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Nuclear Sovereignty

Re-thinking the Relationship between Law and Politics in an
Extreme Context

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Abstract

The purpose of this paper is to facilitate the understanding of the relationships between law and politics through an analysis of different conceptions of sovereignty. Sovereignty is a concept that touches upon both legal and politics aspects. The concept is founded within the legal, but developed through processes within the political sphere. This invariably leads to numerous meanings of the sovereignty concept, while having an effect on its practice and use in world politics. Sovereignty, at once a “normal” and traditional concept within international law, also gives rise to “extreme” instances of its practice within the international political realm. This results in new reorientations of the term, such as “nuclearised sovereignty”. The traits inherent to the sovereignty concept makes it difficult to ascertain the ultimate determinant of sovereignty: that is, the legal or the political.

Keywords: sovereignty, power, international law, politics, nuclear weapons

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List of Abbreviations

ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Court for Rwanda
ICCTY	International Criminal Court for Yugoslavia
ECHR	European Court of Human Rights
GDP	Gross Domestic Product
GDR	German Democratic Republic
NGO	Non-Governmental Organisation
UN	United Nations
UNCH	United Nations Charter
UNSC	United Nations Security Council
R2P	Responsibility to Protect
US	United States
USSR	Union of Soviet Socialist Republics
WWII	World War Two

1 Introduction

Almost daily, nuclear weapons and the countries that seek them feature in the headlines of news reports. This is definitely in relation to the upcoming review conference of the NPT that will take place later this year. Currently, the US and Russia are engaged in talks in order to reconfigure the nuclear programs of both nations. North Korea is also under pressure to comply with calls for nuclear non-proliferation. Iran is in the midst of a nuclear standoff and possible war after recent news reports reveal the building of secret nuclear facilities.¹

Surrounding this is also a new fear: that of “nuclear terrorism.”² Subsequent talks and negotiations regarding all this activity involve the Members of the Security Council: that is, the world's greatest superpowers. One can see that “nuclear weapons, and the way they are acknowledged, proliferated, regulated, and controlled by nations are an utmost international issue.”³

It is easy to see the scope and dimension of the problem. For example, how does one begin to deal with nuclear weapons; an issue that lies so close to a nation's own internal situation? It is not a coincidence that most of the nations involved in the nuclear debate are either superpowers or aspiring towards that title. Additionally, one cannot ignore nuclear weapons and its relation to inter-state conflict for most of the nations involved (especially in regards to undeclared nuclear states, or those on the brink of acquiring nuclear weapons). Thus, power—in terms of how it is maintained, projected and used in relation to others—is central to the nuclear debate.

Politics deals primarily with power, usually in terms of how to attain and maintain it. Interestingly enough, law also deals with the same issues. States gain power by virtue of recognised statehood in international law, but as a consequence, the state's power must be controlled in relationship to those around it. The international legal regime and the treaties within it usually deal with how to control inter-state relations. Laws against the external use of force and intervention serve as examples for this. In this way, the relationship between law and politics starts to emerge.

In this context, sovereignty arises as an interesting variable to place within the law and politics relationship. Sovereignty is something that is claimed as the basis of unilateral and often questionable

¹ Watkins, Susan “Lulling Nuclear Protest: The Non-Proliferation Treaty”, p26 *New Left Review* 54. New Left Review Ltd

² “UN Council Endorses Nuclear Curbs” accessed from <<http://news.bbc.co.uk/2/hi/americas/8272396.stm>> on 4 January 2010

³ Cohen, A, “Israel and the Bomb Revisited”, *Why do States Want Nuclear Weapons? The Cases Of Israel and South Africa* p 6 IFS Info 2: 2005

state action; it is used as a basis for achieving political ends. Nevertheless, the sovereignty concept is one that originates and is protected in law.

Despite this, states will find new and innovating ways (such as nuclear weapons) to protect their sovereignty. In light of this, how can one attempt to control the sovereignty concept? Nuclear weapons pose as an interesting problem to answering this question. They are weapons that represent these instances of law and politics mixing: “as such, the ruling nuclear order provides one of the most vivid illustrations of the reality of “international law.””⁴ These weapons represent the highest instance of a military and political tool. Through the mere acquisition and “use” of these weapons (in the form of nuclear deterrence) states achieve the highest political ends with a minimal use of actual force. This ultimate military and political tool, when coupled with the highest instance of power—that of sovereignty—gives rise to a study of “nuclearised sovereignty” : a study of extreme contexts, and for this reason, of high interest.

