

THE TRANSPARENCY OF SOVEREIGNTY IN INTERNATIONAL LAW¹

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The sovereign is the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence.

AGAMBEN, Giorgio, *Homo Sacer: Sovereign Power and Bare Life*.

Sovereignty and discipline, legislation, the right of sovereignty and disciplinary mechanics are in fact the two things that constitute—in an absolute sense—the general mechanism of power in our society. If we are to struggle against disciplines, or rather against disciplinary power, in our search for a nondisciplinary power, we should not be turning to the old right of sovereignty; we should be looking for a new right that is both antidisciplinary and emancipated from the principle of sovereignty.

FOUCAULT, Michel, *Society Must Be Defended*.

¹ Some sections of this paper are based on Living Short of Paradise. International Law after the End of the Cold War by Miguel González Marcos, Heinrich Böll Foundation, 2003.

SUMMARY: I. *Introduction*. II. *Sovereignty's opacity*. III. *Piercing sovereignty's opacity*. IV. *Enlightening sovereignty's opacity*. V. *Sovereignty's transparency*. VI. *Conclusions*. VII. *Sources*.

I. INTRODUCTION

On August 8, 2008, Georgian tanks entered Tskhinvali, capital of South Ossetia.² Located in the Caucasus Mountains, South Ossetia “has been all but independent since fighting broke out in the early 1990’s, after the collapse of the Soviet Union”.³ Georgia, which itself gained its independence from Russia under the notion of self-determination, wants to affirm its sovereignty from South Ossetia. Russia responded by bombarding Georgia. The battle, cast between pro-democracy, modernizing forces against a ruthless 19th century style empire, is fought under flags of national sovereign claims.⁴ This larger conflict played out at the

² *Reuters AlertNet*, Georgian Tanks Attack Tskhinvali, August 8, 2008, available at <http://www.alertnet.org/thenews/newsdesk/L8428694.htm>.

³ *New York Times*, World, South Ossetia, available at http://topics.nytimes.com/top/news/international/countriesandterritories/georgia/south_ossetia/index.html.

⁴ See generally James Traub, “Battle Cry: Taunting the Bear”, *New York Times*, August 10, 2008, available at <http://www.nytimes.com/2008/08/10/weekinreview/10traub.html?scp=1&sq=taunting+the+bear&st=nyt>.

Georgia is a polyglot nation, and views both [South Ossetia and Abkhazia] regions as historically, and inextricably, Georgian. Each, however, had its own language, culture, timeless history and separatist aspirations. When the Soviet Union collapsed, both regions sought to separate themselves from Georgia in bloody conflicts—South Ossetia in 1990-1, Abkhazia in 1992-4. Both wars ended with cease-fires that were negotiated by Russia and policed by peacekeeping forces under the aegis of the recently established Commonwealth of Independent States. Over time, the stalemates hardened into “frozen conflicts,” like that over Cyprus.

But the Georgians are intensely nationalistic, and viewed these de facto states on their border as an intolerable violation of sovereignty. Mr. Saakashvili cashed in on this deep sense of grievance, vowing to restore Georgia’s “territorial integrity”.

Olympics in China when, full of national pride, two women born and living in Brazil, Cristine Santanna and Andrezza Chagas “wearing Georgian uniforms stepped onto a patch of sand” to play beach volleyball against the Russian team. It is reported that they did not feel “animosity toward the Russian opponents Alexandra Shiryaeva and Natalia Uryadova”, who felt that they were not playing against Georgians, but against “Brazilian friends”. The Brazilians, who had adopted the Georgian names Saka and Rtvelo, were offended. They felt like Georgians, and moreover, the words Saka and Rtvelo are the Georgian words for Georgia. “When asked if the war added an emotional edge to the match, [one woman] said: “Yes. Yes”.⁵ In waging war Georgia seems to appeal to an old notion of sovereignty rooted in ethnic, territorial claims; in playing competitive sports, Georgia seems post-modern enough to have two Brazilians wearing the Georgian uniforms at the Olympics. Are these different concepts of sovereignty, and is there a way of explaining both acts under the name

See also Francisco Veiga, “Una rosa con demasiadas espinas”, *El País*, August 14, 2008, at http://www.elpais.com/articulo/opinion/rosa/demasiadas/espinas/elpepuopi/20080814elpepiopi_5/Tes. (saying that: “la operación militar Georgiana no tenía sentido, porque hubiera implicado limpieza étnica de la población Osetia y era de esperar una contundente respuesta militar rusa”).

⁵ See Lynn Zinser, “Far From War Zone, Georgia Edges Russia on the Beach”, *New York Times*, August 14, 2008, <http://www.nytimes.com/2008/08/14/sports/olympics/14beach.html>. See generally Jerry Z. Muller, “Us and Them, The Enduring Power of Nationalism”, *Foreign Affairs*, March/April, 2008, <http://www.foreignaffairs.org/20080301faessay87203/jerry-z-muller/us-and-them.html>, (arguing that “ethno nationalism will continue to shape the world in the twenty-first century”). See also generally Christopher J. Borgen, “Kosovo’s Declaration of Independence: Self-Determination, Secession and Recognition”, *ASIL Insight*, vol. 12, issue 2, February 29, 2008, <http://www.asil.org/insights/2008/02/insights080229.html>, (suggesting that depending on the circumstances “certain secessions are favored or disfavored”). From his analysis of “state practice, court opinions, and authoritative writings”, Borgen argues that a legal secession claim may trump territorial integrity if the ethnographic identity of the secessionist as people can be shown; the state from which they try to break away has been violating their human rights; and there are no effective remedies available in domestic or international law to redress grievances).

of sovereignty as the search for national pride? Is sovereignty so rooted in our basic instinct as human beings beyond family and tribal ties that it cannot be overcome in the way we are organized as human beings? Is it a matter of winning for resources, natural, reputational, or otherwise? Whatever the answers to these questions, Georgia is not alone in this quest for recognition on the heels of sovereignty.

II. SOVEREIGNTY'S OPACITY

Inspired by speculations on the impact of natural disasters or grounded in the validity of ancient titles, states of all sizes and ideological inclinations bring to international fora sovereignty claims to be rightfully honored. For example as the Arctic begins to melt, opening the promise of marine transportation and exploitation of its deposits of natural resources, Canada has sent naval patrol vessels and plans for a deep-water port to affirm its sovereign claims to the Arctic.⁶ Russia has sent icebreakers and submarines “to plant its flag on the North Pole’s sea floor”.⁷ Like-

⁶ See Ian Gunn, “Canada to reclaim Arctic waters”, *BBC News*, July 10, 2007, available at <http://news.bbc.co.uk/2/hi/americas/6287436.stm>.

