 (2003); Adam McBeth, *Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights*, 30 HAMLINE J. PUB. L. & POL’Y 33 (2008); NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005).

40. See Richard A. Barnes, *Democratic Governance and International Law*, 8 IND. J. GLOBAL LEGAL STUD. 281, 283–86 (2000) (book review).

41. See, e.g., Human Rights Watch, About Us, <http://www.hrw.org/en/about> (last visited Mar. 21, 2010). All of these organizations, for example, have had allegations of anti-Semitism lodged against them at one time or another and thus they are by no means NGO panaceas for human rights violations.

42. See e.g. Noah Bialostozky, *Overcoming Collective Action Failure in the Security Council: Would Direct Regional Representation Better Protect Universal Human Rights?*, 15 BUFF. HUM. RTS. L. REV. 1 (2009).

43. Damrosch, *supra* note 24, at 498; see also William H. Meyer & Boyka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 CORNELL INT’L L.J. 501 (2001).

44. Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT’L & COMP. L. 1, 5 (2006).

In essence, the international system’s approach to enforcement and implementation of human rights has proven unrealistic in a world

renewed commitment from nation-states of the world to abide by international human rights treaties with the *erga omnes* positive obligation of “good faith” bestowed upon them by the Vienna Convention on the law of treaties.<sup>45</sup> The central point that will be emphasized throughout the course of this Note, however, is that sovereignty has changed from being an international legal principle which protects *borders* and the legal integrity of sovereignty, to being an international legal principle which protects *peoples* and *human rights*. Part I, therefore, examines statehood and the erosion of sovereignty, while Part II discusses the legal-philosophic consciousness of sovereignty. Part III discusses globalization and its effects on sovereignty and human rights. Part IV looks at key international instruments, discusses and related international human rights to national sovereignty. Part IV discusses international human rights. Part V discusses the end of national sovereignty and likelihood of the suzerain world polity.

## I. STATEHOOD AND THE EROSION OF SOVEREIGNTY

An appropriate place to begin this inquiry is with the concept of the nation-state or statehood, the necessary preconditions for national-sovereignty. “Nation-states have been the foundation blocks of the international system since the birth of international law in modern time.”<sup>46</sup> They “came into existence by historical self-formation, conquest, agreement or revolution.”<sup>47</sup> While the term “state” is often incorrectly used synonymously with “country” or “nation,” “state” (and “statehood”) is an international law term of art.<sup>48</sup> Rudimentarily speaking, “[t]he [basic] principle of State sovereignty and sovereign equality inherently requires that a State refrain from interference in the internal or external affairs of another State.”<sup>49</sup> Owing to this basic concept, this section addresses legal notions of

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characterized by oppression, autocratic governments, poverty, and armed conflict. Although there is no clear consensus regarding what enforcement of international human rights should look like, few would disagree that existing enforcement mechanisms remain the weakest link in the international human rights system.

*Id.*

45. Generally, the Vienna Convention only applies to state signatories that have ratified the treaty. Vienna Convention on the Law of Treaties, art. 31(b), May 23, 1969, 1155 U.N.T.S. 331. While this is true, it is commonly accepted through the practice of international customary law and the principle of *jus cogens* that there are certain peremptory norms from which no derogation is permitted, irrespective of ratification of the Vienna treaty, among them, genocide, crimes against humanity, and wars of aggression. *Id.* See also MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS: ERGA OMNES 44–48 (1997).

46. Shen, *supra* note 26, at 419.

47. *Id.* at 428–29.

48. Roth, *supra* note 36, at 1023 (“Statehood is conceptualized as consummating the self-determination of a ‘people.’”).

49. Shen, *supra* note 26, at 420.

and the international history of statehood and sovereignty in order to establish the continuing vitality of the concept and the barrier it continues to pose to full respect for international human rights in the contemporary world.

There are two commonly accepted theories of statehood in international law: the declarative and the constitutive.<sup>50</sup> These are different from the philosophical conceptions of sovereignty which have *influenced* legal and political theory.<sup>51</sup> The declarative theory posits that the existence of a state depends on the facts which indicate whether those facts meet the criteria of statehood laid down in international law. Thus, “a state may exist without being recognized by other states,” but “[s]uch recognition is merely ‘declaratory’ of an *already existing statehood*.”<sup>52</sup> In contrast, the constitutive theory posits that “the act of recognition by other states itself confers international personality on an entity purporting to be a state. In effect, the other states by their recognition ‘constitute’ or create the new state.”<sup>53</sup>

Support for each theory may be derived on different accounts. Because under the constitutive theory to determine whether an entity is a state it must be ascertained whether it meets the criteria of international law, acts of recognition or refusals to recognize have had decisive roles in determining controversial situations.<sup>54</sup> In contrast, under the declarative theory, an “entity that *de facto* meets the conditions of statehood cannot, because of the lack of recognition, be denied certain fundamental rights or escape certain fundamental obligations.”<sup>55</sup> Despite the nuanced differences between the theories, “the theoretical gap between the declaratory and constitutive views may be rather less in practice than in theory.”<sup>56</sup> The theories remain significant, however, because they illustrate the contentiousness that may arise in diplomatic and international legal relations, and possible routes of resolution to various disputes through the invocation of the sovereignty principle.<sup>57</sup>

Asserting the overall importance of nation-states in international law, Hong Kong university law professor Jianming Shen writes:

In the exercise of their national sovereignty, States *created* international law. The validity and effectiveness of international law depends on the continuing consent and support of nation-States, while the protection of national sovereignty and independence is contingent upon an effective

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50. Damrosch, *supra* note 24, at 304.

51. *Relational Sovereignty*, *supra* note 20, at 2030.

52. Damrosch, *supra* note 24, at 304 (emphasis added).

53. *Id.* at 304.

54. *Id.* at 305.

55. *Id.*

56. *Id.*

57. See Cohan, *supra* note 5, at 925–30.

international legal system that is *founded upon* nation-States. *In contemporary conditions, neither States nor international law can exist without the other.*<sup>58</sup>

Professor Shen's position on sovereignty is a politically realist one because it emphasizes the law making power of nation-states to protect their sovereign integrity through the international legal system.<sup>59</sup> The terms "political realism" or "neo-realism," as they are used in this Note, denote the relentless security competition among states, the resistance to a "government of governments,"<sup>60</sup> and the view that (the absence of) anarchy is the organizing principle of international relations.<sup>61</sup> Nation-states must provide for their own defense and security; no one can do so for them.<sup>62</sup> Ultimately, there may be some reality to Shen's position that international law cannot exist without nation-states; for without nation-states as entities in the creation of international law, one must wonder how the international system would indeed function, and whether international anarchy would ensue, as power politicians often argue it would.<sup>63</sup>

Widely respected law professor Louis Henkin, however, takes issues not only with sovereignty itself but implicitly neo-realist notions of it as well:

States are commonly described as "sovereign," and "sovereignty" is commonly noted as an implicit, axiomatic characteristic of statehood. The pervasiveness of that term is unfortunate, rooted in mistake, unfortunate mistake. Sovereignty is a bad word, not only because it has served terrible national mythologies; in international relations, and even in international law, it is often a catchword, a substitute for thinking and precision.<sup>64</sup>

As will become apparent throughout the course of this Note, through the dispensation of some of these mythologies, neo-realist conceptions of national sovereignty—often invoked in this 'catchword' sense—remain a formidable challenge to the triumph of international human rights realization throughout the world. Furthermore, this conception of sovereignty has fostered a legitimacy gap: who has the *legitimate* authority to speak for and to represent the peoples of various nations?<sup>65</sup> Is it really only the governments of nation-states?

Indeed, it is imperative for the contextual purposes of this Note that the "widening concept of international legal personality beyond the state, is one of the more significant features of contemporary international law. This

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58. Shen, *supra* note 26, at 419 (emphasis added).

59. Damrosch, *supra* note 24, at xxiii.

60. Greenberg, *supra* note 27, at 1791.

61. See KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* 88–89 (1979).

62. Greenberg, *supra* note 27, at 1791.

63. *See id.*

64. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8 (1995).

65. *See* WARD, *supra* note 2, at vii.

broadening is particularly evident in the case of public international organization, supranational entities such as the European Union, and insurgent communities and movements of national liberation.”<sup>66</sup> This changing nature of international law is addressed elsewhere in this document; for the present moment, the focus remains on a brief legal history of sovereignty.

#### A. Westphalia Treaty

Westphalian sovereignty is the most well known in academic discourse and takes its name from the Treaty of Westphalia, which dealt with the ending of the Thirty Years War in Europe (1618–1648).<sup>67</sup> It represented “the concession of some power by the emperor, with his claim of holy predominance, to numerous kings and lords who wished to vigilantly protect their own feudal powers.”<sup>68</sup> The treaty now, however, stands for the “notion of the absolute right of the sovereign to exclude external actors from domestic authority.”<sup>69</sup>

Prior to the seventeenth century, the international system was highly centralized. The Catholic Church exercised spiritual dominion over Europe and the Holy Roman Empire exercised political control over the same. Gradually the Holy Roman Empire began to dissolve and was replaced by a system based on *territorial sovereignty and the nation-state*. The watershed moment came with the Westphalian peace settlement of 1648, which Western publicists typically attribute to origins of both their discipline and the *modern idea of sovereign equality among nation-states*.<sup>70</sup>

Thus, “the first [major] transformation of sovereignty occurred with the Peace of Westphalia, under which reformation theology transformed the territorial vassals of the Vatican into the nation states of Europe.”<sup>71</sup> Sovereignty claims precipitated by the Westphalian sovereignty revolution were legitimized through the rhetoric of liberation, but were not concerned with providing comprehensive freedom for individuals within the new state. Instead, the focus was on the creation and vigorous enforcement of national borders.<sup>72</sup> Thus, the appropriate way of looking at Westphalian sovereignty is:

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66. Damrosch, *supra* note 24, at 299.

67. Cohan, *supra* note 5, at 914.

68. *Id.*

69. *Id.*

70. Olmsted, *supra* note 17, at 410 (emphasis added).

71. *Relational Sovereignty*, *supra* note 20, at 2037 (“The second transformation of sovereignty occurred during the decolonization of the twentieth century, when ideas of colonial nationalism and racial equality transformed colonial supplicants into self-determining countries.”).

72. *Id.* at 2038.

With the rise of nation states in the seventeenth century, however, classical international law gave enormous weight to the importance of state sovereignty, at the expense of emerging supranational human rights norms. Sovereignty was in large part seen as not simply an instrument for the promotion of the welfare of its citizens, *but also as an end in itself*. The overwhelming focus on the intrinsic value of sovereignty was reflected in the view that individuals were mere objects of the international law whose rights existed simply as derivative of state sovereignty.<sup>73</sup>

The Westphalia treaty precipitated the creation of nation-states as the “standard item of social organization” and became “the voice of civilization.”<sup>74</sup> Emphasizing the inviolability of borders rather than the freedom of individuals, in the tradition of classical international law the idea of national-sovereignty would come to be the dominant philosophical and legal theory of international states’ organization for close to three hundred years.

