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# ARTICLES

## THE EXTINCTION OF NATION-STATES

Ali Khan\*

### INTRODUCTION

Hugo Grotius founded his theory of international law upon the concept of territorial sovereignty.<sup>1</sup> Over the centuries, territorial sovereignty has played a key role in the development of international legal order.<sup>2</sup> Contemporary principles of territorial integrity and political independence enshrined in the United Nations Charter and other eminent treaties derive their historical continuity from the Grotian theory.<sup>3</sup> The Alliance's aim in the Gulf War to evict Iraqis from Kuwait reaf-

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1. H. GROTIUS, *DE JURI BELLI AC PACIS LIBRI TRES* [THE LAW OF WAR AND PEACE IN THREE BOOKS], *Prolegomena* §§ 14-15 (F. Kelsey trans. 1925)(original 1625)[hereinafter H. GROTIUS]. Hugo Grotius is the founder of international law. He first provided a theoretical basis to modern international law. All theories of international law must in the final analysis address the Grotian theory. Since Grotius' time, several schools of jurisprudence, ranging from natural law to critical legal studies, have explored the analytical, structural and normative dimensions of international law. These schools provide insights into the general enterprise of international law, and offer conceptual frameworks within which scholars define and discuss the sources and subjects of international law. International law, however, seems to transcend each school of jurisprudence. Its institutional and normative growth defies the analytical borders into which each era confines it. Despite the various contributions these schools made to the development of international law, the Grotian theory remains powerful. With due respect to the genius of Hugo Grotius, this paper presents a critique of his concept of territorial sovereignty.

2. M. MCDUGAL, W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1295 (1981). Today, the territorial principle of jurisdiction dominates both public and private international law and continues as the basic organizer of the world political structure. *Id.*

3. See *infra* notes 55 to 73 and accompanying text (making reference to Grotian theory).

firms that the forced extinction of a nation-state<sup>4</sup> is contrary to international law.<sup>5</sup> The war also demonstrated the resolve of the international community to preserve the apportionment of the earth into existing nation-states, even if the division stems from colonialism and is arbitrary or mischievous.<sup>6</sup> Of course, unjustly partitioned nation-states may reunite, voluntarily and through valid legal procedures, thereby eradicating colonial or other inequities.<sup>7</sup> Contemporary international law, however, rejects forced mergers which destroy the separate being of a nation-state.

Many examples<sup>8</sup> demonstrate that the principles of territorial integrity and political independence, the defining characteristics of the nation-state, have become the peremptory norms of international law.<sup>9</sup>

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4. The term "nation-state" is used to avoid possible confusion between state as an international person and state as part of a federation. Here, the term nation-state is used in the international sense.

5. See U.N.S.C. Res. 660 (1990), *reprinted in* 29 I.L.M. 1325 (1990) (demanding that Iraq withdraw its forces "immediately and unconditionally" from Kuwait). The United Nations Security Council passed many resolutions after the Iraqi invasion. See U.N.S.C. Res. U.N.S.C. Res. 661, U.N.S.C. Res. 662, U.N.S.C. Res. 664, U.N.S.C. Res. 665, U.N.S.C. Res. 666, U.N.S.C. Res. 667, U.N.S.C. Res. 669, U.N.S.C. Res. 670, *reprinted in* 29 I.L.M. 1325-36 (1990) (applying a wide range of sanctions against Iraq including an economic blockade); U.N.S.C. Res. 674, U.N.S.C. Res. 677, U.N.S.C. Res. 678, *reprinted in* 29 I.L.M. 1561-1565 (1990) (resolving to free Kuwait by "all necessary means," including the use of force).

6. Iraq justified its invasion and occupation of Kuwait by asserting that British colonialism wrongfully separated Kuwait from Iraq's Basra Province. Ann Peters, *Saddam Hussein Offers to Release Women, Children*, United Press Int'l, Aug. 28, 1990.

7. For example, consider Hong Kong and Germany. Hong Kong fell into British occupation following the Opium War in 1840. *\$8,000 in Debt*, Toronto Star, March 21, 1991, at A7. China desired the recovery of Hong Kong for several years, and, by mutual agreement in 1984, Britain agreed to return Hong Kong to China. *Id.* China has begun acquiring some control over the city. People's Republic of China: The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, April 4, 1990, *reprinted in* 29 I.L.M. 1511, 1520 (1990). Germany, which was forcibly divided into two separate nation-states following World War II, was unified by treaty. In accordance with the right of self-determination, the German people desired to become a united Germany. Treaty on the Final Settlement With Respect to Germany, Sept. 12, 1990, *reprinted in* 29 I.L.M. 1186 at 1188 (1990).

8. See Acevedo, *The U.S. Measures Against Argentina Resulting From the Malvinas Conflict*, 78 AM. J. INT'L L. 323 (1984) (noting that the war between Argentina and Great Britain over the Falkland (Malvinas) Islands prompted many states not parties to the conflict to impose economic and financial restrictions on Argentina for violating the United Nations Charter); *but see* Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 154-59 (1984) (describing how the United States justified the invasion of Grenada on the basis of restoring human rights and self-determination).

9. L. HENKIN, R. PUGH, O. SCHACHTER, H. SMIT, *INTERNATIONAL LAW* 677 (1987) [hereinafter L. HENKIN]. It is commonly accepted that Article 2(4) of the United Nations Charter, which forbids "the threat or use of force against the territorial integrity and political independence of any state," has the character of a peremptory norm. *Id.*

Yet, a discernible counter-trend exists. Under the dictates of late twentieth-century life, the principle of territorial sovereignty is undergoing an evolutionary transformation. The nation-state appears to be losing its monopoly on sovereignty. While politicians promoting sovereignty and juridical equality of states continue to reassert the Grotian theory, nation-states become increasingly interdependent within the fold of regional and international networks. More importantly, the conditions of global life liberate individuals from the physical and psychological boundaries of the nation-state. People living in different continents possess a new familiarity with each other.<sup>10</sup> This ever-increasing proximity among peoples creates a web of complex relations giving birth to new sentiments of global harmony.<sup>11</sup>

Two prominent forces challenge the nation-state's traditional sovereignty: economic interdependence and the universal recognition of human rights. Economic interdependence creates a global market in which most nation-states can no longer exercise complete sovereignty. The logic of the global market dictates interdependence, not independence.<sup>12</sup> Even economic super-powers depend upon other states, often finding raw materials, labor and markets outside their territorial boundaries.

The universal recognition of human rights, meanwhile, transforms both the relationship between states and the relationship between governments and their people. The international law of human rights aspires to subordinate the nation-state to the will of the people. Accordingly, governments have less legal authority to invoke the concept of sovereignty to justify policies that violate fundamental rights of citizens.<sup>13</sup> Moreover, matters that historically belonged to domestic jurisdiction may now be lawfully examined in international fora of human rights.<sup>14</sup>

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10. The Cable News Network (CNN), for example, is available in more than a hundred countries. Millions of people viewed the live coverage of the Gulf War. This instant familiarity with world events will change global life in ways still unpredictable.

11. These sentiments are often expressed in songs. "We are the World", for example, is a song of human solidarity. Similarly John Lennon's song "Imagine" captures the feelings of a possible World Community beyond nation-states.

12. See J. JACKSON & W. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 2-4 (2d ed. 1986) (describing how the current state of international economic relations create an environment of interdependence).

13. Even though military governments and other dictatorial regimes violate rights of citizens, they often deny such violations. No government has invoked sovereignty to justify human rights abuses.

14. See T. BUERGENTHAL & MAHLER, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* 116 (1990) (tracing the origins of the international law of human rights to the adoption of the Charter of the United Nations). A number of other specialized agencies and regional organizations have coordinated their efforts in the human rights area

Recognizing the dynamics of economic interdependence and fundamental human rights, many regions have begun to establish institutional frameworks within which member states may pool their sovereignties.<sup>15</sup> The European Community best exemplifies this new phenomenon.<sup>16</sup> The member states of the European Community agreed to dismantle their internal barriers to facilitate the free flow of goods, services, and people.<sup>17</sup> Furthermore, these states undertook the protection of the fundamental rights of all individuals regardless of their citizenship.<sup>18</sup> Although member states of the European Community remain signatories to international agreements that recognize the principles of territorial integrity and political independence,<sup>19</sup> the evolution of the Community will gradually diminish the practical as well as the theoretical significance of territorial sovereignty. The Com-

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with the United Nations. *Id.* at 125. These include the International Labor Organizations, UNESCO, the Council of Europe, the Organization of American States, and the Organization of African Unity. *Id.*

15. Many regional organizations have emerged in the past few decades. Economic cooperation or regional protection of human rights are often the primary goals of these organizations. Of course, the European Community is the most successful. Other organizations include the Arab League, the Organization of American States and the Organization of African States.

16. Single European Act, *opened for signature* Feb. 17, 1986, *reprinted in* 25 I.L.M. 503 (1986). The Single European Act strengthened and codified the European Community, which is based upon three separate organizations: the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community. *Id.* at art. 1. *See* Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (creating the ECSC); Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter *The Treaty of Rome*] (creating the EEC); Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167 (creating the EAEC). Article 2 of the Treaty of Rome declared the goal of the European Economic Community:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated rising of the standard of living and closer relations between the States belonging to it.

*Id.*

17. Laudati, *Report of the Delegation to the European Community: Key Issues in the 1992 Unification Program*, 1990 A.B.A. SEC. INT. LAW & PRACTICE 9-13. By 1992, border controls with regard to persons, goods, services and capital within the internal frontiers of the Community shall be removed or relaxed. *Id.*

18. European Convention For The Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5, (entered into force, Sept. 3, 1953). Many parties to this Convention are not members of the European Community. *Id.* at 256. All members of the European Community, however, are parties to the Convention. *Id.* This convention is supplemented by seven protocols. B. CARTER & P. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 429-50 (1991).

19. For example, all member-states of the Community are parties to the United Nations Charter, which recognizes the principles of territorial integrity and political independence and juridical equality of states.

munity will, of course, protect its united territory and internal laws against inimical forces. Yet, the new culture of freedoms and economic prosperity within the grand borders of the Community initiates a process by which member states will evolve into new juridical entities, that may be called free states.

This Article develops the concept of the Free State. The character of Free States within the World Community will be akin to that of member states (such as France or Germany) within the European Community. In fact, the evolution of constituent nation-states within the European Community may provide guidance, if not impetus, to the emergence of Free State. The World Community of Free States, however, may or may not evolve in the near future. Nonetheless, the idea of Free State is useful in understanding the changing characteristics of global life. Free State is rooted in the ideas of economic cooperation and human rights.<sup>20</sup> Unlike the nation-state, Free State de-emphasizes the concept of territorial sovereignty and liberates the people from domestic and foreign domination. It restructures the normative role of the government by mandating a government that is accountable to the people. In addition, Free State rejects the concept of borders and invites the free flow of goods, services and persons. It also promotes unification of the human family by supporting sentiments of goodwill among the peoples of the world. Thus, the people's loyalty shifts from the nation-state to the World Community. To anticipate its own evolution, Free State envisages the future world as European Community writ large.

To develop the concept of Free State, I first discuss and analyze the Grotian theory of territorial sovereignty. This theory provides a historical basis to appreciate the significance of the nation-state in the development of international law. I argue, however, that the fundamental assumptions on which Grotius built his theory are no longer valid. In view of unfolding global realities, the concept of territorial sovereignty seems awkward and anachronistic; it is frequently incompatible with new aspirations of the peoples of the world. Furthermore, the partition of the planet into jealously guarded nation-states is artificial and counter-productive. Consequently, the nation-state will regress into extinction, particularly as its traditional characteristics become dysfunctional in serving the needs of global life. The gradual extinction of the nation-state, meanwhile, will create favorable conditions for the evolu-

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20. The idea of Free State stands upon principals enunciated in leading international economic and human rights documents, such as the Charter of the United Nations and the Universal Declaration of Human Rights. Thus, this article will frequently cite to provisions of these documents for support when describing the characteristics of Free State.

tion of Free State. Only Free State can survive in the milieu of human rights and economic interdependence. Just as the widespread reptile extinctions coincided with the rise of mammals, the universal degeneration of nation-states will provide an environment for Free States to flourish. Thus, a critical examination of the Grotian theory supplies a useful context for understanding the advent of Free State.