⁷ Scott G. Borgerson, *Arctic Meltdown, Foreign Affairs*, March/April 2008 saying that:

[g]lobal warming has given birth to a new scramble for territory and resources among the five Arctic powers. Russia was the first to stake its claim in this great Arctic gold rush, in 2001. Moscow submitted a claim to the United Nations for 460,000 square miles of resource-rich Arctic waters, an area roughly the size of the states of California, Indiana, and Texas combined. The UN rejected this ambitious annexation, but last August the Kremlin nevertheless dispatched a nuclear-powered icebreaker and two submarines to plant its flag on the North Pole’s sea floor. Days later, the Russians provocatively ordered strategic bomber flights over the Arctic Ocean for the first time since the Cold War. Not to be outdone, Canadian Prime Minister Stephen Harper announced funding for new Arctic naval patrol vessels, a new deep-water port, and a cold-weather training center along the Northwest Passage. Denmark and Norway, which control Greenland and the Svalbard Islands, respectively, are also anxious to establish their claims.

wise, China's repression against the Tibetan protest in March 2008 was justified by sovereignty claims: The Tibetan problem "is not an ethnic problem, not a religious problem nor a human rights problem... [i]t is a problem either to safeguard national unification or to split the motherland",⁸ said Chinese president Hu Jintao. Also the territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea adjudicated recently by the International Court of Justice addresses criteria —i.e. *uti possidetis*, *effectivités*— to justify sovereignty claims.⁹ Certainly, sovereign claims are very powerful, and if they are connected with an individual identity, exclusion, including extermination, a risk to society may be inevitable based on liberal values of tolerance. A 16-year-old South American girl was attacked by a Spaniard calling her immigrant *de mierda*,¹⁰ and Santi-Roma were and still are similarly discriminated against.¹¹ So, if sovereignty still reigns supreme, and the organizations of societies are still dominant, state based organizations, why is one of the major changes in international law the modification of the notion of sovereignty?¹²

⁸ Jim Yardley, "China's Leader Insists Sovereignty is at State Over Tibet", *New York Times*, April 13, 2008, at http://select.nytimes.com/mem/tnt.html?_r=1&emc=tnt&tntget=2008/04/13/world/asia/13tibet.html&tntemail0=y&oref=slogin.

⁹ See *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), 2007 I.C.J. (October 8), <http://www.icj-cij.org/docket/files/120/14075.pdf>.

¹⁰ Jesús García, "Agresión racista en un Tren de Barcelona", *El País*, October 22, 2007, http://www.elpais.com/articulo/sociedad/Agresion/racista/tren/Barcelona/elpepusoc/20071022elpepusoc_8/Tes.

¹¹ See, e.g., M.M., "La Eurocámara estudia medidas para proteger a los gitanos", *El País*, May 31, 2008, http://www.elpais.com/articulo/internacional/Eurocamara/estudia/medidas/proteger/gitanos/elpepiint/20080531elpepiint_3/Tes.

¹² See generally Robert Jackson, *Sovereignty: Evolution of an Idea*, at 112 (2007) (saying that "[i]f modern history discloses anything about state sovereignty... it is its adaptability to new circumstances, and its continuing popularity around the world." *Ibidem.* at 10. Further, he foresees that the "idea of sovereignty and the institutions associated with it will continue to evolve in ways that

With the genocides of the 20th century, state sovereignty and its corollary non-interference with internal state affairs began to see as an anachronistic shield for governmental abuses against its citizens. How far are we from when Bodin drafted the Six Books of the Commonwealth (1576), in which absolute authority by the state was portrayed as a solution against rebellion, anarchy, and civil war. What has changed of the universal notion sought by Bodin in defining sovereignty as perpetual, absolute, “for any person or persons, within the community or outside it”,¹³ save God’s law and natural law? What should be understood of the “rightly ordered government of a number of families, and those things which are their common concerns, by a sovereign power”.¹⁴

In effect, a cursory review of the literature on international law after the end of the Cold War indicates that one of the major changes in the field was the emergence of an expected democratic standard for governments, motivated among other things by the need of observing human rights values.¹⁵ More and more, demo-

are not predictable.” *Idem*. The idea of sovereignty has been associated from “a godly Christian state, either Protestant or Catholic, under a divinely appointed king...[to] “the sovereign nation-state defined as a good fit between a language foot and a territorial shoe...[until] in some Western countries...is starting to look like a democratic multicultural society.” *Idem*. Moreover, it could be that the notion will be “replaced by a different arrangement of political and legal authority on the planet...But there is not end in sight early in the twenty-first century.” *Ibidem*. at 113. See generally *Politics Without Sovereignty. A critique of Contemporary International Relations* (Christopher J. Bickerton, Philip Cunliffe and Alexander Gouveritch eds., 2007) (for a critic of contemporary critiques of the notion of sovereignty in international relations).

¹³ *Jean Bodin Six Books on the Commonwealth* (Abridged and translated by M.J.Tooley), <http://www.constitution.org/bodin/bodin.txt>.

¹⁴ *Idem*.

¹⁵ For a literature review on international law after the end of the Cold War see Miguel Gonzalez Marcos, “Living Short of Parataxis, International Law after the End of the Cold War” (2003), http://www.boell.org/docs/Living_Short_of_Paradise.pdf. See also Birgit Laubach, et. al., “Die Rolle des Völkerrechts in einer globalisierten Welt”, *Sicherheitspolitische Herausforderungen an die internationale Ordnung zu Beginn des 21. Jahrhunderts* (2004), <http://www>.

cratic governance has begun to be seen as the optimal, acceptable form of government. Some commentators like Turner consider that emergence of that expectation as one of “the most remarkable, and exciting developments in international law of the past half-century [or perhaps] the most significant development in the history of the nation-state system”.¹⁶ Professor Thomas Franck, a pioneer in articulating the international emergence of democratic governance, refers to the emergence of that expectation as “the most important manifestation of the age of individualism.”¹⁷ It could contribute to peace and security as much as the prohibition against the aggressive use of force of Article 2 (4) of the UN Charter.¹⁸ It promises to be “the fulcrum on which the future development of global society will turn”.¹⁹

What is extraordinary about this expectation of democratic governance is that international law ceases to be indifferent to the internal form of government that states adopt.²⁰ If at the heart of one narrative about the genesis of the community of sovereign

oeko-net.de/kommune/kommune04-04/boellmemorandum.pdf, and *Die Zukunft des Völkerrechts in einer globalisierten Welt* (Heinrich-Boell-Stiftung ed. 2006).