Scholar Eric Engle suggests, however, that the “Westphalian model of hermetic sovereign states promising not to intervene in their neighbors’ purely internal affairs lasted roughly from 1648–1989” and its de facto breakdown can be traced to the first and second world wars. A system which had guaranteed peace and security catastrophically failed, resulted in the deaths of literally millions and fundamentally changed the legal rules of the international system.<sup>75</sup> The notion of the nation-state exercising absolute sovereignty over its affairs thus significantly deteriorated in the middle part of the twentieth century, after World War II.<sup>76</sup> However, a solemn international emphasis on “fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small” emerged with creation of the U.N. Charter.<sup>77</sup>

## B. Montevideo Convention

Before considering the U.N. Charter, it is valuable to consider the 1933 *Montevideo Convention on the Rights and Duties of States*<sup>78</sup> and its relative importance to the nation-state. This importance is relative to the degree that it illustrates the kind of international legal instrument that leads to assertions of sovereignty and the creation of national-sovereignty ideologies and

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73. WEISSBRODT, *supra* note 6, at 4 (emphasis added).

74. Olmsted, *supra* note 17, at 410 (Recognizing the historical importance of the treaty, Olmsted writes, “Westphalia emasculated the [Holy Roman] Empire reducing it to one among many sovereigns, and begins a process by which the state becomes a standard item of social organization eclipsing the multifarious forms in existence at that time.”).

75. Engle, *supra* note 28, at 26–27.

76. Wallerstein, *supra* note 34, at 171.

77. U.N. Charter pmbl.

78. Montevideo, *supra* note 22.

myths, which are eventually used to insulate a given nation-state from international intervention based on human rights abuses or violations.

Although preceding the events of World War II, the *Montevideo Convention* was one of the major international instruments crafted in recognition of the ever-evolving nature of international relations and national sovereignty.<sup>79</sup> This Convention, though not ratified universally but now accepted through the international practice of customary law,<sup>80</sup> set forth the requirements for recognition as a nation-state.<sup>81</sup> As presented in the treaty they are: a permanent population, a defined territory, a government, and a capacity to enter into relations with the other states.<sup>82</sup>

Olmsted argues that the adoption of the *Montevideo Convention* represented a shift from the Westphalian “civilization standard” employed by the League of Nations<sup>83</sup> to determine statehood membership to a “declarative [based] one.”<sup>84</sup> The League of Nations Covenant “did not opt for allowing just *any* community of peoples into the ‘heterogeneous’ international legal order, but rather only those communities considered nation-states [which, while] seemingly neutral and objective,” were criteria “loaded with Western biases.”<sup>85</sup>

The nature and character of these biases, as part of the inquiry into the mythologies Henkin wrote of, will be revealed throughout this Note; however, from a neo-realist’s view of the international legal order, the Montevideo requirements represent the continuing requirements for recognition as a state in international customary law. As such, they are the basic elements, of the national sovereignty principle, that continue to thwart the conception of the full realization of international human rights because they limit avenues by which human rights may be claimed, exercised, and enforced by individual peoples and legitimate non-state actors (who are not necessarily neo-realists). Put another way:

79. *Id.*

80. H. VICTOR CONDE, *A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY* 58 (2004) (“In international law this term refers to a source of internationally recognized legal norms that is based on the consent of sovereign and equal states. Customary international legal norms are created by the existence of two elements, one quantitative (usage) and one qualitative (opinio juris) . . .”).

81. *See* Cohan, *supra* note 5, at 919–25 (providing in depth treatment of these requirements).

82. Similar requirements are found in Resolution 2625 (XXV) (1970), which elaborates the principle of State sovereignty. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (XXV), U.N. Doc. A/RES/2625 (Oct. 24, 1970).

83. Olmsted, *supra* note 17, at 444 (“While the League of Nations Covenant limited its membership to ‘fully self-governing states,’ in practice ‘the League tended away from the principle of homogeneous universality...towards that of heterogeneous universality.’”).

84. *Id.* at 445.

85. *Id.* (emphasis added).

International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.<sup>86</sup>

As this Note endeavors to illustrate, sovereignty has thus changed from being an international legal principle which legally protects borders and the legal integrity of sovereignty, to being an international legal principle which legally protects peoples and human rights.

### C. U.N. Charter

Arguably, the U.N. Charter marked the beginning of the modern erosion of Westphalian sovereignty and the modern ascension of human rights; although, following ideologically in the footsteps of the League of Nations efforts, one of its main purposes was to reintroduce a system of collective security against state aggression.<sup>87</sup> Following the Second World War and the war crimes committed by the Nazi regime in Germany,<sup>88</sup> the U.N. Charter was adopted and has heretofore been considered the progenitor of many customary international human rights law norms recognized within various other international legal instruments.<sup>89</sup> Its Preamble, like Article 1—but *unlike* Article 2—however, makes no explicit mention of sovereignty, and instead focuses on *human rights*:

We The Peoples Of The United Nations Determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and; to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and; to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and; to promote social progress and better standards of life in larger freedom. And For These Ends: to practice tolerance and live together in peace with

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86. Reisman, *supra* note 8, at 872.

87. Damrosch, *supra* note 24, at xxvii (noting that additional developments have since increased “the growing importance of states representing non-Western civilizations as members of the family of nations” and “the growing gap between the economically developed and the economically less developed countries, which resulted in the creation of new types of international organization specifically designed to deal with the problems arising from the co-existence of rich and poor nations.”).

88. *Id.* at 457 (“Counsel for the accused [Nazis] argued, inter alia, (1) that international law is concerned only with actions of states and does not encompass punishment of individuals and (2) when the conduct is an act of the state, individuals who carry it out are not responsible.”).

89. See Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT’L L. 783, 784 (2003).

*one another as good neighbors, and; to unite our strength to maintain international peace and security, and; to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and; to employ international machinery for the promotion of the economic and social advancement of all peoples, Have Resolved To Combine Our Efforts To Accomplish These Aims . . .*<sup>90</sup>

Furthermore, Article 1, which documents the “Purposes and Principles” of the Charter, states:

The Purposes of the United Nations are: . . . . To *develop friendly relations among nations* based on respect for the principle of *equal rights and self-determination of peoples*, and to take other appropriate measures to strengthen universal peace; [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights* and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . .<sup>91</sup>

The Charter’s main purposes, therefore, aim for the promotion and encouragement of international peace, security and respect for human rights. However, because of the way the nation-state system operates, the promotion and encouragement of human rights only seems attainable when human rights violations occur on a gross level or humanitarian intervention is extended in times of armed conflict.<sup>92</sup> “Sovereignty itself is something that lies primarily dormant. When a state is functioning smoothly and international relations are in good stead, sovereignty is in hibernation.”<sup>93</sup> Humanitarian intervention, unless welcomed, however, is often viewed as an encroachment upon the kind of sovereignty that the Westphalian notion espouses.<sup>94</sup> While the Charter legally binds member states to uphold human rights, some scholars nevertheless argue that the Charter “says very little about human rights except that they are important.”<sup>95</sup> Mendes and Ozay refer to this as a “tragic flaw” about mixing human rights aspirations with realities of national sovereignty: both seem to not succeed.<sup>96</sup>

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90. U.N. Charter, pmb. (these provisions are more or less repeated in Articles 55 and 56 of the Charter).

91. *Id.* arts. 1–2.

92. See, e.g., Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 *LOY. L.A. INT’L & COMP. L.J.* 365 (1995).

93. Cohan, *supra* note 5, at 911.

94. See Michael L. Burton, Note, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 *GEO. L.J.* 417 (1996).

95. ANTHONY WOODIWISS, *MAKING HUMAN RIGHTS WORK GLOBALLY* 24 (2003).

96. ERROL MENDES & OZAY MEHMET, *GLOBAL GOVERNANCE, ECONOMY AND LAW* 1 (2003).

Despite perhaps only imprecisely recognizing “the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,”<sup>97</sup> not until Article 2, however, does the Charter make mention of (national) sovereignty. In Article 2(1) it states: “[t]he Organization is based on the principle of the *sovereign equality* of all its Members.”<sup>98</sup> And Article 2(4), which is often used for support by detractors of non-U.N. humanitarian intervention or by detractors of unilateral use of force,<sup>99</sup> states: “[a]ll Members shall refrain in their international relations from the threat or use of force against the *territorial integrity or political independence of any state*, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>100</sup> Article 2(7) adds:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>101</sup>

Purely from a legal point of view, this clause does not prohibit intervention by member states—only intervention by the U.N.

Nevertheless, while the Charter purports to have been created for the “vague purpose”<sup>102</sup> of “promoting and encouraging respect for human rights, [peace and security]”<sup>103</sup> it appears to only envision doing so through the nation-state, national-sovereignty system which—although the drafters may not have consciously realized it—has something of an “anti-human rights” consciousness at its core. Simultaneously, however, a paradox exists in that the U.N. itself is a vehicle for furthering human rights. Furthermore, one might wonder whether the peace and security the Charter speaks of are threatened precisely when human rights abuses occur within a given sovereign territory.

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[T]he aspirations of human kind to eradicate the conditions that led to the Second World War and the evils that occurred during the way were soon overwhelmed by the tragic flaw within the nature of humankind. This tragic flaw . . . is the urge in human nature, which is then reflected in the institutions of global governance, to seek the supremacy of territorial integrity over human integrity . . . .

*Id.*

97. U.N. Charter, pmbi. A reference to the two World Wars—but what of the brutality in human history that preceded this exemplification of it?

98. U.N. Charter, art. 2(1) (emphasis added).

99. See Alyn Ware, *Rule of Force or Rule of Law? Legal Responses to Nuclear Threats from Terrorism, Proliferation, and War*, 2 SEATTLE J. SOC. JUST. 243, 252 (2003).

100. U.N. Charter, art. 2(4) (emphasis added).

101. *Id.* art. 2(7).

102. See Buergethal, *supra* note 89, at 784–85.

<sup>103</sup> U.N. Charter, art. 1(3).

Olmsted points out, for example, that “although the [U.N.] Charter lists among its purposes the ‘self-determination of people,’ the term ‘people’ has not been interpreted in the sociological [or natural law] sense, but rather once again within the colonial territorial framework.”<sup>104</sup> In other words, people and self-determination are limited to the concept of western nation-states, which created the Westphalian system of international law. This is indeed an important point when considering the breakdown of the Westphalian system, as it brings to the forefront of history’s consciousness the historical and legal injustices permeating beneath the surface of the venerated national sovereignty system.<sup>105</sup> Olmsted adds:

Indeed, nowhere in the Charter is it suggested that the colonial nation-state is a nullity or that sovereignty should be returned to pre-colonial peoples in the process of preparing them for independence. Rather . . . “[t]he Charter in fact says the opposite: it recognizes the right to political self-determination only for those territorial units that are ‘internationally determined’ of which the colonies are the classic example.” Thus, self-determination of people under the Charter means nothing more than the self-determination of the colonial *nation-state*.<sup>106</sup>

Referencing the work of philosopher Edward Said, Olmsted concludes “just as the Orient participated in its own Orientalization, the former colonies perpetuated their own subjugation by using self-determination as a means of maintaining the Western image of statehood rather than as a means of challenging it.”<sup>107</sup> While this Note is not focused on the sociology or history of post-colonial self-determination claims, either in a historical or modern context,<sup>108</sup> Olmsted’s thinking is crucial because it illustrates the tension among ideas of national sovereignty and human rights that emerge when contemplating what inroads upon sovereignty may very well be necessary in order to achieve full respect for human rights.