At the outset, I caution the reader. The concept of Free State presented here is rudimentary. I do not know, for example, how and when Free State will emerge nor what specific characteristics it will possess. Possibly, Free State will never come into existence. Furthermore, I am not proposing any revolutionary theory similar to the Marxist idea that the state is destined to wither away. Finally, the idea of Free State appears premature, because many nation-states are powerful and many people do not envision beyond their national boundaries. Widespread patriotism and psychologically charged phrases such as "my country", "the fatherland" and "the motherland" reveal that many peoples of the world maintain an attachment to the idea of the nation-state. To men and women willing to die for their country, the proposed concept of Free State may seem merely poetic, if not offensive. Nonetheless, the evidence of economic interdependence and universal human rights, as well as the example of the European Community, point toward the emergence of Free State.

## II. THE GROTIAN THEORY OF NATION-STATE

In the seventeenth century, Hugo Grotius built the theoretical edifice of international law on the foundation of territorial sovereignty, which divides up the earth into distinct portions and vests each such subdivision with equal sovereignty.<sup>21</sup> Although territorial sovereignty is a commonplace concept in contemporary consciousness, this was not true at the time Grotius expounded his theory of international law.<sup>22</sup> In fact, two other powerful and competing conceptions of sovereignty existed: popular sovereignty<sup>23</sup> and universal sovereignty.<sup>24</sup> Grotius, however, re-

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21. H. MAINE, *ANCIENT LAW* 92-108 (1970). Henry Maine shows that Grotius derived his theory from the following three postulates:

- 1) There is a determinable law of nature. *Id.* at 92.
- 2) Each nation-state is sovereign. *Id.* at 94.
- 3) Natural law is binding on nation-states *inter se*. *Id.*

22. *Id.* at 99. The concept of territorial sovereignty was not always recognized because long after the dissolution of Roman dominion, the minds of men were under the empire of ideas that were irreconcilable with this concept. *Id.*

23. Although the precise origin of popular sovereignty may be difficult to pinpoint, its close kinship with tribal sovereignty is manifest. *Id.* at 100. "Tribal sovereignty" is a concept whereby territorial titles such as king or master came into use only as a con-

jected both of them. Instead, he established the theoretical superiority of territorial sovereignty, which would later become the dominant concept for the development of international law.<sup>25</sup> By rejecting popular sovereignty, Grotius questioned the prevailing view that sovereignty must always reside in the people.

In sixteenth century Europe, the notion that the king ruled his people was old and familiar, but the assertion that the king ruled a defined territory was new and innovative.<sup>26</sup> A population that possessed some common characteristics such as race, religion, and language had traditionally been the defining source of popular sovereignty.<sup>27</sup> Historically, the chief of a specific tribe derived his powers from the members of his tribe.<sup>28</sup> Because tribal sovereignty was tied to the tribal people and not to the tribal territory, it was immaterial whether the tribe was nomadic or attached to a certain territory.<sup>29</sup> Accordingly, popular sovereignty was derived from and exercised over a specific people, regardless of their attachment to a particular territory.<sup>30</sup> By rooting sovereignty in a specific territory, Grotius repudiated the nomadic implications of popular sovereignty.<sup>31</sup> In fastening sovereignty to a fixed territory, however, Grotius excluded the popular will as an essential component of sover-

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venient mode of designating the ruler of a portion of the tribe's possessions and not of his people's lands. *Id.* Under this concept of sovereignty, territorial possession was important only insofar as it was a convenient way to designate to the ruler a portion of the tribe's possessions. *Id.*

24. *Id.* at 100. Universal sovereignty implies the notion of universal domination. *Id.* at 100-01. Rulers under this notion aspire to rule a universal empire and as such would claim to be emperor of the world instead of merely king of a tribe. *Id.*

25. *Id.* at 92-94.

26. H. MAINE, *supra* note 21, at 107. Territorial sovereignty, the view that connects sovereignty with the possession of a limited portion of the earth's surface, stems from the theory of feudalism. *Id.* at 102.

27. *See id.* at 100 (describing "Anbe" sovereignty among the Franks, the Burgundians, the Vandals, the Lombards, and the Visigoths). Anbe sovereignty attached no importance to territorial possession. *Id.*

28. *See id.* (describing the king of a tribe as king of his people, not of his people's lands).

29. *Id.*

30. *Id.* Even today, nation-states exercise extraterritorial jurisdiction over their nationals even if the nationals live outside the country. *See generally*, L. HENKIN, *supra* note 9, at 835-36 (citing Indian, British, French and German criminal statutes applicable on the basis of nationality). This might be the remnant of the nomadic implications of tribal sovereignty. International law recognizes nationality as a basis of jurisdiction. *See Cook v. Tait*, 265 U.S. 47 (1924) (holding that a nation-state may exercise jurisdiction to tax the income of its nationals living abroad even if the source of their income is based in another state); *Blackmer v. United States*, 284 U.S. 421 (1932) (holding that a nation-state may order the issuance of a subpoena requiring the appearance as a witness of a national living abroad).

31. H. GROTIUS, *supra* note 1, at bk. I, ch. III, § VII. The state, not the people, is the common subject of sovereignty. *Id.*



eignty.<sup>32</sup> Territorial sovereignty does not require that the people living in a given territory have a common characteristic. Rather, different racial, religious, and linguistic groups may be subject to the territorial sovereign because such a sovereign derives his authority primarily from the existence of the territory, and only secondarily, if at all, from the people in residence.<sup>33</sup> Ordinarily, territorial sovereignty remains within its own boundaries, and the territorial sovereign claims no authority over the people living outside the territory. The territorial sovereign stands in the same relation to his territory as the baron to his estate or the tenant to his freehold.<sup>34</sup>

Grotius also refuted the competing idea of universal sovereignty.<sup>35</sup> Universal sovereignty is neither population-specific nor territory-specific but instead claims authority over all peoples and all territories of the world.<sup>36</sup> Universal sovereignty regards the world as a single realm that should not be broken into separate territories. Accordingly, it does not divide the peoples of the earth: all people constitute a grand human community which must be accountable to the same universal sovereign. Historically, the great religions of the world, such as Christianity, claimed universal sovereignty. God and His Representatives, however, have not been the only claimants to universal authority. Great Emperors of Rome and the so-called Conquerors of the World pursued universal sovereignty as well.<sup>37</sup>

In the Grotian era, both the Catholic Church and the Romano-German Empire aspired to create a universal order supported by competing sources of legitimacy. The Church invoked divine authority based upon faith, whereas the imperial throne claimed positive authority rooted in force. To Grotius, neither was acceptable. As a Protestant, Grotius was reluctant to accept the direct or indirect universal jurisdiction of the Catholic Church.<sup>38</sup> As a Dutchman, he refused to accept the universal authority of the Romano-German Empire.<sup>39</sup> While these personal predilections might have influenced his theory, Grotius rejected universal sovereignty for another reason. Even in the Grotian period, the

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32. *Id.* at bk. I, ch. III, § VIII.

33. *Id.*

34. H. MAINE, *supra* note 21, at 103-04.

35. *Id.* at 107. Universal sovereignty is a precursor to the notion of territorial sovereignty. *Id.* at 101.

36. *Id.*

37. *Id.* at 101-102. For example, the kings of France aspired to rule a universal empire. *Id.*

38. J. SCOTT, *Introduction* to H. GROTIUS, *THE LAW OF WAR AND PEACE*, *supra* note 1, at xxx.

39. *Id.*

world appeared larger than the Romano-German empire. Moreover, not all people were Christians, let alone Catholics. Thus, any international legal order built within the confines of a European Empire or Christianity would have been parochial, not universal.

Grotius instigated a powerful idea that presented sovereign nation-states both as subjects and as authors of international law. Notwithstanding its future viability, however, the Grotian blueprint for the international legal system was speculative: the Grotian theory surfaced at a time when the idea of a universal empire was still tenable.<sup>40</sup> The success of Grotian theory therefore depended on whether the claimants to universal sovereignty failed. History sided with Grotius. Neither the Empire nor the Church succeeded in establishing the ultimate source of universal norms.<sup>41</sup>

The Treaty of Westphalia ending the Thirty Years' War (1618-1648) marked the demise of the Romano-German Empire and created new territorial sovereignties. The Catholic Church had failed to assert its moral authority over nations at war with each other. The fall of both the Empire and the Church paved the way for the implementation of new ideas. At this critical historical juncture, the Grotian theory provided a new framework in which nation-states would become the architects of a new international legal order.

The concept of territorial sovereignty was the linchpin of the new international framework. It provided a new theoretical basis and a practical guide to conceive and legitimize such relations. The competing conceptions of sovereignty, somewhat similar to outmoded biological species, proved inefficient and dysfunctional.

In the absence of an effective Imperial Emperor or Universal Church, for example, no mechanism existed to explain the existing legal relations between different nations. Popular sovereignty proved equally problematic: such a theory could not accommodate those sovereigns who derived their authority from sources other than popular will. The law of nations would have required the abolition of those forms of government, including kingships and monarchies, that remained unaccountable to the people. The Grotian theory discarded these historical concepts of sovereignty that lacked flexibility to adapt. Note that Grotius' theory was not a theory of political revolution, nor was it a norma-

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40. H. MAINE, *supra* note 21, at 105. Grotian theory appeared theoretically perfect at the time it surfaced. *Id.* at 107.

41. *Id.* at 105-06. Maine explains the decay of both feudal and ecclesiastical influences during the fourteenth and fifteenth centuries, and the increasing progress during that time of ideas later organized by Grotius. *Id.*

tive theory to preserve the power of the people. Rather, Grotius pragmatically aspired to build an international legal system.

To justify his theory, Grotius implanted the concept of territorial sovereignty into the law of nature.<sup>42</sup> The bond between natural law and territorial sovereignty was simple. Natural law presupposed a state of freedom under which each constituent unit was independent and sovereign.<sup>43</sup> Because each territorial sovereign was supreme and was not subject to the legal control of another sovereign, all sovereigns were juridically equal. Thus, natural law and territorial sovereignty became mutually supportive, almost collusive, witnesses to testify against the supremacy of any universal superior. This constituted a near theoretical coup d'état against both the Imperial Emperor and the Universal Church.

Grotius built his theory of international law in successive layers of natural law and legal positivism. After subjecting territorial sovereignty to the dictates of natural law, Grotius recognized the authority of nation-states to make international agreements. Grotius, a natural law theorist, carefully pointed out that "outside of the sphere of the law of nature, which is also frequently called the law of nations, there is very little law common to all nations."<sup>44</sup> But Grotius, a legal positivist, recognized that the will of nations could also be a distinct source of international law.<sup>45</sup>

Grotius declared that if the law of nations "cannot be deduced from certain principles by a sure process of reasoning,"<sup>46</sup> it may "have its origin in the free will of man,"<sup>47</sup> and it may derive its "obligatory force from the will of all nations, or of many nations."<sup>48</sup> This legal positivism recognized the right of nations to make international treaties. Henceforth, not only immutable principles of natural law, but also the changeable will of nations created international law. All nations were subject to natural law, but they also retained their positivist power to

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42. H. GROTIUS, *supra* note 1, *Prolegomena* at §§ 35-40.