¹⁶ Robert F. Turner, “Haiti and the Growth of a Democracy Entitlement”, in *The United Nations at Fifty. Sovereignty, Peacekeeping and Human Rights* 18 (D. M. Snider and S. J. D. Schwartzstein, eds., 1995).

¹⁷ Thomas M. Franck, *The Empowered Self. Law and Society in the Age of Individualism*, 284 (1999).

¹⁸ Robert F. Turner, *supra* note 16.

¹⁹ Thomas M. Franck, “The Emerging Right to Democratic Governance”, 86 *AM. J. INT’L L.* 46, 49 (1992). See also Thomas M. Franck, “Fairness in international law and institutions”, 88 (1995).

²⁰ See, e.g. Douglas M. Johnston, “The Historical Foundations of World Order: The Tower and the Arena”, 94 (2008).

Both in the fields of human rights and international environmental law, states are now held increasingly accountable to the international community for the treatment of their own nationals and for the exercise of their stewardship responsibilities. Older concepts of state sovereignty, veering toward the absolute, are not longer acceptable. If it proves impossible to overcome political resistance to UN Charter revision along these lines, then it falls upon the international law community to assist the process of interpretation.

states lies the Westphalia Peace (1648);²¹ at the heart of one of the possible evolving narratives of the future of this community lies the democratic governance. At Westphalia, states acknowledged themselves reciprocally as equals and promised among themselves mutual independence. Now, states not only act upon that understanding, but also expect among them that they comply with minimal democratic standards. In 1648, sovereignty was conceived closed, opaque; now, sovereignty could be conceived open, transparent. In other words, one of the notions making possible the Westphalia peace after 30 years of religious wars was to recognize that within each territory every state may adopt whatever form of government it pleases without the interference of other states. As long as there is no interference in the internal affairs of a state from other states, particularly in the governmental form and the selection of a religion, there should be no war. Now, the expectation of democratic governance suggests that to obtain peace and security, it is true that no interference in domestic affairs or the territorial integrity of a state should be taken over by another state. Nonetheless, if a particular government does not follow or observe certain norms, such as protecting its own population, ensuring fundamental rights, or showing cooperation in addressing pressing global problems such as global warming,²²

²¹ See *ibidem*. at 408-13 (describing the antecedents and analyzing interpretations about the significant of the Peace of Westphalia for the foundations of the international nation state system. "In the theory of international relations, the famous Peace of 1648 has acquired "cornerstone" status, providing support for the new international structure of power... Designed into the settlement was the core concept of state sovereignty." *Ibidem*. at 409. The author concludes that "[t]oday, most legal writers are inclined to resist the notion that the Peace of Westphalia was creative of the world's first system of fully independent, sovereign states." *Ibidem*. at 412.

²² For information about the challenges of climate change and energy policy see generally Heinrich Böll Stiftung, "Die Grüne Politische Stiftung", Ökologie, <http://www.boell.de/oekologie/oekologie.html>. See also Hans Gersbach, "A New Way to Address Climate Change: A Global Refunding System", 5 The Economist' Voice, 1 (July 2008), available at <http://www.bepress.com/ev/vol5/>

then it could be legitimate for the international community to require that it abide by these expectations.²³ The legitimacy of these expectations depends on how they are negotiated to ensure that all interests are taken into account. This expectation that the government of a state would comply with certain internal conditions of democratic governance grew parallel to the growing consciousness of inter-dependence among societies and the connection of all to global challenges. Likewise, integral notions of peace, security, and ecology emphasized prevention, opening the door for more monitoring initiatives. To expect the states of the international community to comply with minimal conditions of democratic governance to ensure the protection of fundamental rights indicates a shift in the notion of sovereignty, and thus, in the foundations of international law.²⁴

iss4/art2/?sending=10284 (commenting that one of the main problems with Kyoto-style cap and trade agreements is the free-rider problem. “Greenhouse gases disperse around the globe and burden everyone. One country’s reductions burden it alone but benefit everyone. That makes it quite a trick to get largely selfish states to reduce emissions” *Idem.*).

²³ See James Crawford, *The Creation of States in International Law* 148-49 (2nd. ed., 2006) (warning that as regards to statehood itself, there exists any criterion requiring regard for fundamental human rights....This is not to say that the transformation in international human rights norms and (to a lesser extent) institutions has had no consequence for States. State are no longer ‘sovereign’ in the sense of entitled to act at liberty on their own territory and with respect to their own nationals....But these changes have occurred, so to speak, within and in the context of the continuing acceptance of the sovereignty of States as the organizing or constitutional principle of the international system. The consequence of violations even of fundamental rights will be responsibility, scrutiny and the loss of legitimacy; they do not entail the loss of title or status of the State concerned.

²⁴ See *ibidem.* at 150 (saying that “there is room for the insistence on general standards of human rights and of democratic institutions as an aspect of the stability and legitimacy of a new State. But this has not matured into a preemptory norm disqualifying an entity from statehood even in the cases of widespread violations of human rights.” *Ibidem.* at 155. Further, “the question of democracy as an element of international law is not a simple one, especially

III. PIERCING SOVEREIGNTY'S OPACITY

The expectation for more transparency from the internal affairs of governments is not new, but it became apparent after the end of the Cold War, on the heels of two notions brought to the foreground: inter-dependence and human rights. The first notion acknowledges that there are global challenges that cannot be solved by one state, no matter how powerful the state. These so called transnational challenges called for concerted actions among states. For instance, the challenge of global warming has an answer in the United Nations Framework Convention on Climate Change,²⁵ in which the findings provided by the Intergovernmental Panel on Climate Change (IPCC), a scientific intergovernmental body organized by the World Meteorological Organization, and by the United Nations Environment Program, played a key role.²⁶ The challenge of money laundering and terrorist financing has an answer in the recommended measures to be adopted by governments as proposed by the Intergovernmental Financial Action Task Force Grupo (FATF).²⁷ The second notion, human rights, claims that there are transnational values based on human dignity and freedom that demand observance by the domestic jurisdiction of the states. If this claim is accepted, then the form of government becomes more uniform according to the expectations defined by the human rights discourse. Thus, the acceptance of the validity of the notions of inter-dependence and human rights tempers the differentiation between the domestic and international spheres, without obliterating it. This has al-

as it tends to be debated in terms of the possibility of external imposition, of a people being forced to be democratic." *Id.* at 153).

²⁵ See generally "United Nations Framework Convention on Climate Change", <http://unfccc.int/2860.php>.

²⁶ See generally Intergovernmental Panel on Climate Change, <http://www.ipcc.ch/about/index.htm>.