1.1 Research Question

The aim of this study then, is to examine the links between law and politics as exemplified by the sovereignty concept. The concept of sovereignty will act as an example of the dynamics of the relationship between law and politics. Thus the research question is as follows: *what is the determinant of sovereignty; the legal or the political?* Examining the determinant of sovereignty will involve exploring the norms, concepts and actors which influence, define and govern sovereignty in theory and practice.

Thus, the following sub-questions and issues work towards addressing these factors:

- Who are the established legal persons of the international political system?
- The relativity of the sovereignty concept.
- Sovereignty in an “extreme” context.

All these questions and issues touch upon both the legal and political, thus making it problematic to delimitate between the two disciplines.

⁴ Watkins,S., p26

1.2 Methodology and Sources

A survey of personalities in international law introduces the problematic nature of sovereignty (state sovereignty in particular). The sovereignty concept will be deconstructed into its barest operational elements and then placed within different contexts; the “traditional” and “extreme” (the “extreme” version as exemplified by nuclear weapons). Through this, the links between the legal and the political will become apparent.

Both primary and secondary sources are used for the study. Anything emanating from states—including signed treaties, agreements, statements made by officials, and documents emanating from government sources—are considered as primary sources. All these sources act as a comment on the sovereignty concept: they illuminate how the state itself perceives the meaning and practice of sovereignty in the world politics. Because this is a study of state sovereignty in the legal-political sphere, these sources were invaluable because they emanated from the original source. Thus, the primary sources of this text acted as the basis for inspiration for the study and also drove the analysis (especially in Chapter 4, which includes 3 case studies).

Secondary sources—such as books, articles, and news reports—have also been of great use to the study. Through their comments on sovereignty, these sources have added on to the meaning of the concept. Though secondary, these sources are nonetheless integral to the analysis, only adding to the variation and fluidity inherent to the sovereignty concept.

1.3 Theory: The Relationship Between Law and Politics

Where do law and politics meet? Addressing this question requires examining the links between law and politics and assessing what both disciplines deal with. There are varying views on this subject. Indeed, some see law as something that should be kept entirely separate from politics and vice versa⁵.

Nevertheless, substantial links between the two aspect remain.

Political action on the international sphere is “a variegated, multidimensional form of human deliberation and action.”⁶ Law itself deals with deals with aspects of deliberation. Substantial law (the rules and treaties that are seen as norms) are the results of deliberation between states; the most powerful political actors on the international scene.

In making the law, these states are driven by the idiographic (“who are we?”), the purposive (“what do we want?”), the ethical (how should we act?), the instrumental (“how do I get what I want?”).⁷ These are all distinctly political considerations. Nevertheless, law deals with these factors also. Law often makes these aspirations concrete, in the form of treaties of other multi-lateral agreements. The establishment of legal regimes (such as the UN) also acts to control these aspects. Therefore, law and legal regimes solidify state interests and action.

Resultantly, law is often described as a “socialised process”, including the entire decision making process.⁸ Law is more than a simple body of rules existing in a vacuum, because it is based on state views and practice: it is an organic and living system: “international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. international law is the entire decision making process, and not just the reference to the trend of past decisions which are termed “rules”⁹. This socialised process requires examining who we are, and what we want to achieve. Thus law emerges as “an articulation of universal interest” working to “secure values we all desire.”¹⁰

Law becomes a a general “toolbox”; a kit containing varying rules and norms which are to be

⁵ Higgins, *Problems and Process: International Law and How We Use it* p8. Oxford University Press:1995

⁶ Reus-Smit, *The Politics of International Law*, p 6, Cambridge University Press: 2004

⁷ Reus-Smit, p 26

⁸ Higgins, p 2

⁹ Ibid

¹⁰ Ibid, p 10

applied according to specific contexts and circumstances. Under this view, law is not a “closed system of rules, excluding the possibility that certain actors are not covered by relevant norms.”¹¹ This also means the application of law is affected: “judges are not merely 'rule finders' applying the law...instead must determine relevancy of past rules.”¹² Law becomes a system containing multiple operational elements, and thus the role of context is heightened: rules are determined according to what the context allows for. Law becomes a system which allows for interpretation and choice; things that are often driven by political factors (such as state interest).