43. J. SCOTT, *supra* note 38, at xxxi.

44. H. GROTIUS, *supra* note 1, *Prolegomena* at §§ 23-24.

45. *Id.* at § 40-41. Grotius carefully distinguished the law of nations from the law of nature. *Id.* Although the law of nations was rooted in natural law, the two were not synonymous. *Id.* The law of nature, for example, was always the same at different times and in different places; but the law of nations could vary from time to time and from region to region. *Id.* Stated differently, natural law is always universal; the law of nations is sometimes regional. Thus, regional customs may constitute valid international law even though they do not meet the test of natural law. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at § 41.

manufacture customs and treaties. Thus, nation-states became both the subjects as well as the architects of international law.

Without requiring any revolutionary changes in the prevailing legal environment, the Grotian concept of territorial sovereignty furnished a new flexibility to reconstruct the international order. First, territorial sovereignty accommodated all forms of government within the nation-state and made international law neutral to diverse forms of political organization, thus establishing the principle of political independence.<sup>49</sup> Second, it furnished a theoretical basis for nation-states to enter into meaningful legal relations and legitimately recognized the positivist process of making international law through treaties. Third, it vested each nation-state with naturalized juridical equality in international law, thereby preserving the equal dignity of each territorial sovereignty. Finally, it accepted the division of the earth into nation-states, thereby identifying the subjects as well as the architects of the international legal system. By excluding direct popular participation, Grotius presented a system of international law in which territorial sovereigns assume the primary responsibility for managing the affairs of nation-states and deciding the questions of war and peace.

### III. REAFFIRMATION OF THE GROTIAN THEORY

The Grotian theory presupposed the mythical state of nature in which each territorial sovereignty was independent and juridically equal.<sup>50</sup> Because natural law dominated jurisprudence at the time, Grotius based his theory of territorial sovereignty in the legitimacy of natural law. While natural law remained the authoritative jurisprudence for many centuries, it nevertheless began to lose its prestige with the advent of legal positivism. The positivist revolt against natural law, however, did not challenge the concept of the nation-state. In fact, legal positivism elevated the nation-state to new jurisprudential prestige and political power, vesting the state with the authority to fashion the domestic legal order and to participate in the formation of international customs and treaties.

Under both legal positivism and Grotian theory, the territorial sovereign is not required to derive his legitimacy from the will of the people. Professor Hans Kelsen, for example, described the state as a legal order under which individuals are subject to a certain, relatively centralized

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49. J. SCOTT, *supra* note 38, at xxxi.

50. *Id.* at xxxi.

coercion.<sup>51</sup> He distinguished the state from pre-state communities and argued that the pre-state community rules were made by the mutual consent of the people, while the state rules are made by a centralized authority that possesses coercive power to enforce them.<sup>52</sup> The only relationship that the people have with the state, Kelsen argued, is based on coercion. Any attempt to find another bond, he asserted, is destined to fail.<sup>53</sup> Under the Grotian theory, the state derived its sovereignty from the law of nature; under the Kelsenian theory of law, which rejected "metaphysics and mysticism," the state derived its sovereignty from the effectiveness of its coercive order.<sup>54</sup> South Africa, under apartheid, dramatically demonstrates an extreme example of the Kelsenian state. Although, perhaps even under the Grotian system, this morally repugnant form of government remains compatible with the concept of territorial sovereignty.

If treaties constitute positive international law, the Grotian concept of territorial sovereignty has firmly established itself in the letter of law. While customary international law has long recognized the concept of territorial sovereignty, eminent treaties of the twentieth century began to preserve characteristics of the nation-state in the written word. In 1933, three hundred years after the first publication of Grotius' *The Law of War and Peace*, the Montevideo Convention on the Rights and Duties of States reasserted the Grotian doctrine that states are sovereign and juridically equal, regardless of their might.<sup>55</sup> The Convention also recognized that the existence of a state<sup>56</sup> is an objective fact independent of recognition by other states<sup>57</sup> and that the territory of a state is inviolable.<sup>58</sup>

In 1945, the Charter of the United Nations, the founding treaty of modern international law, affirmed the Grotian principle of sovereign equality of states. Fifty-one nation-states established an international

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51. See H. Kelsen, *PURE THEORY OF LAW* 286-87 (M. Knight trans. 1967) (distinguishing states as possessing centralized organs such as a government, a legislature, and a court system under a national legal order).

52. See *id.* (describing how primitive law permitted individuals to seek their own retribution pursuant to decentralized coercive orders).

53. *Id.* at 287.

54. *Id.* at 286.

55. See Convention on the Rights and Duties of States, Dec. 26, 1934, art. 4, 49 Stat. 3097, T.S. No. 881, 3 Bevans 145, 165 L.N.T.S. 19 (establishing the qualifications and rights of a state as a person in international law).

56. *Id.* at art. 1. The Convention defines the state as a person under international law using four criteria: permanent population, defined territory, government, and capacity to enter into relations with other states. *Id.*

57. *Id.* at arts. 3-4.

58. *Id.* at art. 11.

organization "to be a center for harmonizing the actions of nations in the attainment of . . . common ends."<sup>59</sup> The United Nations replaced its successor, the League of Nations, which was established after the first world war.<sup>60</sup> According to the Charter of the United Nations, the United Nations may accept memberships from nation-states.<sup>61</sup> The principle organs of the United Nations, including the General Assembly,<sup>62</sup> the Security Council<sup>63</sup> and the Economic and Social Council,<sup>64</sup> all consist of nation-states. Furthermore, only nation-states may appear as litigants before the International Court of Justice.<sup>65</sup> Even specialized agencies in economic, social, cultural, educational, health, and related fields are established by "intergovernmental"<sup>66</sup> agreements among nation-states. To preserve the existing partition of the earth against any forced mergers, the United Nations Charter prohibits the threat or use of force against the territorial integrity or political independence of any nation-state.<sup>67</sup>

Inspired by the United Nations Charter, regional charters of America, Africa, and Europe reaffirm similar principles that enshrine the nation-state as an inviolable international person. The Bogota Charter of the Organization of American States preserves the territorial inviolability<sup>68</sup> of member states and maintains that although each state has a right to self-preservation, the right does not extend to committing unjust acts against another state.<sup>69</sup> Likewise, the Charter of the Organization of African Unity established "respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence."<sup>70</sup> The Charter further avowed absolute dedication to the freeing of African territories that are still dependent.<sup>71</sup> Since

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59. U.N. CHARTER art. 1, para. 4.

60. Note that the names of both organizations are derived from "nations".

61. U.N. CHARTER art. 4, para. 1.

62. U.N. CHARTER art. 9, para. 1. The General Assembly consists of all members of the United Nations. *Id.*

63. U.N. CHARTER art. 23, para. 1. The Security Council consists of fifteen members of the United Nations.

64. U.N. CHARTER art. 61, para. 1. The Economic and Social Council consists of fifty-four members of the United Nations. *Id.*

65. Statute of the International Court of Justice, art. 34, para. 1, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052.

66. U.N. CHARTER art. 57, para. 1.

67. U.N. CHARTER art. 2, para. 4.

68. Charter of the Organization of American States, April 30, 1948, art. 20, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

69. OAS CHARTER art. 14.

70. Charter of the Organization of African Unity, May 25, 1963, art. III, para. 3, 479 U.N.T.S. 39, *reprinted in* 2 I.L.M. 766 (1963).

71. OAU CHARTER art. III, para. 6.

the proclamation of the African Charter, many African territories have won independence, Namibia being the most recent one.<sup>72</sup> Finally, in 1975, the Final Act of the Conference on Security and Cooperation in Europe, also known as the Helsinki Final Act, proclaimed that the frontiers of all States in Europe are inviolable and must not be assaulted.<sup>73</sup> In addition to prohibiting the threat or use of force against the territorial integrity or political independence of any state, the Final Act bans the use of force to induce another participating state to not exercise its sovereign rights.<sup>74</sup>

In view of the above international agreements, territorial integrity and political independence appear to be two universally accepted attributes of the nation-state. These two attributes comprise the essential characteristics of territorial sovereignty. While the territorial integrity of a state insulates its physical borders, the principle of political independence shields its form of government, political ideology and governmental institutions.

The principle of political independence is consistent with the Grotian postulates that international law is neutral toward different forms of government and also that each community freely determines its internal political organization. Thus, the concept of territorial sovereignty, anchored in eminent treaties, provides a normative basis to assert and enforce the physical and political sovereignty of the nation-state. Territorial sovereignty further creates a theoretical environment in which all nation-states, small and large, freely exist.

#### IV. FREEDOM FROM SUBJUGATION

The Grotian theory of international law excludes the people from the concept of territorial sovereignty.<sup>75</sup> This exclusion occurred at two levels. First, Grotian theory denies people the right of self-determination.<sup>76</sup> Second, Grotian theory denies individuals the right to choose their government.<sup>77</sup> Contemporary laws of human rights, however,

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72. In 1990, Namibia won its independence. Zimbabwe, formerly Rhodesia, won its independence from White minority rule in 1980. *L'ETAT DU MONDE 1987-1988*, 315 (1988). Algeria, Uganda, Swaziland, Nigeria, Kenya, and Zambia won independence after 1960. *Id.*

73. Conference on Security and Cooperation in Europe: Helsinki Final Act, Aug. 1, 1975, art. III, *reprinted in* 14 *I.L.M.* 1292, 1294 (1975).

74. Helsinki Final Act at art. II.

75. H. GROTIUS, *supra* note 1, at bk. 1, ch. III, § VIII.

76. *Id.*

77. *Id.*

modified the Grotian concept of territorial sovereignty.<sup>78</sup> Consequently, any definition of sovereignty that systematically excludes popular participation is no longer valid. Over the years, many peoples have successfully asserted their right of self-determination against external subjugation.<sup>79</sup> More recently, the people have asserted their right to be free from internal subjugation.

Freedom from both external and internal subjugation is the chief characteristic of Free State. This attribute of Free State emerges out of aspirations of all people to live free from domination and exploitation. Anchoring its legitimacy in the law of human rights, Free State promises freedom; it rejects both the Grotian theory as well as the concomitant subjugation of the people.

#### A. FREEDOM FROM EXTERNAL SUBJUGATION

The desire to live free from external subjugation has inspired many revolutions. In 1776, the authors of the American Declaration of Independence presented a manifesto that rejected foreign rule and articulated the right of self-determination.<sup>80</sup> Twentieth century nationalist and socialist movements, meanwhile, invoked self-determination as a political principle.<sup>81</sup> After the Second World War, however, the principle of self-determination acquired new prestige when the creators of the United Nations incorporated the principle into the United Nations Charter.<sup>82</sup> Many subsequent international declarations and treaties reaffirm and explain this principle.<sup>83</sup> In 1960, for example, the United

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78. Moreover, the First and Second World Wars exposed the brutality of territorial sovereigns and the fragility of the international legal system. They showed how breach of territorial sovereignty could result in the horrors of war. World War II also showed how an unchecked territorial sovereign, Hitler, could commit genocide against his own people. To "save succeeding generations from the scourge of war" and "to reaffirm faith in fundamental human rights," the victors in World War II attempted to establish a new international legal order in which nation-states explicitly agreed to respect territorial integrity of other states. They also agreed to achieve international cooperation in promoting and encouraging respect for human rights. See *Preamble to U.N. CHARTER* (providing the rationale for creating the United Nations).

79. See N.Y. Times, Sept. 7, 1991, at A1 (reporting the successful independence struggles of the Baltic states, Lithuania, Latvia, and Estonia).

80. See *The American Declaration of Independence (1776)* (articulating the right of self-determination of the American people).

81. See Cassese, *The Self-Determination of Peoples*, in *THE INTERNATIONAL BILL OF RIGHTS* 92-93 (L. Henkin ed. 1981) (noting that Third World states, supported by the socialist countries, won international recognition of the principle of self-determination).