²⁷ See generally "FATF-GAFI", http://www.fatf-gafi.org/pages/0,3417,en_32250379_32235720_1_1_1_1_1,00.html.

lowed for a relatively more normative strength of international law vis-à-vis a given state, upon which consents and practices in international law depends. Perhaps for this reason, Cornelia Navari, said that in the second half of the XX century, a transformation in the relations among states took place that could be considered in the future as revolutionary; some called this transformation internationalization, others emphasized the interdependence of nations, and others described it as the emergence of a global community.²⁸ Certainly, the possibility of beginning to talk seriously about a global community is partially due to accepting the notions of interdependence and of human rights as unquestionable.

An increasing cooperation among states, however, due to the acknowledgement of the notion of interdependence could be explained within the conceptual framework of traditional international law, i.e. practices and rules that the states adopt as customary or treaty law. It is in the best interest of the states to relate to each other rationally. From the need, for example, of controlling pollution across borders and of allocating responsibilities as a result of environmental damages, a practice developed first; and then treaties regulating it.²⁹ If a particular state does not cooperate to solve a common problem of contamination among several

²⁸ See Cornelia Navari, *Internationalism and the State in the Twentieth Century*, 1 (2000).

²⁹ See generally Noah D. Hall, *Transboundary Pollution: Harmonizing International and Domestic Law*, 40 U. Mich. J.L. Reform 681 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931276 (mentioning “[T]ransboundary pollution...is one of the oldest and most persistent problems in environmental law”. *Idem*. Further, “approaches that either entitle the polluting state to do whatever it wants regardless of the consequences to its neighbors under the guise of absolute territorial sovereignty, or outlaw any pollution that would harm a neighboring state under the guise of absolute territorial integrity, were rejected long ago”. *Ibidem*. at 686). Cf. generally Kertin Mechlem, International Law Commission Adopts Draft Articles of a Transboundary Aquifers Convention, *ASIL Insights*, Vol. 12, August 27, 2008, available at <http://www.asil.org/insights/2008/08/insights080827.html>; International Law Commission, Shared Natural Resources, The Law of Transboundary Aquifers, A/CN.4/L.724, May 29, 2008, <http://www.asil.org/pdfs/ILCDraftArticles.pdf>.

states, it would show a lack of reciprocity, and perhaps it would infringe on an international obligation for which bilateral or multilateral recourses could be available to demand compliance or indemnity. But to consider the way a government treats its own people a matter of international concern and measured according to international human rights standards cannot be explained satisfactorily within the conceptual framework of the traditional international law. The observance of human rights brings the expectation that governments adopt a type of government, regardless of how this affects directly or indirectly other states. It is assumed that the basic institutions of democratic governance have a strong tendency to ensure observing human rights.³⁰ It is also assumed that states with institutions of democratic governance are less inclined to initiate offensive wars and this contributes to the maintenance of international peace and security.

In *Nicaragua v. United States of America*,³¹ the International Court of Justice reiterated that the adoption of one or other form of government does not constitute a violation of customary international law; otherwise the principle of state sovereignty in which

³⁰ Cf. generally Simon Chesterman, *The UN Security Council and the Rule of Law. The Role of the Security Council in Strengthening a Rules-based International System*, Final Report and Recommendations from the Austrian Initiative, 2004-2008 (2008), at 16, http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/Vertretungsbehoerden/New_York/Kandidatur_SR/FINAL_Report_-_The_UN_Security_Council_and_the_Rule_of_Law.pdf (“Human rights treaties since the 1948 Universal Declaration of Human Rights have advocated the rule of law as the foundation of a rights-respecting State”).

³¹ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) <http://www.icj-cij.org/docket/files/70/6503.pdf>, addressing the finding by the United States government that Nicaragua was adopting measures to adopt the form of government as a “totalitarian Communist dictatorship,” the Court stated that adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State, *ibidem*, at par. 263, p. 133.

international law is based and the freedom to choose the political, social, economic, and cultural system of each state would lose any meaning. True. But the expectation that governments observe human rights standards coupled with the theory that democratic governance is one of the most suitable institutional arrangements to ensure compliance with human rights puts restrictions on the way state sovereignty is organized and exercised. In other words, sovereignty still is the principle in which international law rests, but the freedom resulting from this sovereignty of choosing the political, social, economic, and cultural system by each state has changed.³² This is a significant change for international law, to say the least, because it implies that expected standards of democratic governance might be a matter of international concern justifying initiatives of verification and prevention to ensure compliance with them. Assuming that those standards must be negotiated by the still sovereign states, once agreed upon, they will not be entirely within the sovereign freedom of states to change because the measure of its compliance comes from a transnational human rights discourse demanding minimal international standards. As Rainer Forst indicates, the normative principle of the respect of human dignity applies to everyone “regardless of political settings.... [But] the political context where this right turns into a basic political right to justification [is] the context of a particular, ‘domestic’ society and its basic structure...[in other

³² Cf. Martti Koskeniemi, “From Apology to Utopia: The Structure of International Legal Argument” 192-263 (1989) (explaining the difficulties with the notion of sovereignty, the author concludes that: [i]n modern international law “sovereignty” plays a role analogous to that played by “liberty” in domestic liberal discourse. It works as a description and a norm. It characterizes the critical property an entity must possess in order to qualify as a State. And it involves a set of rights and duties which are understood to constitute the normative basis of international relations. But moderns have difficulty to envisage how the relations between the descriptive and prescriptive parts of sovereignty doctrine should be understood, *ibidem.* at 262).

words] a historically situated political community and order”.³³ It is possible to have a “decent hierarchical society”, in the Rawlsian sense, which complies or should comply with at least some notion of human rights in the normative, moral dimension. How this normative, moral dimension finds particular expression, however, including the ways in which these particular expressions are legitimately produced in a given society, should be left alone unless it can be demonstrated that a particular expression shows extreme deviations from reasonable normative, moral discourse, values, or principles. This does mean, however, that sovereignty has become superfluous. It means that sovereignty has become transparent vis-à-vis its population.³⁴

IV. ENLIGHTENING SOVEREIGNTY’S OPACITY

The relevance of the internal governance of states for international law became evident when a connection was established

³³ See Rainer Forst, “Toward a Critical Theory of Transnational Justice”, in *Global Justice* 180 (Thomas W. Pogge, ed., reprint 2004). See also generally Frans Viljoen and Lorette Louw, “State Compliance with the Recommendations of the African Commission on Human and People’s Rights, 1994 – 2004”, 101 *Am. J. Int’l L.* 1 (2007) (distinguishing between direct compliance and indirect compliance with human rights law. Direct compliance refers to if the European Court of Human Rights determines that a country must give compensation to a national whose rights have been violated; indirect compliance refers to use of human rights in shaping new domestic legislation or in its use as a source of interpretation).