This particular view on the nature of law also has an effect on the sources of law. If law is seen as fact, then the source of law is simply the body of codified rules already decided upon. On the other hand, if law is seen as process, then law may arise from a variety of sources: “law as process embraces a number of sources of law, not just mere codification—but claims and counter claims, state practice, and decisions by a variety of authorised decision makers.”¹³

A discussion on the sources of law leads to a discussion on the binding nature of law: How and why should states obey rules? Is law the result of state practice, or does law itself control what states can do? Koskenniemi notes that if international law is based on consent, then “it is open to the criticism that international law is whatever states choose to regard as law, so that law cannot be an effective external constraint on their behaviour.”¹⁴ Law then becomes an apologist for state action.

As one can see, attempting to disentangle law from other aspects really requires one to examine the nature of law itself.¹⁵ This exercise ultimately reveals the double structure of international law. This double structure is both normative (law as fact) and concrete (law as process).

International law works to make the conflicting elements (and double structure) of law compatible: “law is simultaneously both normative and concrete: it binds a state regardless of state's behaviour, will and interest, but its consent can nevertheless be verified by reference to actual state behaviour, will or interest.”¹⁶ This specific nature of law often results in incoherent /ambiguous legal argument. A clear example of this is found in the controversial ruling in Paragraph 2E of ICJ Nuclear Weapons Advisory Opinion, which states the following:

¹¹ Dekker, I.F and Werner, W.G “ The Completeness of International Law and Hamlet's Dilemma: Non-liquet, The “Nuclear Weapons Case and Legal Theory” p 244. *Nordic Journal of International Law* (68):1999.

¹² Higgins, p 4

¹³ Higgins, p 10

¹⁴ Koskenniemi, *From Apology To Utopia: The Structure of International Legal Argument*, p8. Finnish Lawyer's Publishing Company: 1989

¹⁵ Ibid, p 4

¹⁶ Ibid, p 17

However, in the current state of international law, and of the elements of the fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defence, in which the very survival of a State would be at stake.

Indeed, the entire Opinion represents a persistent tension between law as fact (norms and values definitively enshrined in the form of rules) or law as process; wherein law is the result of changes in the international political sphere, leading to the alterations to the “current state of international law.” Law as process allows for the role of politics to shape and alter the law, especially in instances such as the Nuclear Weapons Advisory Opinion, where the law is indeterminate or has yet to be created: “when international law is indeterminate, or when situations arise that were not anticipated when the rules were formulated, international law serves a discursive medium in which states are able to make, address, and assess claims.”¹⁷ The body of law grows according the new experiences met in the international sphere, and how states deal with such experiences: “the system of international law has evolved in conjunction with the modern international political States system and it is hypothesized that the idea of international law is integral to that power structure.”¹⁸

To conclude, one can see that there are numerous links between the legal and political. The two disciplines often deal with common things, such as power—specifically, how to attain, maintain, and control it. The points at which law and politics meet invariably affects the substantial nature of both disciplines; and so in some cases law and politics share a symbiotic relationship.

All this will definitely have an effect on how concepts such as sovereignty are deemed in theory and practice. The following sections illuminate the multiple links between the two disciplines, at the same time problematizing the sovereignty concept. A discussion on established legal persons of the international political system introduces the occurrence of sovereignty in international law and politics.

¹⁷ Reus-Smit, p 5

¹⁸ Scott, V.S“International Law as Ideology: Theorizing the Relationship between International Law and International Politics” p319,*European Journal of International law*:1994

2 Legal Subjects of the International Political System

Within the international political system, certain actors may be recognised by the international legal regime. After fulfilling certain criteria, a body is recognised by the law and this act of recognition qualifies the “personality” of the body in question.