#### D. Universal Declaration of Human Rights

Arguably, further erosion upon national sovereignty was the U.N. General Assembly’s 1948 adoption of the Universal Declaration of Human Rights (“UDHR”).<sup>109</sup> “The Declaration is *not* a treaty, [however;] it was not adopted as one and was ‘never submitted by states to their respective

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104. Olmsted, *supra* note 17, at 449.

105. See generally Wayne Hudson, *Fables of Sovereignty*, in RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA? (Trudy Jacobson et. al. eds., 2008).

106. Olmsted, *supra* note 17, at 449–50.

107. *Id.* at 451.

108. For such a study, see ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 196–235 (2004).

109. Damrosch, *supra* note 24, at 976; Universal Declaration of Human Rights, G.A. Res. 217 (III), pt. A, U.N. Doc. A/810 (Dec. 10, 1948).

ratification processes.’ As such, the Declaration originally was not intended to constitute binding law.”<sup>110</sup> There have, however, been efforts to “attribute legal character to many of the Declaration’s provisions” and virtually no state or government that has “come into existence has since questioned or expressed reservations to the Universal Declaration, and it continues to be cited with unanimous approval or acquiescence in resolutions of international bodies.”<sup>111</sup> Thus, some parts of the UDHR may have become customary international law, and as a result, binding on international states.<sup>112</sup>

Croatian legal scholar Ivan Simonovic identifies the momentum human rights have gained in international legal dialogue and the clash that occurs between them and national sovereignty since the UDHR:

[T]here is an ever growing acceptance that the promotion and protection of human rights is a legitimate concern of the international community. An increasing number of states have recognized the value of working for international cooperation in the area of human rights and have accepted various forms of human rights assistance, monitoring, and field presence as supplementary to national mechanisms . . . . In spite of these clearly positive developments in the international protection of human rights, some serious obstacles still remain . . . . Some states demonstrate their isolationism by rebuffing international concern for human rights *in order to protect national sovereignty* or preserve certain traditional customs, both of which are used *as a shield for violating human rights*.<sup>113</sup>

What onus, in effect, then does the UDHR then place on nation-states to respect human rights, if it is not a *legal* one? The answer to this question is essentially a politically indeterminate one. Under customary international law, however, the legal answer is that there is at the minimum the “good faith” onus to abide by the UDHR; at the maximum, that insofar as the UDHR is customary law, it binds the parties as strongly as any other international law does.

“Regardless of its precise legal status, [however] the Universal Declaration is, after the U.N. Charter, probably the most influential instrument in the field of human rights; it helped secure the *recognition of human rights by states and instilled the idea and the principles of human*

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110. Damrosch, *supra* note 24, at 977 (“It is not a treaty,” said Eleanor Roosevelt in the General Assembly at the time of its adoption, “it is not an international agreement. It is not and does not purport to be a statement of law or legal obligation.”).

111. *Id.*

112. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 289 (1995/1996) (“Many of the Universal Declaration’s provisions also have become incorporated into customary international law, which is binding on all states.”).

113. Simonovic, *supra* note 11, at 389 (emphasis added).

rights into the national constitutions and laws of virtually all states.”<sup>114</sup> This statement overlooks, however, the indispensable importance and contribution that the *International Covenant on Economic, Social and Cultural Rights*,<sup>115</sup> and the *International Covenant on Civil and Political Rights*<sup>116</sup> have made in the field of human rights.

The response by the international community in the form of the UDHR is nonetheless illustrative of the desire to prevent the barbarous acts that humankind had committed leading up to and including the Holocaust.<sup>117</sup> This instrument should, therefore, be seen as reflective of a response to the atrocities committed by the Nazis, but also of the atrocities and acts of barbarism that have occurred in history leading up to its declaration.<sup>118</sup> Seen in this light, the reality emerges that human rights have been part and parcel with sovereignty<sup>119</sup> since “divine right” enabled kings to absolutely rule other human beings; however, respect for human rights still sometimes seem to be subordinated to exercises and claims of national sovereignty in the international system.

#### E. U.N. Resolution 2625 (XXV)

Finally, in this Part, there is one more instrument to briefly consider which illustrates the primacy that the international community has placed on national sovereignty and the tension between diverging points of view of sovereignty vis-à-vis human rights written about in this Note’s Introduction. This instrument is U.N. Resolution 2625 (XXV) (1970), which elaborates the principle of State sovereignty by providing:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social political or other nature.

In particular, sovereign equality includes the following elements:

(a) States are juridically equal;

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114. Damrosch, *supra* note 24, at 978 (emphasis added).

115. International Covenant on Economic, Social, and Cultural Rights, *opened for signing* Dec. 16, 1966, G.A. Res. 2200A (XXI), 993 U.N.T.S. 3, 6 I.L.M. 368 [hereinafter IECSCR].

116. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

117. See Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 87 (2001).

118. WEISSBRODT, *supra* note 6, at 8–10.

119. See *id.* at 2 (“[O]ne can trace the origins of human rights back to early philosophical, religious, and legal theories of the “natural law,” a law higher than the positive law of states (such as legislation).”).

- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable;
- (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.<sup>120</sup>

While this Resolution is an example of international soft law, as U.N. resolutions are generally non-binding, several other General Assembly resolutions and documents have repeatedly stressed the importance of the principles of state sovereignty, non-intervention, and non-use of force; for example, Resolution 2131 (XX) (1965) which declares that “[n]o State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States.”<sup>121</sup> But from the neo-realist perspective:

[W]hile the General Assembly does not possess the legislative power to pass binding resolutions, its importance in manifesting the general attitude of UN members cannot be underestimated; especially where the same principles have been repeatedly declared and reaffirmed. The various declarations and resolutions mentioned above, together with relevant Charter provisions and other treaty provisions, *provide weighty evidence that the principle of State sovereignty and its corollaries are essential to the existence and proper functioning of the United Nations and the entire system of international law as a whole.*<sup>122</sup>

If this assertion is correct that sovereignty is essential to international law and for the time being preempts all other international concerns including human rights in order to make the international system work, where do we go from here? Maybe the case is that national sovereignty is essential to the international law system, but does *not* in fact preempt international human rights?

The answers to these questions perhaps lie in the middle road creation of a global governance framework in which the state as well as other

120. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (XXV), U.N. Doc. A/RES/2625 (Oct. 24, 1970).

121. Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

122. Shen, *supra* note 26, at 427.

legitimate international actors and participants create a less state-centric or decentralized political and legal framework, perhaps sanctioned by the international community, in which full respect for human rights may culminate.<sup>123</sup> Such a global governance scheme need not be realized in a single “suzerain” entity, as this Note endeavors to illustrate, but rather in a body of networked legitimate (state and) non-state actors such as NGOs, or “civil society,”<sup>124</sup> aggregated at a greater level than currently exists in the world. Nevertheless, the preceding discussion illustrates the political and legal tension that exists between national sovereignty and human rights; it lays the framework for the points to follow. Perhaps the two most important international human rights instruments, the *International Covenant on Economic, Social and Cultural Rights*,<sup>125</sup> and *International Covenant on Civil and Political Rights*,<sup>126</sup> are reserved for discussion in the Human Rights section of this Note.

## II. SOVEREIGNTY AND LEGAL-PHILOSOPHIC CONSCIOUSNESS

“Sovereignty,” writes law professor Brad Roth, “is not an empirical condition, but a *legal status*.”<sup>127</sup> The concept of the Westphalian nation-state is, therefore, reflective of a particular legal *idea* we have of the state—one that has perhaps been historically engrained in our consciousness.<sup>128</sup> This vision of the nation-state, as detailed in the Westphalia treaty, the Montevideo Convention and U.N. Resolution 2625, for example, in some ways, eclipses our capacity to envision a world where full respect for human rights may be achieved because we insist on forcing them into the template of the national sovereignty system and thereby, circumscribing them to the needs or purposes of the nation-state. In other words, “[w]hile international law’s metanarrative portrays the nation-state standard as a step toward

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123. See WARD, *supra* note 2, at 85–86.

124. See CONDE, *supra* note 80, at 33.

125. ICESCR, *supra* note 115.

126. ICCPR, *supra* note 116.

127. Roth, *supra* note 48, at 1025 (emphasis added).

128. *Relational Sovereignty*, *supra* note 20, at 2048.

The key point is that philosophical and political ideas about human identity and human behavior have played a dialectical role in constructing political and legal beliefs about sovereignty. Sovereignty is a concept that reflects both the historic conditions at the time of its initial conception, and the philosophical and intellectual moods of that moment. In other words, the conceptions of sovereignty at the foundation of legal and political theory arose out of the contingencies of history, rather than as the result of any imminent logical necessity in history or in the development of political thought.

*Id.*; see also BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (2006).

universality and objectivity . . . . The nation-state itself can be viewed as a metaphorical prison that incarcerate[s] innumerable diverse communities of cultures, peoples, and histories.<sup>129</sup>

Because of this metaphorical national sovereignty yoke on our consciousness, it seems to make little difference that we have international human rights instruments which purport to place primacy upon human rights or at least on par with national sovereignty protections. One scholar claimed, based on an empirical study she performed:

[G]iven that I find not a single treaty for which ratification seems to be reliably associated with better human rights practices and several for which it appears to be associated with worse practices, it would be premature to dismiss the possibility that human rights treaties may sometimes lead to poorer human rights practices within the countries that ratify them.

If this is an accurate assessment of the current reality, is this assertion not then evident or indicative of a problem with the global consciousness and political will rather than insufficient international legal protection and enforcement mechanisms for human rights? Stated another way, “despite the impressive structure of human rights agencies and notwithstanding the energy and action driving the creation of international human rights system, the world remains full of human rights atrocities.”<sup>130</sup> Another scholar adds, “whilst we are possessed of more and more rights, in more and more charters, nothing it seems can prevent the systematic exercise of the most

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129. Olmsted, *supra* note 17, at 448–49.

These imaginative geographies were neither neutral nor universal but rather were based on Western values, biases and practices. Just as the disciplines make the individual, and the Orientalists create the Orient, international law fabricated these nation-states as a means of control and subjugation. International law chose the nation-state over the civilization standard for the same three reasons that the carceral city was chosen over the punitive city. First, the nation-state acts as a buffer between the international community and nationalist groups in the colonies, which the West perceived as immoral, irrational, and a threat to the stability of the international legal order. It therefore silences resistance. Second, with the expansion of the Family of Nations, international law needed a means of subjugation and control that could be effective against a potentially large number of subjects. The nation-state provided such a mechanism by reducing the number of international actors to a relatively small and controllable lot. Finally, because the nation-state is a normalizing judgment that is also hierarchically structured, it provided a subtle and efficient means of enforcing conformity and eliminating difference with each nation-state acting as a normalizing gaze over the peoples within its borders.

*Id.*

130. HELEN M. STACY, HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY CULTURE 6 (2009).

gruesome acts of inhumanity across the globe.”<sup>131</sup> These positions appear to be a static world views rather than dynamic ones. However, in the present author’s mind, it would be folly to label the incremental fashion in which international evolves to be “dynamic” as it would be to call it “static.” International law moves slowly and for all intents and purposes in this Note, it is a changing phenomenon, but not a “dynamic” one.