³⁴ See Thomas F. Franck, *Human Rights as Impingement on Sovereignty*, in *Shifting Boundaries of Sovereignty* 30 (Heinrich Böll Foundation, ed., 2006), http://www.boell.org/Pubs_read.cfm?read=154, stating:

In the twenty-first century, the notion of sovereignty, which has been evolving constantly from the days of the Greek city-state to the present, will change even more. Sovereignty will become ever more layered. Persons will have more rights and duties that are protected by, and owed to, the city, province, nation, region and global system. The task of allocating the new layers of protections and governance must be addressed by balancing concern for efficiency, fairness and transparency or accountability.

among peace, security, development, human rights, and democracy. This connection became evident after the end of the Cold War. This is not to say that the interrelation among them emerged suddenly. On the contrary. This connection was already *in nuce* in the United Nations Charter, when opened membership to the organization to “peace-loving states which accept the obligations contained in the present Charter, and in the judgment of the Organization, are able and willing to carry out these obligations”.³⁵

Already in 1950, Hans Kelsen, commenting on membership requirements for joining the United Nations, indicated that the requirement of being a peace-loving state is very vague, and that “it [was] significant that among the conditions of membership—be it original or subsequent—there is no reference to the form of government”.³⁶ Kelsen left the door ajar; however, to considering the form of government for membership to the United Nations, *if and when* the form of government would cease to be a matter of domestic concern exclusively. The United Nations “Charter does not require a democratic form of government as a condition of being or becoming a Member of the Organization”,³⁷ said Kelsen. The Charter, he continues, offered no basis for intervention of the Organization with the goal of promoting “a democratic form of government in a state where another form of government is established or about to be established, *as long as* the form of government is considered to be a matter which is within the domestic jurisdiction of the state”.³⁸ Kelsen pointed out, however, that the Report of the Rapporteur of Committee I/2 corroborates that although it was considered in the discussions whether for admission to the United Nations it would have been advisable to include in the Charter conditions regarding the “character and policies of governments”; the Committee “did not feel it should

³⁵ United Nations Charter, article. 4.

³⁶ Cf. Hans Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* 76 (1950, 4th reprint 2004).

³⁷ *Idem*.

³⁸ *Idem* (emphasis added).

recommend the enumeration of the elements which were to be taken into consideration”, not only for the difficulties of assessing the political institutions of states, but also because such an assessment would infringe the principle of non-intervention”.³⁹ Nonetheless, the Report made clear that this does not mean that “in passing upon the admissions of a new Member, considerations of all kinds cannot be brought into account”.⁴⁰ Also, Kelsen highlighted that due to a motion by the Mexican delegation, the Committee included in the records that in the understanding of the Mexican Delegation “[Article 4 of the Charter] cannot be applied to the states whose regimes have been established with the help of military forces belonging to the countries which have waged war against the United Nations, as long as those regimes are in power”.⁴¹ Further, Kelsen refers to several resolutions adopted by the General Assembly of the United Nations, in which recommended that “the Franco Government of Spain be debarred from membership in international agencies established by or brought into relationship with the United Nations... until a new and acceptable government is formed in Spain”.⁴² Acceptable government was explicitly described in the resolutions as a government that “derives its authority from the consent of the governed, [it] is committed to respect freedom of speech, religion and assembly and to the prompt holding of an election in which the Spanish people, free from force and intimidation and regardless of party, may express their will”.⁴³ Thus, the connection between the ability to carry out the goals of the United Nations and the form of government of states was already established at the creation of the United Nations and continues to evolve thereafter.

Dorothy Jones, on her excellent work *Toward a Just World: The Critical Years in the Search for International Justice*, finds

³⁹ *Ibidem.*, at fn. 4.

⁴⁰ *Idem.*

⁴¹ *Ibidem.* at 76.

⁴² *Ibidem.* at 77.

⁴³ *Idem.*

a progressive refinement among several connections: between justice and peace, between justice and rights, particularly in the form of human rights; and between justice and compliance.⁴⁴ Professor Franck, on his seminal work, *Fairness in International Law and Institutions* (1995) also indicates that the advancements of international law occurred some times using connections via legal fictions, for instance, that the violations of human rights constitute a threat to international peace and therefore it could be characterized as a violation of the duty of a state to the right to security of other state.⁴⁵ Thus, it was the refinement of the connection among peace, security, development, human rights and form of government that brought the belief that democratic governance increases the disposition of states to comply with international obligations and standards. In fact, Kofi Annan suggested that strengthening the rule of law and fair elections —to cite some features of democratic governance— are part of peace building activities.⁴⁶

⁴⁴ See Dorothy Jones, *Toward a Just World: The Critical Years in the Search for International Justice* 233-34 (2002) (finding conceptual refinements in making justice an international value in the following links: 1. The link between justice and peace... 2. The link between justice and rights, particularly in the form of human rights. This link was prompted by the failure of protecting human beings in the Second World War. This link “is now exceptionally strong”; and 3. The link between justice and law. It implies a shift from “voluntary compliance with international rules toward a system in which those rules can be enforced.

⁴⁵ See Thomas M. Franck, *Fairness in International Law and Institutions*, *supra* note 19, at 5 (indicating the increasing maturity of international law not only in regulating relations between states, but also between states and non-states entities as well as persons. The author said that some of these international regulations took place under what he considers a ‘veil of legal fictions’, namely, that civil war of human rights violations within a country could pose “a threat to international peace... But even this creative fiction cannot hide the newness of the idea that international legal standards may govern conflicts between citizens, or factions, and their own government”).

⁴⁶ See Kofi Annan, “Report of the Secretary-General on the Work of the Organization” § 94, 12 (2000),

Peace-building in practice involves initiatives to help promote national reconciliation and justice, respect for human rights and the rule of law, and the

The connection among the values of peace, security, development, human rights, and democratic governance brought an emphasis on prevention via monitoring of compliance with human rights standards and key components of the rule of law of the governments. Thus, it is considered that without the observance of human rights, a government has the tendency to deteriorate the conditions of the lives of its people that almost inevitably will become a threat for international peace and security. There is no surprise that this connection has been consistently shown in the research attempting to predict state failure.⁴⁷ For instance, in the most comprehensive initiative to measure state failure and identify early signals, thus far the State Failure Task Force, now known as the Political Instability Task Force (PITF),⁴⁸ the following were found to be the key global drivers of state failure:

organization of free and fair elections. It also includes measures to create propitious conditions for sustainable economic growth, a necessary condition for reconstruction. In pursuing these goals, our offices maintain regular contacts with relevant donor countries and with representatives of the international financial institutions.