82. U.N. CHARTER, art. 1 para. 2. One of the purposes of the United Nations is to develop friendly relations among nations and to strengthen universal peace. *Id.*

83. See *supra* notes 68-74 and accompanying text (giving examples of subsequent international declarations reaffirming the principle of self-determination).



Nations General Assembly recognized the inalienable right of all peoples to complete freedom.<sup>84</sup> In 1966, the leading covenants on human rights reaffirmed that all peoples have the right of self-determination.<sup>85</sup>

The principle of self-determination is a defining characteristic of Free State. It provides a moral and legal basis to repudiate all forms of external subjugation, such as colonialism. In the past few decades many new states have sprouted in regions previously occupied by colonial powers.<sup>86</sup> Despite the criticism that colonized regions such as the Arabian peninsula or the Indian subcontinent have been "unjustly" divided, inhabitants of newly founded nation-states jealously guard their territorial boundaries and political independence.<sup>87</sup> There appears to be a universal attachment to the idea of the nation-state, and people in almost all parts of the world celebrate their national independence with profound emotions, patriotism, flags, and national anthems.<sup>88</sup> Arguably, in view of such widespread nationalism, the principle of self-determination has bolstered the Grotian notion of territorial sovereignty, not weakened it.

This argument, however, is deceptive: it conceals the schism between the Grotian theory and the principle of self-determination. The Grotian sovereign does not derive his authority from the people, nor is he accountable to them.<sup>89</sup> The territorial sovereign is not tied to any particu-

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84. Declaration on the Granting of Independence to Colonial Countries and Peoples, para. 1, Dec. 14, 1960, G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961) (declaring that the foreign subjugation, domination and exploitation of one people by another people constitutes a violation of fundamental human rights).

85. See International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), *reprinted in* 6 I.L.M. 360 (1967) (declaring that all people have the right to self-determination); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967) (same).

86. See *supra* note 72 (giving examples of nation-states that have emerged from previously occupied colonial regions).

87. The celebration by Kuwaitis on the liberation of Kuwait, for example, shows that the idea of creating one Arab nation may not be a practical goal. Many efforts to unite the Arabian region have failed. Similarly, on the Indian subcontinent, the emergence of India, Pakistan and Bangladesh as independent nation-states demonstrates the aspirations of the people to found nation-states. This partition of historical regions may be a necessary dialectical step for moving toward Free State, which reaffirms unity through the principle of self-determination rather than unity through coercion or historical inertia.

88. W. FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, 35-36 (1964) The proliferation of sovereignties is a product of the era of decolonization. *Id.*

89. H. GROTIUS, *supra* note 1, at bk. I, ch. III, § VIII, para. 1. The sovereign's power is not subject to the legal control of another sovereign, and his actions cannot be invalidated by the operation of another human will. *Id.* at § VII, para. 1. The common subject of sovereignty is the state, not the people. *Id.* at para. 2. There is nothing

lar people, or for that matter to *any* people. The Grotian theory turned the King of the French into the King of France. In fact, Grotius argued that "the peoples who have passed under the sway of another people . . . are not in themselves a state."<sup>90</sup> Such "inferior people", he stated, are equivalent to slaves in a household.<sup>91</sup> If people who have once been conquered or subdued strive for independence, he declared, "they act like desperadoes and not like lovers of liberty."<sup>92</sup> Nothing in his theory, therefore, allows the people under external subjugation to struggle for their freedom and self-determination.<sup>93</sup>

Contrary to Grotian theory, Free State subordinates territorial sovereignty to the principle of self-determination. Hence, Free State rejects the legitimacy of colonial rule and alien domination, even if such external subjugation is efficacious.<sup>94</sup> Because subjugated people have the right to free their territory from alien rule,<sup>95</sup> Free State spurns sover-

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wrong, Grotius argued, with a territorial sovereign heading several distinct peoples. *Id.* at para. 3.

90. *Id.* at para. 2.

91. *See id.* at § VIII, para. 1 (reasoning that a man can enslave himself to a master, so a people can submit themselves to a person, thus transfer the "legal right to govern").

92. *Id.* at bk. II, ch. IV, § XIV, para. 1 (noting a remark made by King Agrippa to the Zealots who clamored for liberty after being overcome).

93. *Id.* at bk. I, ch. IV. Although Grotius rejects as a general rule any right to revolution against the territorial sovereign, he recognizes some right to resistance under limited circumstances. For example, the people may resist a sovereign who has the hostile intent to commit genocide. *Id.* at § XI. They may also wage war against a usurper who has seized power unlawfully and "not in accordance with the law of nations." *Id.* at § XVI. One may expand these exceptions to argue that Grotius would have recognized a right to revolution against unjust alien sovereigns, but such an interpretative magnification reads too much into the Grotian theory.

In contrast to Grotian theory, the principles of international law generally accepted by the international community confer upon the people under racist regimes or other forms of alien domination a "right to struggle" and to seek and receive support for gaining independence. *See* Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16, 31 (Advisory Opinion of June 21) [hereinafter *Advisory Opinion on Namibia*] (finding that developments in international law have led to the principle that self-determination and independence are the ultimate objectives of non-self-governing peoples). Such armed struggle would not constitute aggression ordinarily prohibited under the United Nations Charter. *See* U.N. CHARTER art. 1, para. 1 (declaring that suppression of acts of aggression is one of the principle purposes of the United Nations). This right to struggle against colonial, racist and alien sovereigns, even if their control over the territory and the coercive machinery of the state is efficacious, weakens the Grotian conception of territorial sovereignty.

94. W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 188 (1977). The right to self-determination should be available to all subject peoples including ethnic and religious minorities. *See* V. VAN DYKE, *HUMAN RIGHTS, THE UNITED STATES AND WORLD COMMUNITY* 77-78 (1970) (stating that the champions of self-determination may tend to ignore the rights of the minorities).

95. *See* *Advisory Opinion on Namibia*, *supra* note 93 and accompanying text (noting that principles of international law confer upon the people under certain forms of

eigns who claim legitimacy merely on the basis of effective control of territory. Until the occupied people exercise their right of self-determination, their territory remains separate and distinct from the territory of the occupying state.<sup>96</sup>

Although Free State rejects all forms of foreign domination, it nevertheless tolerates territorial sovereignty in exceptional cases. Foreign occupiers, for example, may claim temporary dominion during the brief period when occupied territories evolve from subjugation to independence. Such exceptions to the right of self-determination, however, are subject to abuse. Therefore, the theory of Free State requires that the territorial population demonstrate by some verifiable method, such as a plebiscite, a clear willingness to accept such temporary foreign rule.<sup>97</sup> Even in these cases, however, occupying sovereigns derive their temporary legitimacy not from control of the occupied territory, but from the consent of the occupied people.<sup>98</sup>

Although Free State champions the right of self-determination, it repudiates armed struggle and suspiciously views any use of violence as a means to seek freedom.<sup>99</sup> The principles of contemporary international law recognize the right of the people under racist regimes or other forms of alien domination to struggle, and to seek and receive support

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alien domination a right to struggle and to seek and receive support for gaining independence); Western Sahara, 1975 I.C.J. 12, 31-33 (Advisory Opinion of Oct. 16) (citing the Advisory Opinion on Namibia to support its conclusion that non-self-governing peoples have a right to seek self-determination).

96. See Declaration On Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8082 (1970), reprinted in 9 I.L.M. 1292 (1970) [hereinafter Declaration of Principles] (reaffirming the commitment of United Nations members to equal rights and self-determination without outside interference for all peoples).

97. The Indian province of Kashmir would act as an appropriate place to implement such a plebiscite. See *Three Wars Fought Over Province*, Chicago Tribune, May 29, 1991, at C10 (discussing Kashmir, a territory under the control of predominantly Hindu India but with a predominantly Muslim population where three wars have been fought over the issue of self-determination). Right now, the territory of Kashmir is divided between India and Pakistan. A plebiscite would be one peaceful solution to resolve this dispute.

98. See generally Wilkie, *Moment of Hope After Decades of War and Despair*, Boston Globe, July 23, 1991, at 1 (examining the long history of Israeli-Palestinian conflicts over the West Bank and Gaza Strip in light of the recent Middle East Peace Conference prospects).

99. See U.N. CHARTER, *supra* note 93 and accompanying text. Thus, the right to struggle sanctioned by Free State is distinguishable from the right to armed struggle recognized in contemporary international law. The right to armed struggle against colonial, racist and alien sovereigns has been recognized even though aggression is generally prohibited under the United Nations Charter. *Id.*

for gaining independence.<sup>100</sup> This right to struggle against external subjugation is important. Nonetheless, Free State does not interpret this right to excuse or justify any acts of armed aggression or terrorism. In fact, Free State rejects all forms of violence. Following the principles of the United Nations Charter, a fully developed Free State will strengthen universal peace and promote friendship among the peoples of the world.<sup>101</sup> Even in its formative stage, Free State remains pacifist: it abhors war and refrains in its international relations from the threat or use of force.<sup>102</sup> While the right to "armed" struggle may be lawfully invoked to found a nation-state, the establishment of a Free State cannot justify such violence. The right of self-determination is an essential attribute of Free State only when this right is exercised through peaceful means.

#### B. FREEDOM FROM INTERNAL SUBJUGATION

The moral and legal environment of human rights altered that characteristic of the Grotian state which divested the people from the ultimate source of governmental power.<sup>103</sup> For many centuries, questions regarding forms of government remained matters of domestic concern, outside the reach and scrutiny of international law. In fact, international law recognized that a state was "free to organize itself as it sees fit."<sup>104</sup> This freedom, however, belonged to the state. The people did not have an international right to demand any particular form of government. Consequently, international law legally accepted even cruel and unjust governments. Early in the nineteenth century, Chief Justice John Marshall of the United States Supreme Court articulated the Grotian idea of territorial sovereignty, reporting that sovereignty of a nation within its own territory is necessarily exclusive and absolute.<sup>105</sup> Any exceptions to such all-encompassing power, said Marshall, may

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100. See Resolution on the Definition of Aggression, art. 7, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974), *reprinted in* 13 I.L.M. 710 (1978) (stating that nothing in the United Nations' definition of aggression in any way affects the right of self-determination, especially of peoples under colonial or racist regimes); Declaration of Principles, *supra* note 96 and accompanying text (declaring that states pursuing self-determination are entitled to receive support in accordance with the principles of the Charter).

101. U.N. CHARTER art. 1, para. 2.

102. U.N. CHARTER art. 2, para. 4.

103. H. GROTIUS, *supra* note 1, at bk. I, ch. III, § VIII, para. 1.

104. Convention on the Rights and Duties of States (Inter-American), art. 3, 49 Stat. 3097, 3100, T.S. No. 881, at 3, 165 L.N.T.S. 19, 25 (entered into force, Dec. 26, 1934).

105. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

find the consent from the nation itself because they can flow from no other legitimate source.<sup>106</sup>

One may argue that international law, through an evolutionary process, has suppressed the absolute form of territorial sovereignty by creating a normative order that states can no longer revoke at their free will. The sovereign right of a state to do as it pleases within its own territory is now greatly reduced. Furthermore, even though states may still have the power to ignore many international obligations, they no longer enjoy the absolute sovereignty to derogate from all principles of international law. On the contrary, certain norms of international law exist from which no state has the lawful authority to derogate.<sup>107</sup>

The law of human rights, for example, places important limitations on the sovereignty of a nation-state within its own territory. Such limitations may have already been placed by some internal higher law such as a national constitution.<sup>108</sup> The international law of human rights, however, constitutes a distinct authority that acts to limit claims of absolute domestic sovereignty. No nation-state, for example, may claim a sovereign right to commit genocide within its territory.<sup>109</sup> Similarly, no nation-state may invoke any moral or legal basis rooted in any concept of territorial sovereignty to institute slavery.<sup>110</sup> In fact, all nation-states agree to a general international consensus that each protect a broad spectrum of human rights. Any assertion that a government has the sovereign right to abuse its citizens has lost its legitimacy.