It is thus the present Author’s contention that the insistence on geographical or territorial boundaries as the *locus classicus*, as it were, of national sovereignty, has resulted in the world’s international human rights imaginary being almost perpetually constrained. Furthermore, this constraining keeps the individual’s place in the international social order incomplete or crudely reductionist.<sup>132</sup> The Hobbesian notion of sovereignty, for example, creates a simple psychological paradigm that ascribes to each human “only enough agency to prefer order to chaos” and fashions each human as a subject who “is concerned only with keeping chaos at bay, asks no more of the sovereign than to repel external threats and keep the peace at home.”<sup>133</sup>

Similarly, the Lockean paradigm gives each human enough agency merely to cede the authority to ensure that the sovereign protects private property.<sup>134</sup> But even though Locke’s sovereignty describes a more complex social relationship by containing the dialectic of right and duty between sovereign and citizen, its fundamental preoccupation with the border of the nation state remains. “Human relationships are still determined by their containment within national borders.”<sup>135</sup>

Ideologically, there seems to be a tendency to think of respect for international human rights as being limited to or characterized by the actions and behaviors performed by the states in which we live, rather than being, on their own, transcendent of the spacial, temporal or legal boundaries of the state—real, imagined, or otherwise. In this vein, Louis Henkin reiterates how our consciousness is affected by the national sovereignty system:

It is part of my thesis that the sovereignty of states in international relations is essentially a mistake, an illegitimate offspring. Sovereignty began as a domestic term in a domestic context. It referred to relations between rulers and those they ruled, between the “Sovereign” and his or her subjects. Its application to modern states—a state is not a person, but an abstraction—and its relation to other abstractions, such as the

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131. WARD, *supra* note 2, at 143.

132. *Relational Sovereignty*, *supra* note 20, at 2047–48.

133. *Id.*

134. *Id.*

135. *Id.*

governments which represent states, has inevitably brought distortion and confusion.<sup>136</sup>

It is the present Author's contention that this distortion and confusion have placed limits on the ways in which national sovereignty and the human rights we are endowed with by natural law are conceived of by individuals in the global polity. The present Author does not espouse nor particularly believe the words of Henry Kissinger or any other power politician or neo-realist, for example, who argue that the state exists only for its own its own sake and in furtherance of its own purposes.<sup>137</sup> Indeed, of what use is state or national sovereignty to the people in the world who are by their governments or others being raped, burned, mutilated, crucified, flogged, burned, terrorized, denied education, kept hungry, prevented from working, forced into marriage, kept in poverty, and summarily executed among other violence?<sup>138</sup> Henkin asks similar questions.<sup>139</sup>

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136. Henkin Lecture, *supra* note 21, at 2.

137. See generally Kissinger, *supra* note 117.

138. For the "United Nations . . . limited attention to the cause of victims," see Theo van Boven, *The Perspective of the Victim*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND* 13 (Yael Danieli et al. eds., 1999).

139. Henkin Lecture, *supra* note 21, at 9–10.

Who is sovereign when the state is helpless against local terrorists, or against suicide bombers? Who is sovereign, or what can sovereignty do, against ethnic conflict within or across state borders, against civil war, whether it spills over into other territories? And how sovereign is a state if it cannot prevent genocide? And then, there are other kinds of terrible things: what can sovereignty do for (or against) floods of refugees or internally displaced people? . . . If the state system is losing control, if it is exploding, is state sovereignty perhaps also imploding? If a government no longer has control within a state's territorial boundaries, who does? Can there be a sovereign state with nobody in control? If what happens inside a state's territory is no longer subject to effective internal control, who is in charge? Who in the state system is responsible for genocide within the former Yugoslavia? Who is responsible for ethnic cleansing, for crimes against humanity, for war crimes, for internal wars, and for terrorism, whether internal, transnational, or international? . . . Or—helplessly—who is responsible for the devastating consequences of natural disasters—floods, hurricanes, and earthquakes that have devastated economies and blighted hopes for economic and social development, and economic and social rights for hundreds of millions of people seeking human dignity? Who is responsible for the recurrent problem of terrorism, transnational or international, or for drug smuggling and people smuggling, and various other forms of international crime, or for internal crimes which states cannot or will not address, or may even promote or condone?

The present Author instead believes that human rights are indeed *natural rights*: something all of humankind is endowed with as a matter of human existence and should not depend on the state to create through law. Human rights are universal, inherent, and inalienable, meaning everyone has them, is born with them, and cannot be given or taken away (except they can be limited in certain circumstances).<sup>140</sup> Rather the state should, as part of its function as an apparatus of international organization, respect, guarantee and protect either positively or negatively, but preferably positively, all of our human rights and provide the forum to ensure they are respected, and when they are violated, the forum to have them remedied without regard to carefully politicized and artfully litigated legal procedures or norms that often enable them to be avoided or not complied with.

But how then is this discussion dispositive to law? It is dispositive because it illustrates the tired modalities of international legal thinking and consciousness: problems are always seen in contrast or in opposition to one another; even the present Author, for example, suggested national sovereignty and human rights might be seen as polar opposites—an example of the positivist yoke that has been placed on our consciousness.<sup>141</sup> Yet, even when national sovereignty is exposed for what it is, neo-realists will always attempt to reconcile national sovereignty on some basis of political or legal legitimacy that prevents ensuing anarchy.

The extreme view that human rights are more important than national sovereignty is contrary to the reality under positive law, and is in particular incompatible with the principles of sovereign equality, non-intervention, and prohibitions on the use of force. Despite the importance of international promotion and protection of human rights, it would be misleading simply to maintain preeminence of individual rights over national sovereignty. These two categories of rights, though somewhat contradictory to one another, do not have to be viewed as “enemies” with one “conquering” the other. In my opinion, neither should national sovereignty and the principle of non-intervention be used as a shield behind which a State can act in wanton and unrestrained disregard for its international obligations relating to fundamental rights and freedoms of individuals or groups of people, nor should the need for respect and protection of human rights be used and indeed abused to disrespect and undermine the sovereignty, inviolability and dignity of States. Instead, the relationship between national sovereignty and individual rights should and can be *complementary*. When one deals with the legal relationship between national sovereignty and human rights, both categories of rights

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140. Conde, *supra* note 80, at 111.

141. See Radhika Withana, *An Alternative Theoretical Approach for Understanding the Relationship Between International Law and State Behaviour During International Crises: International Law as Ideology*, in POWER, POLITICS, LAW: INTERNATIONAL LAW AND STATE BEHAVIOUR DURING INTERNATIONAL CRISES 61–89 (Radhika Withana ed., 2008) for an illustrative example.

should be viewed *in the context of positive international law* rather than from perspectives of value, religion, culture and ideology.<sup>142</sup>

While such a view aims to defend national sovereignty, and aims to benevolently classify it as a corollary to international human rights it is in reality is perhaps little else but an undisguised attempt at legitimizing the practices of states which abuse human rights, such as Iran or Burma, for example.<sup>143</sup>

From a *legal* point of view, however, we must accept the additional fact that globalization has brought about fundamental changes in the world, especially in relation to human rights and that a polar spectrum, if it ever were apposite, is no longer extant. We need to dispense with these old modalities of legal thinking, and in the spirit of the technology that governs our modern economics and communications, create an interconnected international legal system of governance that goes beyond merely nation-states consolidated in the U.N. We have outgrown the Westphalian national-sovereignty system, and we cannot continue to allow the neo-realists' dying vision of a short, nasty, brutish world bring us down with their relentless pursuit of state power. We must instead cautiously embrace globalization and recognize it is as the impetus for a *new* form of global governance for human rights.<sup>144</sup>

### III. GLOBALIZATION AND ITS EFFECTS ON SOVEREIGNTY AND HUMAN RIGHTS

The post-World War II flourishing of human rights can be mostly attributed to globalization.<sup>145</sup> Globalization may be understood, generally, to mean "those processes which tend to create and consolidate a unified world economy."<sup>146</sup> But globalization "is a journey toward an unreachable destination"—a chosen, not a destined, world where neither geographic distance nor national borders impede the flow of commerce.<sup>147</sup> Noting that globalization has serious negative effects as well,<sup>148</sup> it is impossible to address the full panoply of globalization's effects on national sovereignty and human rights in a space as short as this; however, it may be done so amply in the context of international law and human rights.

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142. Shen, *supra* note 26, at 435–36 (emphasis in original).

143. See, e.g., S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109 (1997).

144. For a need to do so cautiously, see BENJAMIN BARBER, *JIHAD VERSUS MCWORLD* 53 (1992).

145. Franck, *supra* note 28, at 193.

146. WILLIAM TWINING, *GLOBALISATION & LEGAL THEORY* 4 (2000).

147. Wolf, *supra* note 9, at 178, 182.

148. See NOAM CHOMSKY, *PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER* 20-28 (1999).

If there is a single phenomenon most relevant for the various developmental trends and relevant for sovereignty of the state and its future, it is globalization. Globalization itself is not an entirely new phenomenon. There have always been some global travelers, global exchange, and global aspirations. There have also always been global problems, but the human capacity to create them, or to solve them, was lacking. There was a certain awareness of globality [sic] and global concerns, but there was no real possibility to influence them. Therefore, the problems were simply registered and accepted as a part of our destiny.<sup>149</sup>

Stacy identifies globalization as presaging the new major revolution in the nature of sovereignty.<sup>150</sup> Henkin adds that the international human rights movement is the next major transformation in sovereignty.<sup>151</sup> Stacy argues that “there is a general consciousness among people that historical circumstances are altering in significant ways.”<sup>152</sup> She asks, “[w]hat is the phenomenon of globalization, and how might it suggest a new analysis of the relationship between individuals and the nation state?”<sup>153</sup> Henkin answers, perhaps to the dismay of ardent neo-realists or power politicians: “[t]here is growing, though grudging, realization that world economic affairs, world communications, and inevitably, therefore, world politics, are no longer cabined within the state system.”<sup>154</sup>

Kofi Annan, former U.N. Secretary-General said: “[s]tate sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation.”<sup>155</sup> Another scholar adds:

Over the past decade, globalization has transformed the territorial and moral status of the nation state. The older rhetoric of sovereignty as either Hobbesian protectorate or Lockean concern for citizens’ property rights *needs rejuvenation* to emphasize instead the dynamic interactions among sovereign states and among the citizens of those states—interactions that have been with us since the Silk Road but that have become crucial with globalization. While powerful states still maintain sovereignty in respect of issues of security, “*the era of sovereignty as a universal organizing principle for the management of the global system has ended.*” It is a

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149. Simonovic, *supra* note 11, at 385.

150. *Relational Sovereignty*, *supra* note 20, at 2039.

151. Henkin Lecture, *supra* note 21, at 3–4.

152. *Relational Sovereignty*, *supra* note 20, at 2040.

153. *Id.*

154. Henkin Lecture, *supra* note 21, at 6–7; see also Elliot Meyrowitz, *What Does Law Have to do with Nuclear Weapons?*, 9 MSU-DCL J. INT’L L. 305, 305 (2000).