Even trade agreements are viewed in light of its effect on individual freedom. See generally Steve Charnovitz, *Trade Law and Global Governance*, 396 (2002) (“Because it enhances both due process and property rights of economic actors, the WTO is more than a commercial agreement; it is also a human rights agreement”). See also Fergus Carr and Theresa Callan, *Managing Conflict in the New Europe: The Role of International Institutions*, 15 (2002) (mentioning that “[t]he demarcation lines between what in the Cold War was deemed to be security and the ‘softer’ world of political economy have blurred as states now view their stability in a broader sense. Additionally processes of democratization, human rights, and law have rendered security a much more complex concept”).

⁴⁷ For security reasons, the need to prevent state failure gained urgency in the 1990s. Several attempts at developing indicators to measure state failure were made in the previous decade. For an account of attempts to developing indexes for failed, weak, or fragile states see Susan E. Rice and Steward Patrick, *Index of State Weakness in the Developing World*, The Brookings Institution, (2008), at 5-7, http://www.brookings.edu/reports/2008/02_weak_states_index.aspx.

⁴⁸ State Failure Task Force Report: Phase III Findings by Jack A. Goldstone, Ted Robert Gurr, Barbara Harff, Marc Levy, Monty G. Marshall, Robert

- Quality of life: the material well being of a country's citizens.
- Regime type: the character of a country's political institutions.
- International influences, including openness to trade, memberships in regional organizations, and violent conflicts in neighboring countries.
- The ethnic or religious composition of a country's population or leadership.

Although the PITF report indicates that other factors—such as patterns of development, and types of ideology—played a role in certain regions, they were not “significant in a global analysis”.⁴⁹ For the global model, the “strongest influence on the risk of state failure was the type of regime”.

If this connection is accepted as valid, the form of government ceases to be a matter solely of domestic concern, and becomes a matter of international concern that requires monitoring, compliance, and prevention. As a corollary, sovereignty, the foundation of the nation-state system, should be seen through new eyes also. Sovereignty still is the principle on which international law rests, but the freedom from sovereignty in choosing the political, social, economic, and cultural societal organization has changed. Whatever the form of government, it must observe human rights, and this has implied so far an understanding that minimal institutional components of democratic governance should be present.

V. SOVEREIGNTY'S TRANSPARENCY

Several attempts have been made to express the shift in the notion of sovereignty. One way is to reread the classical notion

H. Bates, David L. Epstein, Colin H. Kahl, Pamela T. Surko, John C. Ulfelder, Jr., and Alan N. Unger, in consultation with Matthew Christenson, Geoffrey D. Dabelko, Daniel C. Esty, and Thomas M. Parris (2000).

⁴⁹ *Ibidem.* at V-VI.

of sovereignty to show that it was never conceived as an absolute, as widely held by later interpreters, but that sovereignty is restricted by notions of natural law. In effect, when Bodin talked about sovereignty as perpetual and absolute, he mentioned its restrictions. He understood *perpetual* sovereignty as that which “lasts for the life time of he who exercises [it]”.⁵⁰ He understood absolute as the power exercise without conditions from anybody, except when “the condition of appointment [of the sovereign] are only such as inherent in the laws of God and nature...[A]ll princes of the earth are subject to the laws of God and of nature, and even to certain human laws common to all nations”.⁵¹ Another attempt is to decouple elements of security from their territorial dimension arguing that a global community cannot tolerate incubations of violence within a state because of its effects beyond its borders such as refugees and terrorism, so security should be understood as preserving more subtle components of social cohesion in a society. Security, as John Steinbruner postulates, is better conceived not over a territory, but on vital legal standards. The responsibility of keeping these standards requires monitoring; verification and control among states are in placed.⁵² Thus, sovereignty should comply with universal legal standards to avoid breakdowns or failed states. The responsibility to keep legal universal standards would impose checks on the member nation-states.⁵³ It would imply also that the international community could intervene if a particular nation-state failed to

⁵⁰ Jean Bodin, *supra* note 13, <http://www.constitution.org/bodin/bodin.txt>.

⁵¹ *Idem*.

⁵² John Steinbruner, *Principles of Global Security*, 146 (2000). Cf. generally Klaas van Walraven *Early Warning and Conflict Prevention: Limitations and Possibilities* (1998).

⁵³ See John Steinbruner, *supra* note 52, at 148.

In principle the concept of sovereignty already has evolved to encompass not only the right to be protected from outside interference but also the obligation to uphold universal standards. And, again in principle, it is a natural extension of this development to make the right of protection contingent on the effective exercise of this fundamental obligation.

maintain these standards. In the end, a condition to the legitimate exercise of sovereign powers would be minimal human rights compliance defined as essential for good governance. This legitimacy would avoid a breakdown of the legal order, and therefore, avoid posing a threat for peace and security.⁵⁴ By implication, democratic governance and human rights (*vital standards*) are no longer a domestic matter. Internal sovereignty must comply with substantive international standards and could be challenged if the government of a state were not to respect its commitment to equitable and sustainable development in democracy.⁵⁵ Briefly,

See also ibidem. at n. 26 (quoting Francis M. Deng and others, *Sovereign as Responsibility: Conflict Management in Africa* (Brookings Institution, 1996); Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995). *See also ibidem.* at 173

It is increasingly doubtful that vital interest can be defined in compartmentalized terms – ones that are selective with regard to geography, culture, or national identity. It is increasingly likely that security and prosperity for all societies will depend on coordinating rules resting on legal foundations that must be generally defended if the integrity of the rules is to be maintained.

⁵⁴ *See ibidem.* at 149.

⁵⁵ *See idem.*

The doctrine of sovereignty responsibility... would impose a serious requirement on recognized members of the nation-state system to preserve the most basic legal standards within their jurisdiction and a residual obligation on the international community as a whole to do so if a member state fails to meet the requirement.