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106. *Id.*

107. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 53 & 64, 1155 U.N.T.S. 331, 344, 347, U.N. Doc. A/CONF. 39/27 at 289 (1969), *reprinted* in 8 I.L.M. 679, 698, 703 (1969) (articulating the doctrine of pre-emptory norms which mandate that states may not enter into any agreement in violation of basic international law standards).

108. See U.S. CONST. (protecting certain fundamental rights and freedoms of United States citizens).

109. See Convention on the Prevention of Punishment of the Crime of Genocide of Dec. 9, 1948, 78 U.N.T.S. 277 (denouncing genocide as an "odious scourge" that all nations must seek to prevent and punish). This convention, making genocide a crime under international law, seems to have become customary international law. See L. HENKIN, *THE AGE OF RIGHTS* 21 (1990) [hereinafter *AGE OF RIGHTS*] (stating that after forty years of international human rights activity culminating in a series of widely held pledges, acts such as genocide, slavery, or torture are banned by customary international law).

110. Universal Declaration of Human Rights, art. 4, G.A. Res. 217 (III), 3 (1) U.N. GAOR at 71, Doc. A/810 (1948); International Covenant on Civil and Political Rights, *supra* note 85, at art. 8; Vienna Convention, *supra* note 107, at arts. 53 & 64. Prohibition against slavery has become a peremptory rule of international law. See *AGE OF RIGHTS*, *supra* note 109, at 21 (stating that acts such as slavery, torture or genocide are banned both by customary international law and by general principles of recognized law).

In accordance with the law of human rights, Free State requires that governments derive their legitimacy, as well as their authority, from the people.<sup>111</sup> Free State grants the people freedom from internal tyranny and subjugation. In order to fully understand the democratic nature of Free State, it might be helpful to first review the character of the Grotian state.

Grotius made several arguments to justify internal domination of the sovereign. He asserted that the right to sovereignty should not be confused with any preferred form of government.<sup>112</sup> Grotius also asserted that the people's consent should not be a prerequisite to a right to sovereignty.<sup>113</sup> Grotius argued that even though people in certain regimes had retained the authority to form a government,<sup>114</sup> it does not follow that the legal right to sovereignty in every other regime must also be conditioned upon popular sovereignty.<sup>115</sup> Nations may institute undemocratic forms of government.<sup>116</sup> A kingship under which the sovereign is not answerable to the people is as valid as any other form of government.<sup>117</sup> Many nations, he asserted, existed for centuries under monarchs.<sup>118</sup>

This conceptual wedge between the right to sovereignty and the form of government was designed to disentangle the sovereign from the people. The separation of the people from the sovereign was a great scholarly artifice to root the concept of sovereignty within the boundaries of a defined territory.

Grotius makes a descriptive argument. He takes this analytical approach to discredit popular reasoning which confused "what sovereignty is" with "what sovereignty ought to be." Grotius recognized, without any normative criticism, that in reality all forms of government are not based on the popular will.<sup>119</sup>

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111. See International Covenant on Civil and Political Rights, *supra* note 85, at art. 25 (recognizing the right of every citizen to vote at genuine periodic elections based on universal and equal suffrage); Universal Declaration of Human Rights, *supra* note 110, at art. 21 (proclaiming that the will of the people shall be the basis of the authority of government).

112. See H. GROTIUS, *supra* note 1, at bk. 1, ch. III, § VIII, para. 2 (explaining that the right to sovereignty should not depend upon the relative excellence of a particular form of government).

113. *Id.* at paras. 6 & 7.

114. *Id.* at para. 2.

115. *Id.* at paras. 1 & 2.

116. *Id.* at paras. 3 & 10-12.

117. See *id.* at paras. 10 & 11 (embellishing Aristotle's theory on the king's relationship to the people and his right to sovereignty).

118. *Id.* at para 5.

119. *Id.* at para 3.

Grotius further justified internal domination of the sovereign by questioning the notion that all governments were established for the welfare of the people.<sup>120</sup> Moreover, Grotius prohibited the people from challenging the acts and policies of the sovereign. Although Grotius recognized some right to resistance under limited circumstances,<sup>121</sup> he rejected as a general rule any right to revolt against the territorial sovereign.<sup>122</sup>

This severance of the ruler from the ruled implied that the sovereign required the people to obey if they disagreed with him. Grotius warned that acting otherwise would introduce disorder.<sup>123</sup> The immorality of a sovereign act did not justify disobedience to the sovereign.<sup>124</sup>

One may argue that Grotius correctly adopted neutrality toward forms of government. Even today, many different forms of government exist. Some states have democratic governments, others have dictatorships, and still others have kingships. This diversity of government may reflect cultural plurality and may even find justification under the principle of political independence enshrined in the United Nations Charter.<sup>125</sup> Grotian neutrality, however, poses dangers to human rights. Under a neutral conception of territorial sovereignty, the principle of political independence allows each state to institute a form of government according to its sociopolitical needs and cultural imperatives. This interpretation, however, does not mandate that each state institute some popular form of government. In fact, the principle of political independence justifies even cruel regimes that violate fundamental human rights.<sup>126</sup> Under this interpretation, moreover, the question of how a government treats its people shifts from international concern to

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120. *Id.* at para. 14. "It is not universally true," Grotius stated, "that all government was constituted for the benefit of the governed." *Id.*

121. *See id.* at bk. 1, ch. IV, § XI (stating that the people have the right to resist a sovereign who intends to commit genocide). They may also wage war against a usurper who has seized power unlawfully and "not in accordance with the law of nations." *Id.* at § XVI.

One may expand these exceptions to argue that Grotius would have recognized a right to revolution against unjust alien sovereigns, but such an interpretative magnification of the Grotian theory is unwarranted.

122. *See id.* at § II, para. 1 (noting that the right of unrestrained resistance would lead to a state's dissolution).

123. *Id.* at bk. 1, ch. III, § IX, para. 1.

124. *Id.*

125. *See* U.N. CHARTER art. 2, para. 1 (stating that the United Nations is based upon the sovereign equality of all states).

126. *See generally*, Khan, *A Legal Theory of Revolutions*, 5 BOSTON UNIV. INT'L L. J. 1, 12 (1987) (criticizing Grotius' notion of sovereignty which denies that government necessarily exists for the sake of the governed, and finding the notion unacceptable under a stated principle of human rights).

the domestic jurisdiction of each nation-state. Consequently, the principle of political independence acts to justify suppressive dictatorships and totalitarian legal orders.

Free State rejects all descriptive and normative arguments that justify the internal subjugation of the people. It requires that the will of the people sustain the authority of the government. Thus, Free State reestablishes the concept of popular sovereignty that Grotius discarded. Accordingly, Free State protects the political independence of the people within the domestic jurisdiction of the state. Additionally, it interprets the principle of political independence in the context of human rights and recognizes that all peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>127</sup> Free State shifts the focus of international law from the state to the people and interweaves human rights into the basics of political independence.

In Free State, the people have the right to freely determine their political status and to structure domestic institutions in order to fulfill their unique cultural and socioeconomic aspirations. While Free State affords people these rights, it does not require that all domestic institutions in each state be the same. Moreover, Free State does not approve only those forms of government in which the people elect the chief executive and legislative bodies. Even constitutional monarchies and kingdoms can be instituted according to the will of the people.

Free State asserts that no one superior form of government exists. Nonetheless, Free State disclaims those forms of government which lack the legal mechanisms to respond to the popular will. Only a government system that periodically ascertains popular will qualifies as Free State. For example, a periodic referendum to test the validity of a royal government may be fully compatible with popular sovereignty. In comparison, any government which initially submits itself to the people, but which provides no method for its removal, fails to meet the requirements of popular sovereignty. Even though a government that provides no legal method for its removal may be benevolent, Free State requires even that government to show that it continues to enjoy the support of the people.<sup>128</sup> Free State finds offensive any form of government in which the people have no right to remove the sovereign. In contrast, Grotius argued that a people threatened with destruction or in dire

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127. International Covenant on Economic, Social and Cultural Rights, *supra* note 85.

128. See Khan, *supra* note 126, at 22-23 (concluding that revolutions only acquire legitimacy if the people approve the succession rules).



need of life-sustaining supplies may wholly renounce the right to govern themselves.<sup>129</sup>

More importantly to the Free State, human rights are transforming the Grotian concept of territorial sovereignty by anchoring it in the needs and aspirations of the people.<sup>130</sup> The Grotian theory of sovereign state imposed no duty on the sovereign to act for the benefit of the people.<sup>131</sup> Government officials could appropriate state power and resources to aggrandize their personal fortunes, and a government could "have in view only the advantage of him who governs."<sup>132</sup> In light of the universal recognition of human rights, however, most states now assume moral and legal duties to protect the welfare of the people.<sup>133</sup> Human rights law imposes on a sovereign an internationally recognized normative obligation to advance the welfare of its subjects.<sup>134</sup>

In contrast to the Grotian state, Free State accepts its normative obligation to protect fundamental human rights.<sup>135</sup> It forbids the gov-

129. H. GROTIUS, *supra* note 1, at bk. 1, ch. III, § VIII, para. 3. History shows, however, that a people so threatened may eventually fare poorly because they have no legal mechanism to remove unacceptable sovereigns.

130. See D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 517 (1990) (projecting that United States actions in Panama and Grenada may represent the new order by advancing human rights through military intervention). Professor D'Amato supports intervention in another state to promote the development of human rights. See *id.* at 516 (announcing that the United States intervention in Panama produced positive results for human rights). See also Weston, *The Role of Law in Promoting Peace and Violence: A Matter of Definition, Social Values, and Individual Responsibility* in TOWARD WORLD ORDER AND HUMAN DIGNITY 114-15 (1976) (stating that the individual is the ultimate actor, and to suggest otherwise would be to misconceive the true architects of social justice and injustice).

131. See GROTIUS, *supra* note 1, at bk. 1, ch. III, § VIII, para. 14 (conceding, however, that most sovereigns guard and work for the benefit of their people).

132. See *id.* (supporting the view that the master exercises his authority to further his own power to the detriment of his servant).

133. See *infra* notes 134-138 and accompanying text (providing examples of how states attempt to protect citizens).

134. See International Covenant on Economic, Social and Cultural Rights, *supra* note 85 (declaring that everyone may enjoy their economic, social and cultural rights); International Covenant on Civil and Political Rights *supra* note 85 (proclaiming that everyone should enjoy civil and political freedom); and Optional Protocol to International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967), 6 I.L.M. 383 (1967) (creating a Human Rights Committee to receive communications from victims of civil and political rights violations within parties to the Optional Protocol).

135. See International Covenant on Economic, Social, and Cultural Rights, *supra* note 85, at arts. 6-12 (requiring that parties provide the right to work at a chosen profession, under safe conditions, the right to form trade unions, the right to social security, the right to an adequate standard of living, and the right to the highest attainable standard of physical and mental health).

ernment from violating civil and political rights of the people.<sup>136</sup> It accepts the mandate that governments employ their maximum available sources to construct a socioeconomic system under which individuals enjoy meaningful employment, an adequate standard of living, and proper physical and mental health.<sup>137</sup> Accordingly, no person acting in an official capacity may violate these rights,<sup>138</sup> and all state institutions

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136. See *Preamble* to the International Covenant on Civil and Political Rights, *supra* note 85 (declaring that signatories recognize the individual dignity of each person). Signatories assume the responsibility to safeguard the liberty and security of the person against random deprivation of life, torture, forced labor, arbitrary arrest and invasion of privacy. *Id.* at arts. 6, 7, 8, 9 & 17, *reprinted in* 6 I.L.M. 370-71, 373. In addition, signatories undertake to create a legal environment that ensures the freedom of thought, conscience and religion; the freedom of expression; and the freedom of association with others. *Id.* at arts. 18-22, *reprinted in* 6 I.L.M. 374 (ensuring that signatories observe the right to adopt a religion, the right to freedom of speech and press, and the right to peaceful assembly).