155. Press Release, The Secretary General, Secretary-General Presents his Annual Report to General Assembly, SG/SM/7136, GA/9596 (Sept. 20, 1999), available at <http://www.un.org/News/Press/docs/1999/19990920.sgs7136.html>.

patchwork development, with different effects in different parts of the world.<sup>156</sup>

While the present Author cannot debate at great length the veracity of the assertion that “the era of sovereignty as a universal organizing principle for the management of the global system has *ended*,” it should be apparent that national-sovereignty is at least undergoing significant changes with the continually evolving international emphasis on human rights and the advent of modern globalization. Another way of saying this is that “the magic aura of the state is disappearing”<sup>157</sup> as human rights become more important in and to the world. The formation of the European Union (“EU”) or the World Trade Organization (“WTO”) are excellent examples of the globalized changing nature of sovereignty in the international context and how the concept may actually mean something different in various parts of the world. For example, individual states within the EU “no longer maintain either complete external or internal sovereignty because of their legal compact to observe European laws in ways that constrain both domestic regulation and also their interactions with other nation states. Yet considered as a unit, the European Union retains substantial external powers.”<sup>158</sup> In this sense, might the EU be viewed as a suzerain entity of sorts and provide a suzerain model for human rights? Perhaps it might.<sup>159</sup>

If, in “a new century of further globalization, integration and interdependence, the concepts of nation-States and sovereignty will almost certainly face greater tests and challenges,”<sup>160</sup> is it still possible to conceive of a suzerain entity, a one world government, that might emerge to govern the international community and to ensure compliance with international human rights? The present Author does not think it is possible because not only would the national sovereignty system not allow it, the experiences of historical, religious, and cultural differences almost indefinitely foreclose such a possibility as well.<sup>161</sup>

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156. *Relational Sovereignty*, *supra* note 20, at 2030–31 (emphasis added).

157. Wallerstein, *supra* note 34, at 182.

158. *Relational Sovereignty*, *supra* note 20, at 2038.

159. See EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 3 (2009), <http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQenglish.pdf> (“The Convention is applicable at national level. It has been incorporated into the legislation of the States Parties, which have undertaken to protect the rights defined in the Convention. Domestic courts therefore have to apply the Convention. Otherwise, the European Court of Human Rights would find against the State in the event of complaints by individuals about failure to protect their rights.”).

160. Shen, *supra* note 26, at 442.

161. *Id.* at 442–43.

Some have characterized the proliferation of international law norms and public international organizations in the latter part of the 20th century as a trend toward “multilateralization,” and even conjectured that this alleged trend “has so fundamentally transformed the

The horrible atrocities that occurred in Kosovo, Rwanda, and Darfur, and the continuing chaos amidst the Arab-Israeli conflict, all putatively motivated in part by historical, cultural, religious, or ethnic differences, are prime examples of differences—namely valorized ideologies—which do not easily die off in the pursuit of something greater than simple respect for another human being’s rights.<sup>162</sup> The nation-state normally defines identity and a sense of belonging is part of a peoples’ concept of security; realities that most people would not want to forfeit in the age of globalization.<sup>163</sup> Therefore, even at the most rudimentary level to conceive of a supranational entity which governed or ruled nation-states in respect of human rights seems quixotically imaginative.

Indeed, for reasons of history and the prevalence—albeit decaying prevalence—of the national sovereignty system, while it seems implausible to conceive of a situation where a world government would (legally) emerge, it is not necessarily impossible as evidenced by the creation of such entities as the EU; IMF Organization of American States; U.N.; U.N. Educational, Scientific and Cultural Organization; Shanghai Cooperation Organisation; World Intellectual Property Organization; World Health Organization; and WTO among others.

Richard Falk and Andrew Strauss, for example, envision the creation of a diverse “global parliament.”<sup>164</sup> Their theory shows that, with the advent of modern globalization,<sup>165</sup> the emergence of a global governance scheme with a multitude of participants—not just nation-states—is not inconceivable.<sup>166</sup> Such an assertion holds promise if this account of the current state of affairs is accurate:

The process of globalization will continue and intensify. Integration of the world’s economy, trade, and financial flows will progress. International and transnational interaction will increase, requiring improved coordination and further development of international regulatory

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character of international law that even the term ‘international law’ is an anachronism.” However, it is doubtful nation-States will ever be ready in a considerable period of time to dissolve themselves and reform into, or subject themselves to, a world government. National identity and national interests will continue to matter. *Existing cultural, ethnic, religious, philosophical and other differences between nation-States are such that they will not easily die off.*

*Id.* (emphasis added).

162. See Nathaniel Berman, *The International Law of Nationalism: Group Identity and Legal History*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 25 (David Wippman ed., 1998); Diane F. Orentlicher, *Citizenship and National Identity*, in *INTERNATIONAL LAW AND ETHNIC CONFLICT* 296 (David Wippman ed., 1998).

163. Wolf, *supra* note 19, at 190.

164. See Richard Falk & Andrew Strauss, *Towards Global Parliament*, 80 *FOREIGN AFF.* 212 (2001).

165. Globalization is not a new phenomenon; it is just occurring in a new form.

166. See generally Sassen, *supra* note 39.

mechanisms. National governments—under the pressure of their citizens—will seek agreements and partnership relation with other national governments, international organizations, non-governmental organizations, and multilateral corporations . . . . The role of states will continue to change. Their role as a security and economic framework is decreasing. Global or regional organizations such as the United Nations (Security Council), the OSCE, and NATO are taking over quite a number of international peace and security tasks. Global trade and economy are being increasingly influenced by World Trade Organization, international business practices leading to development of international law, and arrangements by various associations of states, such as European Union, MERCOSUR, or the North American Free Trade Act . . . . Instead, the state is shifting its role towards a framework for the protection and promotion of traditions, culture, language, and specific values and interests. Perhaps this is the explanation of the seemingly contradictory processes of the decrease of the role of the state, and, at the same time, the increase of the number of states, and the pressure to create new national states.<sup>167</sup>

Notwithstanding the pressure in the international community to create new states (out of former colonies and those seeking independence), in support of creating a global governance scheme, “for those who care about human rights, the need is to work to make the state system more human rights-friendly, even in the age of globalization, even taking globalization into account.”<sup>168</sup> Once the international system is made more “human-rights friendly” it becomes apparent that the changing nature of sovereignty emphasizes the protection of *peoples* rather than the protection of *borders and territories*. One could even say that, transformatively, sovereignty (or popular sovereignty) *becomes* an international human right.<sup>169</sup>

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167. Simonovic, *supra* note 11, at 401.

168. Henkin Lecture, *supra* note 21, at 7.

169. Sampford, *supra* note 34, at 349; *see also* Reisman, *supra* note 9, at 869.

Although the venerable term ‘sovereignty’ continues to be used in international legal practice, its referent in modern international law is quite different. International law still protects sovereignty, but—not surprisingly—it is the people’s sovereignty rather than the sovereign’s sovereignty. Under the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its “invasion” of the sovereign’s *domaine réservé*. The United Nations Charter replicates the “domestic jurisdiction-international concern” dichotomy, but no serious scholar still supports the contention that internal human rights are “essentially within the domestic jurisdiction of any state” and hence insulated from international law.

This view of popular sovereignty is not necessarily new of course, as for example, the preamble to the United States Constitution recognized the sovereignty of the people with its now famous declaration:

We the People [and] . . . inaugurated the concept of the popular will as the theoretical and operational source of political authority. Political legitimacy henceforth was to derive from popular support; governmental authority was based on the consent of the people in the territory in which a government purported to exercise power. At first only for those states in the vanguard of modern politics, later for more and more states, the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty.<sup>170</sup>

However, this remains the crucial point in this Note. Sovereignty has changed from being an international legal principle which protects borders and the legal integrity of sovereignty to being an international legal principle which legally protects peoples and human rights. In this sense, it is then at least partially true that the “era of sovereignty as a universal organizing principle for the management of the global system has ended.”<sup>171</sup> Though arguably only decayed or “decomposed/recomposed”<sup>172</sup> instead of dead, older concepts of national sovereignty have through their demise paved the way for sovereignty based on peoples and human rights to emerge. It need not be a suzerain entity which emerges to enforce this changed sovereignty, but rather as Falk and Strauss suggest, perhaps a global parliament which promotes their protection—an ideal which is inherently a democratic one, and perhaps even a flawed one at that.<sup>173</sup> The difference between a suzerain entity and a global parliament is that the former is envisioned as anti-democratic and somewhat autocratic while the latter is seen as democratic, taking into account the regionalism that on a participatory level globalization has brought about.

The preceding analysis has sought to demonstrate “that the nation state is shrinking under the conditions of globalization; or at least, it is at risk of becoming less relevant.”<sup>174</sup> It is worthwhile here to take a moment to point out that certain human rights scholars see globalization as an impediment to socio-economic human rights, and instead see development as the answer to

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170. Reisman, *supra* note 8, at 867.

171. *Relational Sovereignty*, *supra* note 20, at 2031 (citing Christopher Clapham, *Sovereignty and the Third World State*, 47 *Pol. Stud.* 522 (1999) (Special Issue, Robert Jackson, ed.)).

172. Gerry Simpson, *The Guises of Sovereignty*, in *RE-ENVISIONING SOVEREIGNTY* 63 (Trudy Jacobsen et al. eds., 2008).

173. See Joseph S. Nye Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, 80 *FOREIGN AFF.* 2, 3–4 (2001).

174. *Relational Sovereignty*, *supra* note 20, at 2043.

better respect for human rights in the world.<sup>175</sup> They argue that organizations such as the IMF, the WorldBank, and the WTO serve the purposes of industrialized and developed nations in the neo-liberal economic order.<sup>176</sup> Irrespective of the validity of such an assertion, in the contemporary world, from a Henkinian point of view, the interstate system, instead of organizing itself around sovereignty as state interest, ought to be organizing itself around human values.<sup>177</sup> In other words, sovereignty in a globalized world should be continually focused on ensuring and protecting human rights as much as the security of the state, if not more.

#### IV. INTERNATIONAL HUMAN RIGHTS

While the preceding discussions detailed the erosion of national sovereignty through the changing norms of the concept and the resultant primacy placed on human rights in the twentieth century, as well as the effects of globalization on human rights, this part is devoted to detailing international human rights and some of the effects that national sovereignty has contributed in the failure to heretofore secure *full respect or realization* of human rights throughout the world. Its aim is to add the last necessary component to this Note, before finally making a normative claim on whether full respect for human rights requires the abolition of the nation-state, or whether some middle ground may be reached in which both national sovereignty remains intact (partially or otherwise) and full respect for human rights is realized. This Note asserts that the protection of human rights against the state are, historically at least, inroads upon national sovereignty. Stated another way, “[t]he most fundamental point about human rights law is that it establishes a set of rules for all states and all people . . . [i]n this sense, the international law of human rights is revolutionary because it contradicts the notion of national sovereignty—that is, that a state can do as it pleases in its own jurisdiction.”<sup>178</sup>

As is to be expected, “human rights principles, norms, and institutions [are] an indispensable aspect of understanding the inter-relationship between states, as well between states and those persons within their territory and under their control.”<sup>179</sup> Although human rights are not necessarily a new phenomenon,<sup>180</sup> and have a long and diverse history,<sup>181</sup> they have only recently, as we have seen, in the last sixty years been taken

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175. See MARGOT E. SALOMON, *GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW* 39–50 (2007).