Active subjects within international law are endowed with a legal personality, making them subjects of law. Legal personality acts “as a point of attribution of the legal order,”¹⁹ and thus attributed to this status are a number of rights and duties which are stipulated and maintained by the legal regime; including the instruments and processes within it (such as the judicial process and applicable treaties). Possessing a legal personality automatically entails the acquisition rights and duties, and an entity having such a personality has “the capacity to maintain its rights by bringing international claims.”²⁰

This means that bodies *capable* of possessing rights and duties are established legal persons. Thus, intrinsic to the ascertainment of legal personality is some measure of capability (competence) apparent within the body in question. There is a degree of conditionality inherent to the concept which facilitates the application of certain criteria.

Resultantly, the application of criteria may lead to varying outcomes: one entity may have a restricted kind of personality, while another may enjoy “full” personality. The “principle context” according to which the criteria is applied is as follows:

- Capacity to make claims in respect to breaches of international law,
- Capacity to make treaties and agreements valid on the international plane,
- and the enjoyment of immunities and privileges and immunities from national jurisdictions”²¹

As one will see, there are a number of bodies which may fulfil all these conditions, but not all. For example, international organizations may exercise the first two capacities, but not the last. Various

¹⁹ Nijman, J. E, “Paul Ricoeur and International Law: Beyond “The End of the Subject”: Towards a Reconceptualization of International Legal Personality” p31. *Leiden Journal of International Law*:2007

²⁰ Brownlie, p57

²¹ Brownlie, p57

entities have varying capacities for particular purposes;²² meaning personality and the rights and duties within it exist in order to fulfill the function of the body in question.

Accordingly, entities have personalities “in such measure and for such purposes as is necessary for the achievement of their roles within the international legal system as is recognised by the system of international law.”²³ Pursuant to this, states have qualified personalities because the content and scope of their functions are very large in scale.

Who then, are “established legal persons” under international law? As Brownlie notes, addressing this question is problematic because “the realities of international relations are not reducible to a simple formula and the picture is somewhat complex.”²⁴

States are principally cited as primary legal persons, but one cannot ignore the growing influence of actors within the international political arena, a sphere which is constantly evolving. As a result, “international law increasingly has become concerned with the rights and duties of non-state actors in the international arena.”²⁵ Surveying these actors and their subsequent personalities will illuminate the problematic nature of certain legal personalities (states) while also showing the bearings this problem will have on the sovereignty concept. Through analysing legal personality, the sovereignty concept is deconstructed and. “once classical notions such as sovereignty and personality [are] deconstructed, the indeterminacy of international law [is] laid bare.”²⁶

2.1 Established Legal Persons

Established legal persons are entities within international law endowed with legal personality. As the following sections will show, there are different types of legal personalities, and this in turn leads to the establishment of different types of legal subjects. Before understanding sovereignty, one must assess the different personalities in international law. This is because an instance of sovereignty is directly tied to the creation of legal personality. Also, the process through which legal personality is formed has a pronounced effect on the constitution of sovereignty.

²² Dixon, p 112

²³ Dixon, p 112

²⁴ Brownlie, p58

²⁵ Dixon, p111

²⁶ Nijman, J. E, p34.

2.2 Derived Personality

Because states are deemed as the principle subjects of international law, they are the original actors within the law. In effect, states “own” the system, because the praxis of these entities determines the constitution of the system itself. For example, states are the principle determinants of the personalities of other entities within the international legal regime. Thus, the personalities of these bodies are not established by virtue of their own existence, but by the specific action (and recognition) of states.

This has a bearing on the competence of such bodies (the measure of which is used to ascertain the degree of legal personality): “international organisations are subjects of international law which do not, unlike states, possess a general competence. International organisations... are invested by the states which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them.”²⁷

Entities with derived personalities are endowed with powers (competence) which reflect the interests of states. This limits the capacity of such entities. Nevertheless, such personality is bound and fixed by the “concrete”: that is, states and state action: it does not arise spontaneously. Thus, the personalities of these bodies (NGOs, international organizations, companies and individuals) are based on something which has considerable foundation in international law: states.