137. See International Covenant on Economic, Social and Cultural Rights, *supra* note 85, at arts. 2 & 6-12, 6 I.L.M. 361-64 (explaining that signatories undertake many obligations to respect the rights of its citizens). In order to live meaningful and dignified lives, individuals need some sort of security against hunger, homelessness, epidemics, occupational diseases, unemployment, unjust and unsafe working conditions. Signatories must affirmatively implement the rights, rather than merely enacting human rights legislation. *Id.* Free State accepts these obligations. If it lacks sufficient internal resources to realize its goals, Free State may seek international technical and economic assistance to improve methods of production, conservation and distribution of food, to control epidemics and other diseases and to facilitate the provision of other services. Signatories must freely and openly cooperate with one another as members of a symbiotic international community. *Id.* Free State does not tolerate massive illiteracy, which disables populations from enjoying a prosperous and enlightened life. Access to education is perhaps the most precious right, for it fosters a respect for human rights and freedom. *Id.* at art. 13.

Education may not only empower individuals to participate effectively in a free society, it may also promote understanding and harmony among racial, ethnic and religious groups. *Id.* Education will advance peaceful objectives through the workings of the United Nations. *Id.* Free State, therefore, undertakes to build an educational system that encourages technical and vocational secondary education as well as higher education, but under which fundamental education is compulsory and available free to all. *Id.* Signatories must introduce "free education". *Id.*

Free State is not necessarily a rich state that has the resources to provide basic needs of life to everyone. Even a poor state could be a Free State. *Id.* What distinguishes Free State from others is its sincere commitment and persistent willingness to guide socioeconomic forces towards actively achieving economic, social and cultural rights. *Id.* at *Preamble*. Unlike the Grotian state that does not undertake any affirmative obligation to work for the benefit of the people, Free State is firmly anchored in the virtue of human rights. Signatories must promote human rights. *Id.* Free State does not tolerate a government that breaches its responsibility to preserve and promote the good of all the people. It confers no legitimacy on any sovereign who denies his moral duty to uphold all covenants of human rights that Free State has made with the people and the world.

138. See International Covenant on Civil and Political Rights, *supra* note 85, at art. 2, 6 I.L.M. at 369 (stating that a victim of a rights violation enjoys a remedy against even an official who acts in an official capacity).

must adopt such legislative or other measures necessary for the enforcement of these rights.<sup>139</sup>

The fact that many states have not yet firmly committed to protect human rights may reflect the continued validity of the Grotian theory.<sup>140</sup> Even among the states that have assumed such an obligation, many lack laudable human rights records.<sup>141</sup> Therefore, some argue, the Grotian sovereign is not extinct.<sup>142</sup> This argument confuses a simple distinction. Although a state violates human rights, such violation fails to make the action lawful.<sup>143</sup> The breach of an obligation does not prove its absence. On the contrary, once a state accepts the commitment to protect and promote human rights, it ipso facto modifies its Grotian character and relinquishes its power to ignore or violate those rights.<sup>144</sup> This remarkable moral and legal evolution even modifies the

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139. *Id.*

140. See D. Weissbrodt, *Ways International Organizations Can Improve Their Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, in NEW DIRECTION IN HUMAN RIGHTS 69 (1989) [hereinafter Weissbrodt] (acknowledging that many governments have not signed the International Covenant on Civil and Political Rights).

141. See AGE OF RIGHTS, *supra* note 109, at IX (allowing that the consensus on international rights "is at best formal, or nominal and perhaps even hypocritical and cynical"); See also Dowrick, *Introduction*, in HUMAN RIGHTS: PROBLEMS, PERSPECTIVES AND TEXTS 2-3 (1979) (reviewing some states' assumed international human rights obligations and their alleged violations).

142. See AGE OF RIGHTS, *supra* note 109, at 13 (noting the struggle between states seeking to exercise autonomous control over their affairs and the international human rights concern for individual welfare).

143. See *id.* at 21 (emphasizing that the growing body of human rights obligations in the twentieth century forces states to recognize human rights in their laws and practices).

144. See AGE OF RIGHTS, *supra*, note 109, at 6-7 (declaring that international human rights obligations preclude the government from abusing civil and political rights and modify the government's conduct). Many states have not signed important human rights instruments. For example, many states have not ratified the Covenant on Economic, Social and Cultural Rights; and even fewer states have approved the Covenant on Civil and Political Rights. See Weissbrodt, *supra* note 140, at 68 (citing that as of December 31, 1986, the Covenant on Civil and Political Rights of 1966 was ratified by 83 states and the Covenant on Economic, Social and Cultural Rights was accepted by 86 states). Nonetheless, more than half the states in the world have assumed a legal obligation to enforce these basic covenants. See M. McDougal, H. Casswell & W. Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, in INTERNATIONAL LAW ESSAYS 45 (1981) [hereinafter *Theories About International Law*] (announcing that most people recognize that everyone enjoys at least the right to a "dignified human existence"). Furthermore, there is a universal moral consensus that some protection of fundamental human rights is binding on all states. See AGE OF RIGHTS, *supra* note 109, at 19 (explaining that some people argue that the United Nations Charter and its pledges supporting human rights developed customary law of human rights binding on all states). See also McKay, *What Next?* in HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS 67 (1979) [hereinafter HUMAN DIGNITY] (contending that all nations recognize a few well established principles of human rights). Perhaps no state would openly declare that it has no legal

nature of the Grotian sovereign who assumes no obligation to subordinate his own interests to the benefit of the people.<sup>145</sup>

Leading international lawyers disagree on whether foreign intervention is lawful when the political apparatus of a state violates the principle of self-determination or when that apparatus is ruthlessly oppressive. Professor Reisman, for example, argues against mechanically interpreting the standards of territorial integrity and political independence so that deposing a despotic regime appears indistinguishable from overthrowing popular governments.<sup>146</sup> Professor Schachter, in

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obligation whatsoever to protect any rights of the people. See AGE OF RIGHTS, *supra* note 109, at X (analyzing that states recognize human rights as commonplace and condemn government's that do not). See also Wilson, *A Bedrock Consensus of Human Rights*, in HUMAN DIGNITY at 55 (acknowledging that no government, as part of official policy, denies rights to its citizens). All parties to the United Nations Charter have accepted the obligation to protect and promote human rights. See U.N. CHARTER art. 1, para. 3 (stating that the Charter's purpose is to promote the advancement of human rights); *Id.* at art. 55 (commanding global attention to the respect for human rights); *Id.* at art. 68 (establishing an authority to set up commissions for the promotions of human rights).

145. See Hannum, *The Limits of Sovereignty and Majority Rule; Minorities, Indigenous Peoples, and the Right to Autonomy*, in NEW DIRECTIONS IN HUMAN RIGHTS 5-6 (1989) [hereinafter *Limits of Sovereignty*] (realizing that the increase in the multilateral economic and political treaties regulate sovereigns' behavior). Hannum stresses that although the United Nations and the European Community promote sovereign equality among the states, they also reduced the states' ability to freely and individually act. *Id.* Unpopular and ideological sovereigns suppress freedoms of the people to maintain their control over a dissatisfied, and perhaps defiant, population that challenges the legitimacy of the sovereign. See A.H. Robertson, *The European Convention on Human Rights*, in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 99-100 (1967) (asserting that tyrannical regimes deny human rights pursuant to their own constitutions and policies); see also R. GASTIL, FREEDOM IN THE WORLD: POLITICAL RIGHTS AND CIVIL LIBERTIES 1978 4 (1978) (describing that incumbent leaders deny human rights in order to prevent the populace from asserting its criticisms and complaints against the regime). Such sovereigns can become outright cruel if there is no legal mechanism to oust them from power. See D'Amato, *supra* note 154, at 159 (signaling that cruel regimes frequently control the access to arms, and in turn, use this power to suppress their own people). Ideological sovereigns deny people their civil and political rights, including the right to assemble and dissent, because they do not tolerate any criticism of their form of government, of their socioeconomic goals, and particularly of the ideology that they have imposed on the people. See Montgomery, *The Marxist Approach to Human Rights: Analysis and Critique*, SIMON GREENLEAF L. REV. 3 (1983-84) (listing repeated human rights violations as repression of political and ideological dissent among others). Irrespective of their actual motives, almost all suppressive sovereigns tend to justify the denial of these rights in the name of some higher good such as economic development of the people. See Gastil at 4 (criticizing that the modernization of Iran under the Shah succeeded due to the state's suppression of the media, free speech, and religion).

146. See Reisman, *Coercion and Self Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 644 (1984) (advocating that the interpretation of article 2(4) depends on the spirit of protecting political independence sometimes at the expense of territorial sovereignty). The intention behind the language of the rule, and not the language per se, should control. *Id.* Professor Reisman highlights the hypocrisy in

contrast, warns that Professor Reisman's interpretation dangerously weakens the normative restraint against the use of force.<sup>147</sup>

Little comfort exists in choosing between conflicting interpretations of the principles of political independence and territorial integrity. Professor Reisman's policy-oriented exceptions to territorial sovereignty<sup>148</sup> provide no guidance to rule upon the legitimacy of many excuses that states have used<sup>149</sup> to violate the territorial integrity and political independence of another state. Even if some Dworkinian Hercules could understand the normative complexity of a disputed intervention or invasion. These policy-oriented justifications would serve only global or

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denying intervention to overthrow a despotic, unpopular government and providing foreign aid to repressive regimes. *See id.* at 645 (asserting that this interpretation of article 2(4) "rapes common sense").

147. *See* Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984) (countering that Professor Reisman's interpretation trivializes the distinction between aggression and self-protection). Professor Schachter fears that the use of force for a "good cause" will lead to the use of force in a bad cause. *See id.* at 647 (articulating Professor Reisman's interpretation of article 2(4) as destructive to the maintenance of peace).

148. *See* Reisman, *supra* note 146, at 644 (advocating that article 2(4) provides for the use of force by another state to oust "despotism").

149. *See* Schachter, *supra* note 147, at 648 (emphasizing that democratic states, particularly the United States, have used a range of pretexts to justify their interventions). *See also*, *How the Invasion of Panama Affects International Law and the Bahamas*, N.Y.L.J., Jan. 25, 1990, at 1 (citing that Israel launched operations in Uganda to rescue hostages); Grossfeld, *Ethiopian Jews Are Embraced by the New Israeli Homeland*, Boston Globe, July 25, 1991, at 16 (comparing Israel's emotional state after the airlift of Ethiopian Jews to its patriotic fervor following the rescue of its citizens from Entebbe in 1976). The United States invaded Grenada to "protect nationals" from injury. *See* Leigh, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 655, 664 (1984) (comments by David Robinson, Legal Advisor of Dep't of State) (stating that the United States considered 1,000 United States citizens as threatened by conditions in Grenada). Vietnam invaded Cambodia to end "genocidal atrocities." *See* Schanberg, *The U.S. Beat the Lesser of Two Evils*, Newsday, March 1, 1991, at 101 (discussing that Pol Pot of the Khmer Rouge committed "genocidal atrocities" in Cambodia prior to Vietnam's takeover in 1979). The Soviet Union invaded Czechoslovakia to "save socialism." *See* Butturini, *To Czechoslovaks, '68 Invasion Just Old News*, Chicago Tribune, Aug. 21, 1988, at 6 (indicating that the Soviet Union justified the invasion of Czechoslovakia to "save socialism" from "rightists" who attempted to overthrow the communist system). India invaded East Pakistan to stop "military atrocities." *See* Hazarkia, *Bangladesh Insurgents Say India is Supporting Them*, N.Y. Times, June 11, 1989, at 3, col. 3 (relaying that there was a war between India and Pakistan, of which East Pakistan was a part, in 1971 following the exodus of 10 million Pakistanis distraught over the Pakistani military's abusive behavior). Iraq invaded Kuwait to oust "corrupt rulers." *See Inside Iraq: Amid the Ruins, Fear, Anger and Cynicism*, N.Y. Times, Feb. 17, 1991, at 3, col. 4 (reciting that Iraq intended to "chase all corrupt rulers from Arab lands.").

regional superpowers.<sup>150</sup> In fact, weaker states become more vulnerable once exceptions to the principle of non-intervention arise.<sup>151</sup>

Professor Schachter's reluctance to allow any foreign intervention, in contrast, appears to shield vicious governments. International stoicism resulting in absolute non-intervention becomes a moral mistake when state tyranny is incessant and massive.<sup>152</sup> A total ban on foreign intervention favors upholding abstract legal concepts at the expense of human suffering.<sup>153</sup>

Free State rejects the debate between upholding territorial sovereignty and allowing humanitarian intervention.<sup>154</sup> These normative contradictions and nagging dilemmas arise from the lingering legitimacy of the Grotian theory. Free State repudiates the Grotian system. Equally important, it rejects the threat or use of force in the management of global affairs. The concept of human rights embodies Free State. Free State rejects all forms of subjugation and aggression, internal as well as external.