See also Juliane Kokott, *From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization -with Special Reference to the German Basic Law*, in *Constitutionalism, Universalism and Democracy -A Comparative Analysis* 74 (C. Stack, ed. 1999) (saying that the “[m]odifications of the principle of sovereignty now exclude the view that constitutional orders are merely internal matters. Rather, international law prescribes the protection of human rights, and according to an increasingly held view, even democratic governance.”). *Cf. generally* L. Ali Khan, *The Extinction of Nation-States: a World Without Borders* (1996); Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* 128 (Daniel Heller-Roazen transl. 1998). This impetus for universally standardizing the form of government could be interpreted as another phase in the “‘national’ and biopolitical development of the modern state...[that has] at its basis not man as free and conscious political

the condition of the legitimate exercise of sovereignty would be measured according to the standards coming from human rights and democratic governance notions. As the International Commission on Sovereignty and Intervention concludes, sovereignty does not entail an unrestricted state power. Sovereignty conveys “a dual responsibility: externally —to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state... Sovereignty as responsibility has become the minimum content of good international citizenship”.⁵⁶ The implications of thinking about sovereignty as responsibility, which the Commission sees as a trend in state practice, are that national state authorities must protect “the safety and lives of citizens and promotion of their welfare ...[that they] are responsible to the citizens internally and to the international community through the U.N. ...[that they] are responsible for their actions”.⁵⁷ There is no fundamental incongruity between this contemporary notion of sovereignty as responsibility and the classical formulation of sovereignty by Bodin, in which the sovereign is not beyond the laws of God and nature, “and even to certain human laws common to all nations”.⁵⁸ Despite obvious difference between human rights discourse (immanent) and natural law (transcendent), human rights discourse is fulfilling an equivalent function as traditional conceptions of natural law. Human rights discourse would be sustaining once again the idea of a distinct international community along the states. They would underline a transnational order beyond the state consent. It is not a surprise that some critics of this development compare the attempt to exercise moral or spiritual power by international human

subject, but, above all, man’s bare life, the simple birth that as such is, in the passage from subject to citizen, invested with the principle of sovereignty”.

⁵⁶ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), at § 1.35, 8, <http://web.gc.cuny.edu/icissre/search/Final.Report/Commission-Report.pdf>.

⁵⁷ *Ibidem.* at § 2.15, 13.

⁵⁸ Jean Bodin, *supra* note 13, <http://www.constitution.org/bodin/bodin.txt>.

rights authorities with “the sort of “ghostly” authority claimed by the Holy Roman Empire or by the universal Church”.⁵⁹ Human rights discourse is seen as a secular version of that ghostly authority. For those critics, sovereignty always “implies the right to say no to outsiders”.⁶⁰

It has not been easy to articulate this shift in the notion of sovereignty satisfactorily. Commentators refer to a shared sovereignty,⁶¹ especially in those regions in which integration process are taking place; they refer to sovereignty as a network, and not as a monolithic entity; or they note simply that the international order is founded on two logically incompatible ideas. Perhaps, as Dorothy Jones indicates, what happened was that the contemporary international order as symbolized by the creation of the United Nations was based on an internal tension. The organization’s structure gives primacy to state sovereignty with the condition that it does not affect the peace, security, and freedom of other state. Beyond this condition, each state was completely free to organize its internal matters. Nonetheless, in the structure itself, there are elements of a value system (human rights, justice) that evolved within which each state should act as an ‘agent’, and not as a ‘principal’.⁶²

⁵⁹ Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States*, 69 (2005).

⁶⁰ *Idem*.

⁶¹ See, e. g. Thomas L. Ilgen, “Reconfigured Sovereignty in the Age of Globalization”, in *Reconfigured Sovereignty. Multi-layered Governance in the Global Age*, 29 (Thomas L. Ilgen ed. 2003)

To argue that globalization has diminished state sovereignty is not to argue that state sovereignty has eroded but rather that it has peaked and is receding ... we speak more appropriately of modest reconfiguration of sovereignty where the state plays different and less directive roles of shares or pools sovereignty with other actors large and small.

⁶² See Dorothy Jones, *supra* note 44, at 227-28 (2002) (arguing that the San Francisco Conference created a document at odds with itself in the same way that the post war international system was at odds with itself. The basic structure of both was determined by the primacy of the sovereign state... with liberty] limited only by agreement not to disrupt the peace of the world or

At the end of Cold War, this apparent incongruity in the notion of sovereignty that requires the respect of the independence of states and therefore the principle of non-intervention as well as the responsibility of keeping standards of democratic governance is a fundamental shift in the notion of sovereignty, and therefore in the foundation of international law. A systematic, comprehensive articulation of this new notion of sovereignty that accounts for the need of an effective, strong state ensuring a vital civil society based on human rights values together with the compliance with international standards of governance, is a task to be done. There is the need for developing a nuanced theory of state sovereignty.⁶³ A theory that could support keeping the core set of sovereign functions that are necessary for a working state within the international legal order.⁶⁴ In addition, a theory that could

infringe on the liberty of other states. Beyond that, a state was free to make agreements and to withdraw from those agreements. It was free to arrange its internal affairs as seemed best to it, and no other state had the right to interfere. For years this had been at the very foundation of sovereignty, a principle invoked to reject criticism of internal affairs, much less intervention . . . Yet in the charter, as in the international system, there were signs of a different framework of values, one that did not begin and end with the sovereign state. The state was incorporated within this different framework, but as agent not as principal. The key word is within ...: Human Rights, Fundamental Freedoms. Justice. The obligations of law. These signs of a world beyond the horizon of sovereignty, to which sovereignty might contribute but which it could neither encompass nor deny, were far too strong to be ignored at San Francisco.

Idem. See also Kelsen, Hans, *supra* note 36, at 76-7 (indicating the discussion on considering the form of government as a criteria for membership in the United Nations)).

⁶³ See Jennings, Robert, "Sovereignty and International Law", in *State, Sovereignty, and International Governance*, 37-8 (G. Kreijen, M. Brus, J. Duursma, E. D. Vos and J. Dugard eds.) (2002), ("So what is needed is not so much a theory explaining the decline of national sovereignty but a theory explaining and justifying the present vital transformation of State sovereignty into the field of governmental activity on the international plane").

⁶⁴ See Elazar, Daniel J., *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* 1-7 (1998) (explaining the need for developing constitutional frameworks for ensuring democratic governance as "globalization advances". *Id.* at 3. Further, he indicates that "[t]he new confed-

identify those attributes of sovereignty inextricably embedded with transnational standards such as human rights for which the state has a responsibility to ensure their observance.⁶⁵ A theory is

eralism rest on three pillars: security, economic integration, and protection of human rights.” *Id.* at 4. And warns, [i]t is not that states are disappearing, it is that the state system is acquiring a new dimension, one that began as supplement and is now coming to overlay . . . the system that prevailed throughout the modern epoch. That overlay is a network of agreements that are not only militarily and economically binding for the facto reasons but are becoming constitutionally binding, de jure. This overlay increasingly restricts what was called state sovereignty and forces states into various combinations of self-rule and shared rule rather than as the one species of federalism accepted in modern times – federation. *Id.* at 19. As a result, the states have to acknowledge their interdependence and belonging to a non-centralized “multicentered network”. *Id.*)

⁶⁵ See Van Staden, Alfred and Vollaard, Hans, “The Erosion of State Sovereignty: Towards a Postterritorial World?”, in *State, Sovereignty, and International Governance* 182 (G. Kreijen, M.

Brus, J. Duursma, E. D. Vos and J. Dugard eds. 2002).