176. ANTHONY CARTY, *PHILOSOPHY OF INTERNATIONAL LAW* 194–97 (2007).

177. *Relational Sovereignty*, *supra* note 20, at 2043.

178. DAVID P. FORSYTHE, *HUMAN RIGHTS AND WORLD POLITICS* 4 (1983).

179. WEISSBRODT, *supra* note 6, at xxix.

180. *Id.* at 3–26.

181. See WOODIWISS, *supra* note 95, at 2.

as universal and one of the foremost components of the international system.<sup>182</sup>

However, full respect for human rights in the totality of the international legal sphere tragically seems to remain aspirational. “While the language and the law of human rights create higher and higher expectations of good behavior, governments fail in their human rights responsibilities every day. International human rights reality still routinely lags behind human rights aspirations.”<sup>183</sup> Such a reality is problematic as far as the present Author is concerned, because if human rights law exists it ought to be respected, obeyed, and enforced throughout the world. To suggest that human rights need to be implemented incrementally, is to suggest that the Holocaust or Darfur could have been tolerated while changes were being made or that intervention would have only been appropriate if the incrementalism moved too slowly. Part of the outrage, in this sense, stems from the fact that the Allies, in the case of the Holocaust, for example, knew what was going on, but took too long, perhaps under the rubric of territorial integrity, or because stopping the Holocaust was not as important as prosecuting the war, to prevent the slaughter of millions of people. Notwithstanding that the Holocaust took place during the bloodiest of World Wars, and that the inviolable national-sovereignty principle was largely responsible for the rise of nationalism in Nazi Germany, is it fair to say in the modern context that the atrocities in Darfur are merely the culmination of tragedies borne out of a failed incrementalism? In other words, what level of tolerance for the incremental implementation of human rights should a people have to bear before their human rights are violated? Of course a distinction should be made between genocide and poverty and hunger, but how much latitude should nation-states be given in implementing and respecting human rights of all kinds? It should be clear that the present author has very little patience for the margin of appreciation doctrine.<sup>184</sup>

In this discussion one is right to ask what *exactly* are human rights? The U.N. Training Manual on Human Rights Monitoring, another soft law instrument, defines them as the “universal legal guarantees protecting individuals and groups against actions by governments which interfere with fundamental freedoms and human dignity.”<sup>185</sup> This is an ambiguous and ultimately unhelpful definition, if for no other reason that human rights also protect people from depredations of non-state actors. As Louis Henkin puts it, controversial definitions are to be eschewed for a simpler one: “[by] ‘human rights’ I mean simply those moral-political claims which, by contemporary consensus, every human being has or is deemed to have upon

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182. See Franck, *supra* note 28, at 193.

183. STACY, *supra* note 130, at 6.

184. WARD, *supra* note 2, at 124.

185. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, TRAINING MANUAL ON HUMAN RIGHTS MONITORING at 7, U.N. Doc HR/P/PT/7, U.N. Sales No. E.01.XIV.2 (2001).

his society and government . . . enumerated in contemporary international instruments . . . [such as] the Universal Declaration of Human Rights.”<sup>186</sup>

While Henkin takes an obviously broadminded point of view,<sup>187</sup> if his comments are more closely read, it seems apparent that here he sees human rights as a claim made by an individual against his or her *society or government*. This is a noteworthy approach because he—though perhaps unwittingly in the neo-realist sense—casts human rights once again, as something to be asserted against the *nation-state*. One might ask, but against whom else other than society or government may such a claim be asserted? While the answer to that question is more or less no one,<sup>188</sup> the vital aspect to be here gleaned is that human rights exist in all of humankind *a priori* to existence of society or government. In other words, in the present Author’s opinion, human rights exist prior to and without the existence of society or creation of government; they are something inherent in humankind.

It is with the creation of the social contract with the sovereign—Hobbesian, Lockean, or otherwise—in which individuals’ human rights become *further* threatened or abused by that sovereign or others.<sup>189</sup> Life may be chaotic without the sovereign but human rights inherently exist nonetheless—in the state of nature you might kill me, but I still have the natural right to life.<sup>190</sup> Thus, from a natural law point of view, human rights are *universal*, and therefore the most basic rights and freedoms are protected from interference by government or the nation-state. Yet there appears to be view among some governments that there is no such thing as universal or fundamental human rights; there are simply the rights embodied in international instruments incorporated into domestic law, each interpreted in a multitude of ways by different governments and their courts.<sup>191</sup>

Nevertheless, even if a straightforward approach to legally defining human rights is maintained, it might be said that perhaps the best way to do so is to understand the international instruments which construe them and impose legal *obligations* upon nation states to respect them. Through such an approach one discovers what is known as the “International Bill of Rights.”<sup>192</sup>

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186. Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 405 (1979).

187. I will address four approaches to international law later in this paper. Here the word liberal is used in a very specific context and is not to be confused with American liberalism for example.

188. See Conde, *supra* note 80, at 111.

189. See NORBERTO BOBBIO, THOMAS HOBBS AND THE NATURAL LAW TRADITION 2 (Daniela Gobetti trans., 1993).

190. This statement should not be interpreted as a statement on the abortion issue.

191. WARD, *supra* note 2, at 124.

192. WEISSBRODT, *supra* note 6, at 33.

The International Bill of Rights is not a single instrument, but rather comprised of four instruments: the *Universal Declaration of Human Rights* (“UDHR”), the *International Covenant on Economic, Social, and Cultural Rights* (“ICESCR”), the *International Covenant on Civil and Political Rights* (“ICCPR”), and the *First Optional Protocol to the International Covenant on Civil and Political Rights*.<sup>193</sup> Remembering that the UDHR is not a treaty, the covenants which form the *International Bill of Human Rights* “comprise[] the most authoritative and comprehensive prescription of human rights obligations that governments undertake.”<sup>194</sup> There are of course instruments which protect human rights such as the *Convention on the Prevention and Punishment of the Crime of Genocide* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, but these do not form a part of the International Bill of Rights.<sup>195</sup>

#### A. International Covenant on Social, Economic and Cultural Rights

The ICSECR is now considered one of the “principal source[s] of international obligations” imposed on governments by international law.<sup>196</sup> (The other is the ICCPR). Article 1 recognizes the right of all peoples to self-determination, including the right to “freely determine their political status,” pursue their economic, social, and cultural development and to manage and dispose of their natural wealth and resources.<sup>197</sup> It also obliges government to respect the right of peoples not to be deprived of their means of subsistence, and imposes a positive obligation on post-colonial societies to encourage and respect self-determination of peoples still governed by them.

Article 2(1) obliges parties to the Covenant to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the *full realization of the rights* recognized in the present Covenant by all appropriate means, including particularly the adoption of *legislative measures*.”<sup>198</sup> With this provision, the legal onus is placed on sovereign governments, as state parties, to ensure that human rights are respected within their national (sovereign) territories and boundaries. Article 2 also mandates ratifiers “to guarantee that the rights

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193. *Id.*

194. *Id.* at 13.

195. See Antonio Cassese, *Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?*, in *THE HUMAN DIMENSION OF INTERNATIONAL LAW: SELECTED PAPERS* 332–37 (Paola Gaeta & Salvatore Zappala eds., 2008) (providing an interesting human rights discussion).

196. WEISSBRODT, *supra* note 6, at 97.

197. ICESCR, *supra* note 115, art. 1.

198. *Id.* art. 2 .1 (emphasis added).

enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>199</sup>

Articles 6 through 15 of the Covenant list the rights which state signatories must recognize and fulfill, among them the right: to work, under “just and favorable conditions,” with the right to form and join trade unions; to social security, including social insurance; to family life; to an adequate standard of living, including adequate food, clothing and housing, and the “continuous improvement of living conditions;” to “the highest attainable standard of physical and mental health;” to education; and to participation in cultural life.<sup>200</sup> These then may be said to be some of the human rights that are referred to when the term is used.

Precisely for reasons of national sovereignty, some nation-states, the foremost among them, the United States, have chosen not to ratify this instrument. Although this instrument is a vehicle upon which the “progressive realization” of human rights supposedly travels, it remains to some degree as ineffectual as any other international treaty, unless ratified, respected and properly adhered to.<sup>201</sup> Many nations ratify treaties with the aim of increasing their moral stature or esteem in the world, but with no intention of respecting them fully and abiding by the obligations imposed on them by them.<sup>202</sup> In the end, assertions of national sovereignty under international law inevitably seem to get in the way.<sup>203</sup> It should be noted, that the ICESR recognizes that poorer nations may only be able to fulfill certain rights incrementally. The international community has the IMF and WHO, among other similar entities, to help these nations develop, and in accordance with Article 2, they should be provided with whatever assistance is necessary to respect human rights—therefore, there is no excuse, as far as the present Author is concerned.

## B. International Covenant on Civil and Political Rights

Articles 6 through 27 of the Covenant list the rights which state ratifiers must respect, among them the right: to life, protected by law; to be free from torture, cruel, inhuman or degrading treatment or punishment, or subjected without free consent to medical or scientific experimentation; to be free from slavery, servitude, forced or compulsory labor; to liberty and security of person and freedom from arbitrary arrest or detention; to due process in law; to freedom of thought, conscience and religion; and to the conduct of public affairs, directly or through freely chosen

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199. *Id.* art 2.2.

200. *Id.* arts. 6–15.

201. Donoho, *supra* note 44, at 5.

202. See WEISSBRODT, *supra* note 6, at 30.

203. Olmsted, *supra* note 17, at 435–36.

representatives.”<sup>204</sup> Article 26 declares that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>205</sup> Article 27 adds “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>206</sup> The first Optional Protocol provides to individuals procedural mechanisms to pursue redress to the Human Rights Committee for violations of the Covenant.<sup>207</sup> Unlike the ICESCR, the United States has ratified the ICCPR; however, it did so with five reservations, five understandings, and four declarations, and one proviso.<sup>208</sup>

In essence, the ICCPR and the ICESCR codify and impose obligations on nation-states to respect various human rights. These obligations, by their very nature, as inroads on national sovereignty, turn the tables so to speak, and thwart the neo-realist brand of national sovereignty that has dominated Western thinking and practice since Nuremburg.<sup>209</sup> In some sense, with the pursuit of human rights as the new normative organizing principle of the international system beyond merely protecting the “inviolability”<sup>210</sup> of the nation-state, it might indeed be the case, as Fukuyama suggested, that “the end of history” is in the making or, already here.<sup>211</sup> In other words, that western liberal democracy and its ideology of human rights ideals have triumphed over all other ideologies.<sup>212</sup>

### C. National Sovereignty v. International Human Rights

From a legal point of view, is it then fair to say that national sovereignty and international human rights remain in opposition to one another? Are the two like oil and water? Mutually exclusive? The answer to these

204. ICCPR, *supra* note 116, arts. 6–27.

205. *Id.* art. 26.

206. *Id.* art. 27.

207. First Optional Protocol to the International on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302, 6 I.L.M. 383.

208. 102 Cong. Rec. S4781-04 (daily ed., April 2, 1992) (addressing U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights); *see also* WEISSBRODT, *supra* note 7, at 141.