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150. See Schachter, *supra* note 147, at 649 (predicting that Professor Reisman's reinterpretation of article 2(4)'s use of force would authorize powerful states to impose their will over governments that ignore the views of their own people).

151. See *id.* at 650 (fearing that powerful states will abuse the use of force from article 2(4) under the pretense of self-determination or self-defense).

152. See Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L L. 494, 511 (1990) (conceding that arguments that support the legitimacy of the sovereignty can appear morally repulsive).

153. See Reisman, *supra* note 146, at 645 (claiming that a mechanical interpretation of article 2(4) may gravely deprive a large population of its human rights).

154. See Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 500 (1990) (advocating that the United States invasion of Panama was not justified by norms of international law); Farer, *supra* note 152, at 504 (1990) (asserting that the United Nations Charter does not recognize the defense or rescue of United States nationals in Panama as a basis for United States intervention in Panama); D'Amato, *supra* note 130, at 519, 520 (1990) (maintaining that protecting citizens from a tyrannical leader may justify intervention). Like Grotius, Professor Nanda makes a realistic but normatively empty argument that the will of the people is not always recognized as the basis of governmental authority. See Nanda, 84 AM. J. INT'L L. at 500 (voicing that the United Nations does not equate self-determination with the will of the people). Professor Farer also defends the Grotian concept of sovereignty. See Farer, *supra* note 154, at 507 (declaring that one state may not impose its will upon the occupants of another). Professor D'Amato, however, rejects this "statist" concept of international law. See D'Amato, *supra* note 154, at 520 (explaining that intervention and use of force comply with article 2(4) when the action does not harm the "territorial integrity" of the country through annexation or colonization).

## V. FREEDOM FROM BOUNDARIES

New forces of human rights,<sup>155</sup> commerce<sup>156</sup> and technology<sup>157</sup> have interwoven all nation-states, large and small, into an intricate, inescapable web of interdependence.<sup>158</sup> Not even the mightiest state can survive outside the global network. Willful sovereigns following isolationist policies risk catastrophic seclusion.<sup>159</sup> In fact, the recent economic quarantine of Iraq after its invasion of Kuwait demonstrates that isolation from the international community is a serious punishment.<sup>160</sup> Thus, even if the partition of the planet into existing nation-states persists, global interdependence will frustrate any meaningful application of territorial sovereignty.<sup>161</sup> Hence, the nation-state will be increasingly obliged to mutate into Free State.

For centuries, national boundaries have separated and confined the peoples of the world.<sup>162</sup> Innumerable factors may explain this fragmentation of the human family. Racial, linguistic, religious and ethnic differences, for example, are historic barriers which breed ill-will, hostility

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155. See AGE OF RIGHTS, *supra* note 109, at 13-14 (referring to the "internationalization of human rights.").

156. See *Theories About International Law*, *supra* note 144, at 45 (indicating how interdependence among nation-states becomes apparent through their pursuit of wealth). Economic stability requires markets beyond a state's borders, and disruption affects all links in the economic chain. *Id.*

157. See McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in INTERNATIONAL LAW ESSAYS 27 (1981) (intimating that new developments in technology, such as space and planetary exploration, machine simulations of the brain, development of contraceptive devices, and experimental embryology force drastic revisions of fundamental ideas, including the scope and reach of international law).

158. See *Theories About International Law*, *supra* note 144, at 44 (arguing that international trade per se confirms interdependence among nations).

159. See *id.* at 44-45 (proposing that global interaction has forced every individual to think globally not locally).

160. See *Twelve Months Later*, The Christian Science Monitor, Aug. 2, 1991, at 20 (reporting that the economic sanctions against Iraq were punishing). See also, Charmelot, *Iraq Has Limited Sovereignty Since Gulf War*, Agence France Presse, July 28, 1991 (citing that the United Nations enjoyed what one diplomat here calls a "quasi-mandate" as it enforced resolutions regarding the economic embargo, which causes famine and malnutrition among Iraq's population); Flanigan, *Eventually Iraq Will Be One Hot Business Prospect*, L.A. Times, July 28, 1991, at D1 (describing that Iraq is bankrupt, with no oil revenues, \$4 billion in frozen accounts, and depleted foreign reserves of \$14 million).

161. See *Limits of Sovereignty*, *supra* note 145, at 7 (stressing that the state still acts as a buffer among the world's military powers, but acknowledging that international organizations also influence the state).

162. See generally A. COBBAN, *THE NATION-STATE AND NATIONAL SELF-DETERMINATION* (1969) (explaining that nationalism was a response to the powerful sovereign state).

and even hatred between groups and populations.<sup>163</sup> Instituting itself as the *raison d'être* of such human distinctions, the nation-state perpetuates these barriers.<sup>164</sup> The nation-state maintains physical borders to restrict the free flow of goods, services and persons. It also establishes psychological boundaries to repress the free flow of human goodwill.<sup>165</sup> The segmentation of the world seems to have run its course.<sup>166</sup> Numerous scientific, economic, geographical and normative developments challenge traditional boundaries of the nation-state.<sup>167</sup> Moreover, sentiments of cooperation and universal realization of interdependence weaken national identities.<sup>168</sup> Recognizing the dysfunctional nature of the nation-state, Free State liberates people from both physical and psychological boundaries of the nation-state.

#### A. FREEDOM FROM PHYSICAL BOUNDARIES

Freedom from physical boundaries is the hallmark of Free State. Several new developments support the emergence of Free State by challenging the practical significance of national borders.<sup>169</sup> These include the advance of science and technology, the raised consciousness of humankind's role in nature, the interdependent global economy, and the new emphasis on the freedom of international movement.

First, science and technology have in many ways rendered borders dysfunctional.<sup>170</sup> The radiation released in the Chernobyl accident, for example, swept over Europe, fluttered across the Pacific Ocean, and

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163. See generally, *Limits of Sovereignty*, *supra* note 145, at 6 (arguing that these differences prompted various groups to implement their views by controlling political channels).

164. See *id.* at 7 (predicting that the validity of the nation-state will continue, although Hannum desires a more flexible notion of state sovereignty).

165. See *AGE OF RIGHTS*, *supra* note 109, at 47 (formulating that states lack a social contract whenever the persons of one society refuse to accept political and legal obligations of another society).

166. See *Limits of Sovereignty*, *supra* note 145, at 19 (asserting that while the state is still the most significant legal actor, increasing international restrictions on state activity reflect the growing interdependency of international order).

167. See *id.* (stressing that the nation-state ideal is now impracticable due to new international restrictions on state sovereignty).

168. See *id.* (advocating that the interdependency of states will increasingly infringe on state sovereignty, although predicting that sovereignty will persist).

169. See *id.* (heralding that the nation-state hampers the development of interdependence).

170. Cleveland, *The Internationalization of Internal Affairs*, in *HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS* 44-55 (1979). The management of scientific and high-technological endeavors in space and the deep seabed includes all nations. *Id.*



invaded the United States.<sup>171</sup> Against such a phenomenon, state frontiers are meaningless. Similarly, in commerce and banking, the rapid transboundary electronic flow of financial data makes it difficult for territorial sovereigns to regulate, for tax purposes, the precise situs of funds.<sup>172</sup> Space technology poses an equally formidable challenge to the privacy and security of the nation-state.<sup>173</sup> Intrusive satellites orbiting hundreds of miles above the earth can engage in remote sensing of the earth's natural and man-made resources without regard to the boundaries of nation-states.<sup>174</sup>

Second, Free State promotes the universal principle that human civilization is rooted in nature.<sup>175</sup> Therefore, the seamless unity of nature should not be denied in the name of artificial national boundaries. Originally, a state's sovereignty over the airspace above its territory was thought to extend *usque ad coelum*,<sup>176</sup> but recent scientific discoveries and the development of space technology exposed the impracticability of enforcing such a conception. Even if nation-states can appropriate airspace, they cannot partition the incomprehensible horizons of the universe.

Contemporary consciousness, rooted in egalitarian principles of universal rights and cooperation, gives new impetus to the concept that certain things belong to all people. Grotius himself championed that private ownership of the oceans and air can never occur.<sup>177</sup> This limit on sovereignty has now extended to Antarctica,<sup>178</sup> outer space, the

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171. Malone, *The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution*, 12 COLUM. J. ENVT'L. L. 203, 205 (1987). The radiation from Chernobyl spread to Norway, Finland, Sweden and Europe and the United States. *Id.*

172. See Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 VAND. L. REV. 985, 1006 (1983) (noting that the international movement of financial data allows banks and other international business institutions to escape national laws regulating and taxing money transactions). The unchecked transboundary flow of funds also threatens the existence of national money markets. See *id.* at 1006 (exclaiming that "banking institutions have threatened the very existence of national money markets in their efforts to control national currencies in the same international trade transactions that gave rise to the Eurodollar"). Approximately one trillion dollars in investment capital, for example, have been found in a stateless pool. *Id.*

173. See *id.* at 1007 (stating that the remote sensing of the earth from beyond its borders raises concerns among the world's policy makers).

174. See *id.* at 1008 (describing that satellites can orbit 575 miles above the earth and photograph less than 100 yards in size).

175. World Charter For Nature, G.A. Res. 37/7, U.N. GAOR Supp. (No. 51) at 21, U.N. Doc. A/37/L.4 and Add. 1 (1982).

176. L. HENKIN, *supra* note 9, at 317.

177. H. GROTIUS, *supra* note 1, at bk. II, ch. II, § III, para. 1.

178. The Antarctic Treaty, June 23, 1961, art. IV (2), 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

moon and other celestial bodies.<sup>179</sup> Although some states resist surrendering their egocentric view of the universe, an increasing moral and legal consciousness builds to consider the planet as an indivisible natural and legal entity that must be used for the benefit of all.<sup>180</sup>

In addition, a broad moral consensus exists among members of the international community to reorient the human-centric view of the universe, thereby discarding humankind's tendency to usurp the earth's resources to the exclusion of other life forms.<sup>181</sup> Excessive consumption and misuse of natural resources degrade natural systems.<sup>182</sup> Collective life on earth suffers when each nation-state uses sovereignty to maintain a socioeconomic system that disregards the integrity of ecosystems and organisms. To preserve endangered species, biological diversity, and the earth's natural beauty, nation-states must cooperate to restrict not only the human-centric interpretation of nature but also the divisive concept of territorial sovereignty.<sup>183</sup>

Third, the global economy defies state borders that impede the flow of goods, services, and persons. In the intertwined nature of the world economy, a state can no longer confine its economy to national boundaries; nor may a state command global economic forces. Market integration in the European Community highlights the trend towards sovereignties joining for mutual advantage. Similar cooperation in other parts of the world will likely create an economic environment in which regions, rather than nation-states, become the principle players in the global market.<sup>184</sup> Nation-states must substantially dismantle their borders to participate in regional economic communities. Thus, from such regional communities will Free States first emerge. Nation-states within the European Community, for example, are already mutating

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179. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, Jan. 27, 1967. arts. I & II, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (1967), *reprinted in* 6 I.L.M. 386 (1967).