[F]or long, sovereignty has been above all considered the right of independence and freedom from external interference. At present, sovereignty also comprises certain duties, obligations, and responsibilities towards its subjects, other States, and international and regional, public and private bodies according to these standards.

Political sentiment in western countries is tilting towards the belief that States have a duty to interfere with domestic affairs in another State where its government fails to meet universal or regional standards. It is even suggested that an international court could withdraw the legal title of sovereignty from a State should that State violate or neglect certain standards. Though sovereign States may delegate the right to set standards to functionally-organized governing bodies, non-State actors still rely largely on territorially state policy and military to enforce compliance with the standards. Therefore, non-territorial governance will survive only if it is embedded within a secure legal and political framework compelling states to abide by the standards of conduct and committing them to maintain regional or world order.

See also Lahneman, William J., “Summary of Proceedings of the Conference on the Evolution of the Nation-State Through”, 2015 (2000), http://www.cissm.umd.edu/papers/files/lahneman_1.pdf (mentioning that the participant in the conference agreed that “unilateral state action will become less effective as transsovereign problems more prevalent . . . [that states will] change the manner in which they exercise authority over affairs in their territories”).

needed that could explain their mutual interaction and differentiated unity. This rethinking of sovereignty theory is important not only for the sake of knowledge, but crucial for contributing for the advancement of international law.

VI. CONCLUSIONS

Regardless of how this shift in the notion of sovereignty would be conceived, it has been significant. If consensus is reached about considering a democratic governance as the most efficient way of organizing a state for ensuring human rights values, then governments would be responsible internally for aspiring and for keeping basic components of democracy. The basic components that countries could be expected to comply with internationally must be negotiated among states, if the hope is that they wish to abide by them and do not see them as an external imposition. And, above all, if it is so hoped that the states would be willing to exercise their sovereignty openly, transparently, in which monitoring of compliance with vital standards would be not only possible, but also desirable. Unilateral interventions are not acceptable. If intervention is necessary, this has to be procedurally legitimate decision. What about the Security Council of the United Nations? In the meantime, while we find out some answers, there are pressing problems that require a humane solution. Amidst the rhetoric of self-determination, annexation, ethnic cleansing, responsibility to protect, international security, and violations of international law, but above all sovereignty and territorial integrity, South Ossetia and Abkhazia want independence from Georgia. Backed by the Russian Federation, their declaration of independence is considered by the Georgian President Saakashvili as “an attempt to militarily annex a sovereign state —the nation of Georgia”.⁶⁶ While he asked rhetorically “Is it legal to remove

⁶⁶ Saakashvili’s Statement on Russia’s Action, N.Y. TIMES, Aug. 27, 2008, <http://www.nytimes.com/2008/08/27/world/europe/27saakashvili.html?scp=4&sq=South%20Ossetia%20declares%20independence&st=cse>.

ethnic groups from their homes using violence and terror? Is it moral or legal for an ethnically cleansed area to be rewarded with independence by a neighbor?"⁶⁷ many South Ossetians expect to be joining the Russian Federation.⁶⁸ President Saakashvili, in the name of the sacred foundations of international order, reminds the world that "according to international law, Georgia's territorial integrity and sovereignty is inviolable [and that] this is a test for the entire world and a test for our collective solidarity".⁶⁹ It is an irony that many of South Ossetia's population are considered to be "ethnically distinct from Georgians and many hold Russian passports";⁷⁰ as the [Brazilian] Georgian women competing in the Olympics in Beijing in beach volleyball are arguably ethnically also distinct from Georgians and have Georgian passports. It is so hoped that in this and other tests to come, the world realizes that regardless of context, individuals should have the sovereign decision of where they want to belong, and for some, what they want to be;⁷¹ that individuals have right to be part of the sover-

⁶⁷ *Idem.*

⁶⁸ Anne Garrels, "Many South Ossetians Hope for Union with Russia", *National Public Radio*, (Aug. 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=94057377>.

⁶⁹ Saakashvili's Statement on Russia's Action, *New York Times*, Aug. 27, 2008, <http://www.nytimes.com/2008/08/27/world/europe/27saakashvili.html?scp=4&sq=South%20Ossetia%20declares%20independence&st=cse>.

⁷⁰ *Times of Malta*, *Russian tanks, troops patrol deserted South Ossetian capital*, <http://www.timesofmalta.com/articles/view/20080813/world-news/russian-tanks-troops-patrol-deserted-south-ossetian-capital>.

⁷¹ See Joel S. Migdal, *Mental Maps and Virtual Checkpoints. Struggles to Construct and Maintain State and Social Boundaries*, in *BOUNDARIES AND BELONGING. STATES AND SOCIETIES IN THE STRUGGLE TO SHAPE IDENTITIES AND LOCAL PRACTICES 5* (Joel S. Migdal ed. 2004) (arguing "borders are permanent features of social life... Borders shift... leak; and... hold varying sorts of meaning for different people... This volume maintains the importance of a spatial understanding of society and history, but it suggests a way of conceiving of borders and space that goes beyond a school map of states." *Id.* at 5. Further, Migdal emphasizes that the constructions of boundaries involves both the state, but also individual and social processes in which identity and belonging to a community is sort out. This construction is a complex, contested pro-

eign not as objects of the realm, but as individuals with the right to choose among different realms, and if necessary sovereigns.⁷² Politicians and diplomats should learn that their role is to ensure institutional conditions within which that individual freedom can be exercised to the fullest.

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cess particularly for “the most fundamental categories of status and identify beyond kinship in today’s world: those of citizen and member of the nation.” *Id.* at 15.)

⁷² Cf. ROBIN WAGNER-PACIFICI, THE ART OF SURRENDER. DECOMPOSING SOVEREIGNTY AT CONFLICT’S END 103-04 (2005) (analyzing collective sovereignty, he said that “[i]n critical moments of making and unmaking... the identification of the individual sovereign’s sovereignty with that of the collectivity of the realm that is cast in high relief. Does the surrender of the sovereign, or his refusal, necessarily drag his subjects along with him? Might they choose different trajectories if given the chance? Or might their identities be differentiated at this juncture? Paul Kecskemeti explores these conundrums of surrender and sovereignty in the context of the surrender of Germany at the end of World War II: “Hitler ruled out the possibility of capitulation. He adopted the position that the German people, having suffered defeat, no longer had the right to exist.” Here Hitler is seen to conflate his own refusal to surrender, and his ultimate suicide, with that of the German people –the sovereign vanishes and so do his subjects”.

Id. at 104 (quoting PAUL KECSKEMETI, STRATEGIC SURRENDER: THE POLITICS OF VICTORY AND DEFEAT (1957)).

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