209. Simonovic, *supra* note 11, at 395 (“The development of the international protection of human rights is often hindered by the opposition of state authorities who fear that their sovereignty is being limited and that their internal affairs will be subject to international—and possibly hostile—interference. Taking into account that abuses of state power are the primary human rights problem, this fear is quite understandable.”).

210. Shen, *supra* note 26, at 437 (“Effective promotion and protection of human rights must thus be founded upon respect for the inviolability of States’ national sovereignty, political independence, and territorial integrity. We do not need to and should not view States with hostility.”).

211. FUKUYAMA, *supra* note 1, at 3.

212. *See generally* WARD, *supra* note 2.

questions may have to do more with international politics than with international law. In other words, legally speaking, all nations *should be* acting in accordance with international human rights law (or at least not frustrating its objectives); however, politically (and legally) speaking, they do not. Perhaps this is because of the “rule-book image of international law which refers to an understanding of law that (often implicitly) assumes that law is a body of rules that is separate from politics, neutral and universal.”<sup>213</sup> But this might simply evidence the fact that human rights are as much as political idea as they are a legal one.<sup>214</sup>

Nevertheless, it is worthwhile to understand four main theories when discussing why states agree to and often obey international human rights as a way of closing this part of the discussion: realism, institutionalism, constructivism, and liberalism.<sup>215</sup> Strict realists make six basic assumptions about the world: (1) states are the primary and most powerful actors in the international sphere; (2) the world is anarchic; (3) since there is no power over states and no state may command another, there can be no order in international relations; (3) states seeks to maximize their security or power; (4) realists perceive the world as having limited resources that are unevenly distributed, so they see states as primarily focused on maximizing power and security; (5) states behave rationally in their pursuits of security or power; (6) there is utility in the use of force.<sup>216</sup> The realist theory may not explain why states ratify international human rights treaties (and yet still obey them), but it does “help explain why international human rights monitoring is often quite weak.”<sup>217</sup>

Institutionalism, unlike realism, focuses on the “gains that states obtain by cooperating with other nations in the context of inter-governmental relationships created by membership in international organizations.”<sup>218</sup>

Constructivism holds that states come to accept norms and ideas through the processes of socialization and internationalism. While realism and institutionalism are concerned with the pursuit of power, constructivism aims to understand the underlying reasons for pursuing power and other statist objectives to gain social acceptance within the international community.<sup>219</sup>

Liberalism moves its focus from states to individual actors within a state and operates under three basic assumptions: (1) individuals and private groups are the primary actors in the states and also in the international sphere; (2) states represent some subset of the society; depending on whose

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213. WITHANA, *supra* note 141, at 61.

214. DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* 20 (1991).

215. WEISSBRODT, *supra* note 6, at 26.

216. *Id.*

217. *Id.* at 28.

218. *Id.*

219. *Id.* at 29; *see also* ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 25–71 (2008).

interests are represented, states will behave differently in international society; (3) state behavior is determined by the configuration of interdependent state preferences.<sup>220</sup>

In support of full respect for human rights, this Note has adopted a liberal<sup>221</sup> position and argued against the neorealist conception of the nation-state and national sovereignty. Thus, it is somewhat unsurprising that the present Author would disagree with legal positivist H.L.A. Hart, who in his seminal work *The Concept of Law*, wrote:

The rules of international law . . . are often morally quite indifferent. A rule may exist because it is convenient or necessary to have some clear fixed rule about the subjects with which it is concerned, but not because any moral importance is attached to the particular rule. It may well be but one of a large number of possible rules, any one of which would have done equally well.<sup>222</sup>

Hart essentially argued that international law was legally indeterminate because it has no way of distinguishing coercive orders from moral commands, or in the end “primary and secondary rules” of obligation.<sup>223</sup> Furthermore, as an indeterminate and ineffectual body of law, Hart posited, there is no real way for what international law creates as a body of laws to be effectively enforced. While his theory is far more intricate than is summarized here, he remains perhaps the foremost legal positivist of the twentieth century and important to consider in the context of this Note.

Despite, however, the liberal perspective of this Note, Hart is incorrect<sup>224</sup> in this case; at least from a normative or constructive perspective on human rights. Human rights *should be* seen on a par with *jus cogens*, which would, in effect, make them creatures of international law (if they actually became *jus cogens*). More accurately, the present Author argues that human rights are inherent in humankind, and on this basis should be viewed as *non-derogable*. As alluded to earlier, law is not needed to create these rights; law is needed to *enforce* them. Hart may take exception with this criticism because *jus cogens* are chimerical or nowhere positively commanded. By contrast, the naturalist would say *jus cogens* devolve from a higher law than

220. WEISSBRODT, *supra* note 6, at 29–30.

221. By liberal, this Note means to emphasize the importance of individual freedom and autonomy within the world.

222. H.L.A. HART, *THE CONCEPT OF LAW* 228–29 (2d ed. 1994).

223. DAVID INGRAM, *LAW: KEY CONCEPTS IN PHILOSOPHY* 24 (2006); *see also* Sanne Taekema, *The Point of Law: The Interdependent Functionality of State and Non-state Regulation*, in *INTERNATIONAL GOVERNANCE AND LAW* 56 (Hanneke van Schooten & Jonathan Verschuuren eds., 2008).

224. INGRAM, *supra* note 223, at 23 (“But perhaps Hart is wrong in saying that there is no single rule of recognition that unifies international laws under a single system. A German legal positivist who disagrees with Hart on just this point, Hans Kelsen, argues that the rule of recognition (‘basic norm’ or *Grundnorm*) underlying international law is the ‘constitution-like’ custom of observing treaties.”).

that created by the nation-state; therefore, international human rights (as embodied in the concepts of *jus cogens*) should be seen as peremptory norms from which no derogation is permitted by any nation-state.

To say that international law, at least international human rights law, is morally equivocated, is to deny the whole of humanity's struggle for peaceful existence. It is not necessarily the creation or absence of laws, international or otherwise, that has brought strife and misery to the world's peoples,<sup>225</sup> it is barbaric acts of slaughter and war that have done so. humankind's inclination for war, if human history is any indication,<sup>226</sup> has created precisely the opposite effect in law: instead of international law evolving to protect peoples it has evolved merely to protect nation-states and their ideologies.<sup>227</sup> And the cycle of violence repeats itself. "Foucault and Said both reject the idea that history is evolving towards a set of universal ideals. Instead they view history as a series of struggles for domination that simply replace earlier struggles."<sup>228</sup> Fukuyama, on the other hand, sees history as ended with the triumph of liberal ideology. Even though the present Author is not suggesting that law is unimportant unless it is moral, the international human rights norms that have emerged, may, on a philosophical level, be several among many that have emerged but they have emerged precisely for their moral and therefore *legal* importance.

"The influence of the international human rights movement on the system of international law has been profound, to the point that it is no longer accurate to think of international law as strictly an interstate system."<sup>229</sup> Yet ardent neo-realists maintain the following position:

Notwithstanding, the importance of human rights is a matter of *relativity*. Before us is a world of various actors with nation-States at its core. National rights and societal interests still matter. Just as sovereignty is not absolute, nor are human rights. Although some aspects of human rights, such as the right to be free from genocide, slavery and torture, may be said to be inflexible or nearly inflexible, most aspects of human rights are inherently subject to some degree of limitation . . . *limitations* of human rights illustrate that States' *willingness and agreement* to participate in the international protection of individual rights *have not placed individual rights above national sovereignty and societal interests*. The States remain the cornerstone of international law, including international human

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225. Of course law has—and continues to—protected peoples in the past.

226. MENDES & MEHMET, *supra* note 96, at 3 ("What is staggering is [that Nazi] . . . Germany did not enter into this program of genocide devoid of an intellectual, religious and moral history that would have proffered a myriad of reason for not engaging in this barbaric plan [of the "final solution"]. The instinct for dominance, self-interest and territorial grandeur seems hardwired into the nature of humankind.").

227. JAMES B. WHISKER, *THE SUPREMACY OF THE STATE IN INTERNATIONAL LAW: THE ACT OF STATE DOCTRINE* 173 (2003).

228. Olmsted, *supra* note 17, at 435.

229. Damrosch, *supra* note 24, at xv–xvi.

rights law, irrespective of whether one regards that law to be perfect and effective or not.<sup>230</sup>

Such a view seems naïve. The reasons why these limitations exist and more profound changes have not been realized in the effort to secure full respect or realization for human rights is because the nation-state has dominated and preempted many of the sustained efforts to remove these limitations. Consistently maintaining such a view is nonsensical and myopic.<sup>231</sup> What Shen and other international neo-realists fail to grasp<sup>232</sup> is that modern sovereignty is “defined by the language of a human rights culture. If a population is helpless to defend itself against tyranny, it is of little comfort that a state otherwise is in control of its territory, and that its government is able ‘to provide security, economic stability and a measure of prosperity, clean air and water,’ and so on.”<sup>233</sup> Take the situation in Afghanistan as an example: “[a]utocratic elites have learned to fight historical inevitability by destroying the engines of social progress. The cultural Luddites of the Taliban, by disempowering women and dismantling their society’s educational and health infrastructure, hope to delay their own eventual overthrow.”<sup>234</sup> Whether this overthrow is by the people or the result of another nation-state’s intervention remains a mystery. Nonetheless, the preceding section has discussed some of the legal instruments in which international human rights are embodied, argued that national sovereignty manifests in a particular kind of legal-philosophic consciousness, and argued that sovereignty is changing from an international legal principle that protects the territorial boundaries of the state, to one which protects people and human rights.

## V. THE END OF NATIONAL SOVEREIGNTY AND THE SUZERAIN WORLD POLITY

### A. The End of National Sovereignty?

Modern globalization has changed the international legal landscape. “We live now in a human rights culture.”<sup>235</sup> The supremacy of national sovereignty has been whittled away by the global demand for human rights and citizens “pressing their government for better treatment at the hands of the police, for cleaner air and fairer distribution of environmental harms, or for universal health care or the special educational needs of a minority

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230. Shen, *supra* note 26, at 431–32.

231. *Id.* at 434.

232. *Id.* at 439.

233. Cohan, *supra* note 5, at 942.

234. Franck, *supra* note 28, at 203.

235. *Relational Sovereignty*, *supra* note 20, at 2049.

group.”<sup>236</sup> As Stacy points out, “[h]uman rights claims no longer depend on geographic limitations, and may be as appropriately addressed to the broader international community as they are to a nation state’s sovereign . . . . Human rights today are based upon a much richer construction of the human subject than either the Hobbesian subject or the Lockean citizen.”<sup>237</sup>

If national sovereignty is no longer the supreme paradigm in international legal dialogue and the demand for international human rights is one of the forces driving the global community towards full respect of them, does that *truly* mean the nation-state *itself* is dying or is dead? If national-sovereignty is dead, does this mean the only way full respect for human rights to be achieved is indeed by abolition of the nation-state or national sovereignty? Although most governments of the world would never agree, and would take up arms in support of their position, the answer to a large degree is yes. Inversely, that is why full respect for human rights will never be achieved so long as sovereignty can be invoked as both a sword and a shield against human rights in the international legal sphere. This is simply the reality of the international legal order and the mythologies invested into it.