180. World Charter For Nature, *supra* note 175, at 21.

181. *Id.*

182. *Id.*

183. *Id.*

184. See generally, *Asia-Pacific Region Will Be One of Three Major Trade Centers in 1990s*, Int'l Trade Rep. (BNA), No. 33, at 1275 (Aug. 15, 1990) (stating that the Asia-Pacific Region, North America and European Community will be the three major trade centers in the 1990's). The Free Trade Agreement between the United States and Canada, and a possible joining of Mexico in the free trade zone would create a formidable regional market in North America. Similarly, Pacific-rim countries including Japan, Korea, Hong Kong, Australia and New Zealand may create a consolidated regional market. *Id.*

into free states.<sup>185</sup> Through a similar process, it is likely that regional free states will transform into global free states.

Fourth, the right to freedom of movement challenges territorial borders that obstruct the free flow of people.<sup>186</sup> Given modern means of transportation and a willingness to relocate, thousands of people exercise their right to leave their homes and settle in other countries. Because most nation-states control the movement of people, however, many more are denied such freedom. Many countries prohibit their nationals from leaving, and many forbid nationals of other states from entering. Communist states, for example, restrict their citizens' right to travel and immigrate. Prosperous states, on the other hand, possess stringent laws against the inflow of peoples from poor countries. Nonetheless, the right to freedom of movement will challenge the maintenance of rigid physical boundaries and hinder nation-states' attempts to arbitrarily deny the right to relocate.<sup>187</sup>

Free State guarantees the right to freedom of movement. Nation-states within the European Community are already mutating into free states. Millions of nationals within member states are free to travel and even to relocate anywhere within the borders of the Community. Of course, physical boundaries of the Community will restrict the entry of outsiders, and such restrictions are incompatible with the concept of Free State. Nonetheless, considering the many wars fought on the European Continent to forge each nation-state, the evolution of regional free states within Europe is a significant historical milestone. Other regions may follow the example of the Community to neutralize their internal frontiers and create regional free states. In the meantime, global recognition of freedom of movement resulting in the advent of Free State, however, will occur only after the gap between rich and poor regions narrows and the world's people gain psychological freedom from national and regional boundaries.

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185. See generally, D. LASOK, J. BRIDGE, *LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES* (1987) (discussing the European Community in general and legal institutions and organizations specifically).

186. See International Covenant on Civil and Political Rights, *supra* note 85, at art. 12, reprinted in 6 I.L.M. 368 (recognizing the right to liberty of movement and freedom to choose one's residence). Article 12 also declares that everyone is free to leave any country, including their own. See also Universal Declaration of Human Rights, *supra* note 110, at art. 13 (proclaiming the right to freedom of movement both internally and transnationally).

187. See M. McDUGAL & W. REISMAN, *supra* note 2, at 790 (1981) (stating that human dignity prefers free access to all communities).

## B. FREEDOM FROM PSYCHOLOGICAL BOUNDARIES

The borders of the nation-state are not only physical, but also psychological. Although physical borders are capricious, psychological borders are concrete. Geographically, for example, natural barriers such as mountains, oceans and canyons divide but few states. More often, leaders first draw boundaries on a map and then artificially protect them with border police. For example, oceans border the United States in the east and west, but in the Southwest, the dividing line between the United States and Mexico is predominantly unnatural. Similarly, in the North only an artificial concept divides the vast stretch of nature that native tribes freely traversed before the emergence of Canada and the United States. All over the globe, states erected legal and physical fences to divide what nature left united. Psychologically, meanwhile, even unnatural borders of the nation-state possess meaning. The psychological boundary between the United States and Mexico, for example, looms large even if populations on either side remain indistinguishable or substantially related.

Nationality is the primary relationship that binds the individual to the nation-state.<sup>188</sup> Through the concept of nationality, the nation-state imposes burdens, such as military service, and confers benefits, such as diplomatic protection. Nationality, however, is not simply a legal bond that the state uses to control its nationals; it is also a social fact of attachment by which individuals acquire sentimental pride in their nation-state.<sup>189</sup> Nationals frequently favor their state over all others, work for its interests and betterment, volunteer for military service, and even sacrifice their lives defending its honor. States that fail to create patriotic sentiments among their nationals remain unstable, break up, and

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188. Although the concept of world citizenship exists in common discourse, it has little validity in international law; almost all peoples of the world are nationals of some state. The power of states to legislate on matters of nationality is not unlimited. Yet, states have wide powers to determine under their own law who are their nationals. Harvard Research in International Law, *The Law of Nationality*, 23 AM. J. INT'L L. Spec. Supp. 11, 80-82 (1929). Lack of nationality may cause statelessness: a stateless person is one "who is not considered as a national by any state under the operation of its law." Convention Relating to the Status of Stateless Persons, Sept. 28, 1954. art. I(1), 360 U.N.T.S. 117. If stateless persons are expelled from a country in which they lived, there is no state that is required to accept them. Because states have mutually incoherent nationality laws, some individuals may be born without nationality, and may never acquire a nationality thereafter. Even though international agreements have sought to ameliorate the plight of stateless persons, few individuals would choose to embrace statelessness. Convention Relating to the Status of Refugees, July 28, 1951. 189 U.N.T.S. 137; Convention on the Reduction of Statelessness, U.N. Doc. A/Conf.9/15. In the age of nation-states and their collective control over life in general, the peoples of the world have no choice but to seek nationality of some state.

189. *Nottebohm Case Second Phase (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4.

even lose their existence. Patriotic indoctrination, therefore, occurs in almost all states. Furthermore, states use their coercive legal order to protect themselves from subversion by imposing stiff penalties for treason, espionage and other offenses against state interests. In fact, some states go so far as to grossly violate the human rights of their nationals in order to stifle any criticism of the state or its ideology.

The legal and psychological control that a state exercises over its nationals disables many individuals from relating to "foreign" peoples and "foreign" lands. Attachment to the territory of the nation-state may preclude nationals from having a genuine interest in and concern for other parts of the world. Allegiance to the defense of the nation-state may prevent nationals from challenging wrong and unwise state policies, particularly against foreign peoples and foreign lands. National narcissism may impede respect for other cultures and civilizations, causing ill-will, contempt, and even hatred towards them. National fanaticism may even lead to aggression and genocide. Such artifacts of the nation-state could therefore endanger the physical and spiritual well-being of global life.

Quite often, psychological boundaries that nation-states wish to develop are capricious from cultural and anthropological viewpoints. Boundary makers have partitioned ethnic, linguistic, religious and cultural groups which previously lived together for generations. In some states, meanwhile, segments of the permanent population share nothing in common except collective obedience to the central state organs. Of course, all nation-states attempt to forge their nationals together through sentiments of patriotism. In some cases, however, patriotic attachment to the nation-state fails to develop. The Soviet Union, for example, encompassed fifteen republics with disparate historical, sociological and cultural backgrounds. Islamic republics in the East do share little in common with Baltic states in the West. Communist ideology practiced over several decades failed to unify the population of the Soviet Union. The declarations of independence announced by most republics after the failed August coup expose the failure of the Soviet Union to weld together disparate, independent-minded populations.<sup>190</sup> Similarly, secessionist movements in India, Canada, and Yugoslavia demonstrate the cleavage between the state and the people.<sup>191</sup>

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190. See N.Y. Times, March 4, 1991 (reporting that Latvia, Estonia and Lithuania, for example, held plebiscites voting in favor of independence).

191. See Sudetic, N.Y. Times, *Yugoslav Troops Battle Slovenes, Ending Cease-Fire*, July 3, 1991, at A1 (reporting the fighting in Yugoslavia in the wake of Croatia's and Slovenia's declarations of independence). Likewise, strong separatist movements

The conflict between the Israelis and the Palestinians stands as a tragic and bloody example of conflicting psychological loyalties to the nation-state. The establishment of the Israeli state forced out hundreds of thousands of Palestinians from their ancestral territory, making them refugees in neighboring countries. Opposed to the existence of the state of Israel, Palestinian activists launched an armed struggle against the new state and its inhabitants who migrated there to establish a homeland.<sup>192</sup> The Palestinians desire to establish their own nation-state, which Israel opposes. This conflict demonstrates how a nation-state may fail to accommodate complex human realities, and may invite a bloody feud between peoples who previously lived together in relative harmony.<sup>193</sup>

In accordance with the law of human rights, Free State develops universal sentiments of human solidarity.<sup>194</sup> For example, it grants freedom from psychological boundaries of the nation-state. This freedom, however, does not condone anarchy. Rather, Free State proposes ordered liberty within the province of universal human rights. Again, the example of the European Community highlights the evolution of Free State. For centuries, the British, the French, and the Germans fought each other in a series of destructive wars, often in the name of country and patriotism. Now, they decided with other European states to abandon aggression and instead create a community of social cooperation, economic prosperity and human rights.

To create psychological bonding with a larger community rather than national populations is the objective of the regional Free State. To instill sentiments of goodwill, friendship, and cooperation among people is the noble aim of Free State. Free State will achieve these goals with the gradual extinction of the nation-state.

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exist in both Indian Punjab (by Sikhs) and Indian Kashmir (by Muslims). In Canada, French Quebec seems to be aspiring towards independence.

192. See The Palestinian National Charter of 1968, art. 19, reproduced in 3 *The Arab-Israel Conflict* 706 (J. Moore ed. 1974) (declaring that Israel's establishment as a state to be illegal). Later, in order to open a dialogue with the United States, the Chairman of the Palestinian Liberation Organization, in a press conference, renounced terrorism and recognized the existence of Israel. Hoagland, *For Arafat No Turning Back*, Wash. Post, Dec. 22, 1988, at A25.

193. See The Palestinian National Charter of 1968, at art. 19 (recognizing that the Jews who had normally resided in Palestine will be considered Palestinians). Before the establishment of Israel, Palestinians and Jews had lived together for many centuries.

194. See *Preamble* to the Universal Declaration of Human Rights, *supra* note 110 (recognizing that the inherent dignity and the equal and the inalienable rights of all members of the human family are the foundations of freedom, justice and peace in the world).

## VI. CONCLUSION

The concept of Free State is rooted in the global forces of economic interdependence and human rights. As the nation-state loses its historical claim to exclusive and complete sovereignty, Free State will become the basis of regional and global political organization. Accordingly, this normative revolution will also change the character of global life. Free State protects fundamental human rights and frees people from both internal and external domination. Furthermore, Free State recognizes economic interdependence and the need for the free flow of goods, services and persons across national boundaries. The citizens of Free State will shift their loyalty from the nation-state to the World Community, and share universal sentiments of goodwill with all the world's peoples.

Most likely, regional free states will appear as regions consolidate their efforts to create a culture of fundamental freedoms and economic prosperity. The European Community may provide the initial guidance for creating regional infrastructures conducive to the development of Free State. Although the future World Community of Free States is a distant dream, the idea of the Grotian nation-state is becoming increasingly dysfunctional. Perhaps, the concept of Free State is more appropriate to accelerate the future development of Global law.<sup>195</sup>

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195. The term "international law" may be discarded since it emphasizes nations rather than people. Global law, on the other hand, is a more appropriate term because it includes the law of human rights and global markets.