The UN is a subject derived from another subject—that of states. This organisation must fulfil certain tasks, such as receiving and deciding upon claims laid before it, facilitating inter-state communication and cooperation, and maintaining international peace and security. These tasks require a degree of autonomy, and such autonomy is protected by the implied powers inherent in its personality.

As a result, the personality of the UN includes the “capacity to bring claims, to conclude international agreements, and to enjoy privileges and immunities from national jurisdictions.”²⁸ Implicit in the attainment of personality, then, is the acquisition of certain rights—rights which are granted in order to facilitate the purpose of the body in question. There is a direct link between functional rights and the purpose of the body, because “implied powers are necessary for the most efficient performance of its functions.”²⁹ Such personality is reflected in specific legal instruments. Article 105 of the UN Charter states the following:

²⁷ ICJ: *Advisory Opinion of the Legality of the Use or Threat of Nuclear Weapons (WHO Case)*, 1996 ICJ Rep 66.

Derived from <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95>> on 6 January 2010

²⁸ Dixon, p 121

²⁹ Akehurst, p 94

- The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
- Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

International organisations such as the UN usually have a specific “constitution”—in this case, the UN Charter—which establishes the content of personality by demarcating permissible action (through outlining parameters of action with words such as “rights” and “duties”). Again, such a constitution is a direct result of the views and actions of states, which is made concrete in the form of treaties.

Individuals, under certain circumstances, may also harness legal personality. Similar to international organisations, such personality is largely dependant on state action. Individuals may possess personality in cases of war crimes, crimes against the peace, and crimes against humanity (for example, genocide).³⁰ Such personality is based on the provisions of international criminal law, and international tribunals (such as the ICTY and the ICTR) may be formed in order to try such individuals. The establishment of these tribunals represent a “concrete manifestation of the readiness of international law to encompass the international personality of the individual by way of the imposition of obligations.”³¹

Thus, the obligations of the individual is made concrete in the form of international legal instruments and norms, such as *jus cogens* (peremptory norms in international law under which no derogation is allowed) and applicable treaties (such as the Convention on the Prevention of Genocide). For these reasons, the obligations of the individual has discernible concreteness in law.

Likewise, the rights of individuals is also formed in the same way. The law of human rights are “substantive and procedural rights [which] are commonly granted by treaty.”³² Examples of such treaties are the ECHR and the ICCPR. An individual may enjoy the rights enumerated in these provisions if her state of nationality is party to such treaties. Thus, “international personality as individuals is contingent on the agreement of states and its content and scope will derive from their will.”³³

One can see that the concept of legal personality is not absolute. By examining the rights and duties of the body in question, one may ascertain the existence and degree of the legal personality it possess. As shown above, international organizations and individuals do possess rights and duties and the capacity to exercise them (all these factors are criteria to obtaining legal personality). Although,

³⁰ Dixon, p 123

³¹ Ibid

³² Ibid.

³³ Ibid, p 124

these rights and duties emanate from direct state action, and so, these actors enjoy “derived” personality.

Derived personality is outlined, materialized and protected by an original and external source. Such rights and duties occur because of state action, such as international agreements, treaties, and conventions—tangible state action. Thus, the basis of such personality rests on a strong foundation. This means that the competence of bodies with derived personality is concrete, factual, and stable.

Surveying the previous personalities will further illuminate the problematic nature of the personality of the principle subject of this study: states. States have “original” personality, but does this mean that such personality enjoys the same degree of concreteness and protection in international law? Addressing these questions calls for the examination of how such personality is obtained, maintained, and protected. The exploration of these issues is necessary if one is to understand the dynamic and problematic nature of state sovereignty.

2.3 Original Personality and “Traditional” Sovereignty

The scope and nature of personality, then, is determined by law.³⁴ In this way, the status, capacity and competence of an entity is determined.” State exists as a normal subject of international law by virtue of the fact of its existence” but this personality is still subject to the fulfilment of certain criteria.³⁵ For entities aspiring to be states, recognised statehood is the prerequisite to obtaining legal personality. So, states are said to enjoy “full” or “original” personality, as international law itself was created in order to govern the relationships between states.