The mythology of national sovereignty Henkin has referred to manifests eloquently in Mathew Olmsted’s brilliant study of pre and post-colonial societies and the so-called “failed state” vis-à-vis international human rights and national sovereignty. In this study he writes:

[I]nternational law has used the civilization, nation-state, and self-determination standards to achieve its universalizing and dividing project. Through this project, international law has placed diverse communities of cultures, peoples, and histories in a double prison. First, these communities have been imprisoned in the imaginative geography of the colonial nation-state, and second, these artificial nation-states have been imprisoned within an international order that seeks to preserve them into perpetuity through territorially delimited legal norms . . . . The individual histories of these various cultures and peoples are interrupted, erased, and replaced by the history of the colonial nation-state . . . . Far from promoting progress, nation-building and self-determination have effectively silenced the progress of thousands of pre-colonial narratives. In Nietzsche, *Genealogy and History*, Foucault finds legal rules “are empty in themselves, violent and unfinalized” that can be bent to any purpose by those who are able to seize them. The “universal” norms of self-determination and sovereignty illustrate this point by showing that the way one defines a legal term, and who does the defining, can have a profoundly homogenizing and controlling effect on those against whom

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236. *Id.*

237. *Id.*

the term is employed. Moreover, these norms show how words can project into the future the arbitrary and senseless violence of the past.<sup>238</sup>

This Note has argued that national sovereignty is, in essence, a *legal consciousness*. The corollary to this argument is that only in the absence of this consciousness can full respect for international human rights emerge. Thus, to initially answer the fundamental question this Note addresses, while this legal consciousness has changed, and despite its decaying vitality, it seems apposite to conclude—willy-nilly a choice that is freely made—that full respect for human rights *can only be achieved or will only be achieved by the abolition of the nation-state*. But national sovereignty is here to stay, at least for a few more years—there is nothing on the horizon indicating any changes to the contrary. Sovereignty is instead, however, “becoming defined by the different nature of the social contract, a contract that must account for the increasingly complex range of transnational interactions under the conditions of globalization, and also the enlarging role of international human rights norms as benchmarks of good governance and good sovereignty.”<sup>239</sup> In the final analysis, it is not “so important whether we replace sovereignty with another concept or whether we speak about changes of its content, as long as we are aware of the trends of development.”<sup>240</sup> These trends indicate that sovereignty protects, or should protect, peoples as much as it protects borders.

#### B. Global Governance and Human Rights?

How then is this new form of international organization, i.e. global governance to be achieved? One of the results of the post-Westphalian system, in fact a defining feature, is the sublimation of sovereignty into transnational international organizations.<sup>241</sup> On a regional scale, examples of this are the E.U., North American Free Trade Agreement, Association of Southeast Asian Nations, and MERCOSUR; global examples are the W.T.O., and the U.N., among others already referred to in this Note.

All these organizations together comprise a system of global governance predicated on free trade and the belief that free trade encourages peace. That is the definition of the post-Westphalian international system. At the same time as the nation-state is declining in importance, individual rights and duties under international law are increasingly important. This leads

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238. Olmsted, *supra* note 17, at 451–452.

239. *Relational Sovereignty*, *supra* note 20, at 2044.

240. Simonovic, *supra* note 11, at 402.

241. Engle, *supra* note 28, at 45.

to the conclusion that we are now in a different legal landscape than that described by realist state theory and the Westphalian state system.<sup>242</sup>

This different legal landscape is defined and will be further developed by the participation of civil society in the democratization of the international system, i.e. moving away from the principles of classic international law. So far, in the absence of an integrated strategy, efforts have been ad hoc, as civil society—economic elites among them—aim to create their own “mechanisms of influence.”<sup>243</sup> The creation of the International Criminal Court is an example of civil society exerting such influence on nation-states in the international system; it was, in effect, civil society that was the catalyst for the creation of the ICC.<sup>244</sup> There is no reason not to expect greater participation by these aggregated networks of people—civil society—in international law, especially in the field of human rights. The world knows this to be the future of humankind, and for what it’s worth, albeit it somewhat flocculent, the U.N. has recognized the inevitability of civil society’s continued participation in the international system: “Our times demand a new definition of leadership—global leadership. They demand a new constellation of international cooperation—governments, civil society and the private sector, working together for a collective global good.”<sup>245</sup> An integrated strategy is needed, however, if full respect for human rights is to be achieved in a global governance scheme. A coordinated effort, in whatever form that might eventually manifest, however, represents the middle road between the abolition of the nation-state and full respect for human rights. Such a solution, however, must come from outside the United Nations as it has become effete as an international institution.<sup>246</sup>

### C. The Suzerain World Polity

As discussed earlier, scholars Falk and Strauss have proposed a global parliament that would exist in conjunction with the national sovereignty system. Under their model, such an “assembly would not be constituted by

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242. *Id.*

243. See Falk & Strauss, *supra* note 164, at 216.

244. William R. Pace & Mark Thieroff, *Participation of Non-Governmental Organizations*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 93 (Roy S. Lee, ed., 1999).

245. Ban Ki-moon, Secretary-General, United Nations, Speech at the World Economic Forum (Jan. 29, 2009) (transcript available at <http://www.unep.org/Document> <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=560&ArticleID=6059&l=en>).

246. See Wallerstein, *supra* note 34, at 183. See Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000), for how the UN can play a more significant role.

states. Because its authority would come directly from the global citizenry, it could refute the claim that states are bound only by laws to which they give their consent. Henceforth, the ability to opt out of collective efforts to . . . safeguard human rights, or otherwise protect the global community could be challenged.”<sup>247</sup> Falk and Strauss therefore essentially suggest that this assembly could exert a certain political influence over nation-states to such an extent that it could not be ignored. This assembly, they suggest, would keep nation-states globally accountable for their actions and transgressions in respect of human rights.

Recognizing that the current international system lacks reliable enforcement mechanisms, they in turn argue that the assembly would be able to better encourage compliance with human rights norms.<sup>248</sup> They weakly cite the “mobilization of shame” theory as support for this contention, arguing further that “a popularly elected global assembly would be more visible and credible than are existing watchdogs who [sic] expose corporate and governmental wrongdoing.”<sup>249</sup> Apart from not suggesting how such a parliament would be funded or providing any ideas for rules of procedure, most significantly, they do not suggest any mechanisms that would legally bind international states to respect, observe, and participate in the global parliament. Nor do they suggest how to *legally* ensure compliance with already existing international human rights laws and norms. In other words, at bottom their theory really leaves the door wide open for continued assertions of the importance of national sovereignty over human rights and other international human rights concerns.

Thus, as a question posed at the outset of this paper, may a one world government, or suzerain entity, which by *legal* authority binds all the sovereign nation-states of the world into full compliance and respect for human rights, be contemplated as the ultimate inroad upon national sovereignty? It seems a fantastic possibility and an unlikely one. It is difficult to imagine that even with the decay that national sovereignty has suffered that it will ever truly die. In other words, “[g]lobal governance will come not at the expense of the state but rather as an expression of the interests that the state embodies. As the source of order and basis of governance, the state will remain in the future as effective, and will be as essential, as it has ever been.”<sup>250</sup>

## CONCLUSION

Full respect for universal human rights will not be achieved by the abolition of the nation-state now, or at some point even far into the future.

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247. Falk and Strauss, *supra* note 164, at 216.

248. *Id.* at 216–17.

249. *Id.* at 217.

250. Wolf, *supra* note 9, at 190.

For practical reasons of history, politics, and law, it is just an impossible scenario. Even though it may not be the ruling paradigm in international law anymore, the nation-state is still the fundamental building block of the international legal order. Take for example the Arab-Israeli conflict as an illustrative example: the Palestinians demand a state of their own (or the 'return' of their state, depending on how one views the situation) as much as they demand redress for claimed human rights violations by Israel. If, in the paradigm of the international order national sovereignty did not matter, why else would the peace process repeatedly include the creation of a Palestinian state as one of its main objectives?<sup>251</sup>

But all this goes to show is that human rights are a *means*, not an *end*.<sup>252</sup> The end, however, is the kind of society that human rights proponents and activists aim to secure. It is a *kind* of world (or nation-states), defined by law, natural law, which they seek. In turn, this vision is too informed by a particular type of legal consciousness borne out of liberal democratic ideals.<sup>253</sup> Human rights are merely the means by which achieve this desired end, which is a world where peace, prosperity and the human rights of every individual on earth are truly inviolable. However, the creation of such a world is no easy task and has the potential to shake the pillars of history.<sup>254</sup>

The principle of national sovereignty invoked as a shield against human rights abuses and violations may have decayed, but as the neo-realists point out, is in no danger of dying anytime soon. The nation-state is a slightly different matter as state power is being dispersed among economic elites and civil society.<sup>255</sup> Thus, perhaps coming as a relief to many "New World Order" conspiracy theorists, a world where full respect for human rights is achieved will not be attained by the creation of a one world government exercising suzerainty over the various nation-states of the world. To reiterate, neither will it come with the abolition of the nation state, for abolition of national sovereignty could equally mean nothing of the international system as we know it would be left; we might descend into anarchy and chaos without the intactness of national sovereignty.<sup>256</sup>

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251. For a somewhat hawkish discussion of the issues among Israelis and Palestinians, see GUY ARNOLD, *WORLD GOVERNMENT BY STEALTH: THE FUTURE OF THE UNITED NATIONS* 94–105 (1997).

252. WOODIWISS, *supra* note 95, at 1.

253. See Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and Its Implications for International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 1–25 (Gregory H. Fox & Brad R. Roth eds., 2000).

254. Franck, *supra* note 28, at 204 ("But let there be no mistake: the fight is essentially one between powerful ideas, the kind that shake the pillars of history. It is a deadly earnest conflict between an imagined world in which each person is free to pursue his or her individual potential and one in which persons must derive their identities and meanings exclusively in accordance with immutable factors: genetics, territoriality, and culture.").

255. See WARD, *supra* note 2, at 75.

256. See Wallerstein, *supra* note 34, at 171.

“Sovereignty may one day be superseded,” writes Roth, “but not as a direct consequence of either the diminishing efficacy of unilateral regulation or the proliferation of international legal norms. It signifies not an absence of international legality, but a set of legal premises.”<sup>257</sup>

In the end, human rights have to be continually integrated into the evolving national sovereignty dialectic in order to see their full realization—it is a never ending process. We must move away from the idea that national sovereignty butts up against international human rights or viewing them in opposition to one another. It should be possible to understand the changing nature of sovereignty “even though nation-states will continue to dominate the international system in the immediate term, despite the partial emergence of an international or global civil society.”<sup>258</sup> As one commentator puts it:

No one is entitled to complain that things are getting too complicated. If complexity of decision is the price for increased human dignity on the planet, it is worth it. Those who yearn for “the good old days” and continue to trumpet terms like “sovereignty” without relating them to the human rights conditions within . . . states . . . do more than commit an anachronism. They undermine human rights.<sup>259</sup>

Those who do throw in the towel to this fight, indeed mark the “end of history.” Whether the end of history is marked by the ideological triumph of national sovereignty or the ideological triumph of international human rights in the age of liberal democracy will only be determined by posterity. Hopefully they will inherit our imagination for universal human rights, and less of our inhumanity.

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257. Roth, *supra* note 36, at 1025.

258. Hudson, *supra* note 105, at 31.

259. Reisman, *supra* note 8, at 876.