This invariably makes the state the most powerful subject in international law. International law itself is the body of rules which outline the rights and duties (that is, the legal personalities) of states. As will become apparent, this state-centric nature of international law is not without its problems. For example, when and through what process does an entity qualify as a state? The problematic aspect of the criteria applied to the attainment of statehood is a major factor for consideration.

As one will see, determining the legal personality of states (through the application of the criteria for statehood) is not as straightforward as determining the legal personalities of other subjects (such as international organisations and individuals).

The criteria used when determining the instance of statehood has been under much debate. There is no uniform application of such criteria, because the application of such criteria is often liable to

³⁴ Shaw, p175

³⁵ Lauterpacht, H, “The Recognition of States in International Law” p428. *The Yale Journal Law Company* 53(3):1944

shifts in the international sphere and political bias. Nevertheless, the operational criteria most often used are:

- a) a permanent population;
- b) a defined territory;
- c) government and
- d) independence, resulting in the capacity to enter into relations with other states.³⁶

Intrinsic to these criteria is the notion of competence. In order to be deemed as a state, an entity must have the capacity to fulfill and maintain a permanent population, a defined territory, and a government. These requirements exhibit a “sufficient degree of internal stability as expressed through the functioning of a government enjoying the habitual obedience of the bulk of the population.”³⁷ The first three criteria are largely factual, technical, and legal: they are determined by facts on the ground, and the extra-legal does not play a substantial role in assessing competence in this regard.

For example, exercising domestic jurisdiction—which includes determining nationalities and boundaries—all exhibit the capacity of the state to fulfill the first three criteria. The criteria, and thus international law itself “presupposes the existence of the subject...as capable of deliberation and decision-making.”³⁸ A state's sovereignty then, is shown in “areas of conduct in which it is autonomous.”³⁹ As a consequence, domestic jurisdiction is an instance of sovereignty because it refers to the “legal competence” (status, rights and obligations) of the state's legal personality. However, will this show of competence suffice to achieve the full status of sovereign statehood?

In answer to this, the “strange fourth criterion” is one that has been hotly disputed in international law. In order to engage with other states on the international plane, an entity must be regarded as an equal. This implies the qualified criteria of recognition, which stresses on the importance of the recognition of one entity by other sovereign, already recognized states. “It is only by recognition that the new state acquires the status of a sovereign state under international law in its relations with the third states recognizing it as such.”⁴⁰

³⁶ Brownlie, p 70

³⁷ Lauterpacht, H, p410.

³⁸ Nijman, J. E, p32

³⁹ Hart, H.L.A *The Concept of Law* (2nd Ed), p 223, Oxford University Press: 1994

⁴⁰ Hillgruber, C “The Admission of New States to the International Community”, p494. *European Journal of International Law*, 9(3)1998

According to this doctrine, an entity cannot be a state without obtaining and projecting such competence and cannot engage in “serious” politics (such as the creation, ratification and application of law in the form of multilateral treaties) as a result. Consequently, without the acquisition of statehood, the exercise of competence, and resultant sovereignty, a state can neither fulfill basic functions or engage in international politics.

This particular aspect of personality, unlike the others (enshrined the first three criteria) is not internally controlled, or based on the factual/technical, but liable to the inter-state relations (in the form of recognition) and changes according to the political climate. Thus, to a great extent, because states do not exist in a vacuum, personality is controlled in the international context. All this culminates in a qualified notion of competence and how it is measured. It is this particular feature of the legal personality of states which in turn problematises the sovereignty concept—a concept which is determined when one outlines the legal personality of an entity.

Sovereignty then, is not only a criterion used to determine statehood (specifically enumerated in the fourth criterion) but an instance of its exercise. The circularity between statehood and sovereignty (the former is used to determine the ability to exercise the latter, while the latter is used as a “test” to determine the existence and legal personality of the former) means that sovereignty and statehood share an intimate and symbiotic relationship.

Because sovereignty is a direct attribute of being a state (and as such, the rights and duties allotted to states is based on the applicable criteria), sovereignty relies on the continued protection and maintenance of these criteria. In this way, competence (and ultimately, legal personality) is identified and measured. The legal personalities of states is directly affected by the problematic means of not only obtaining statehood, but maintaining it.

The criteria of a permanent population, defined territory, government and independence are often related to inter-state relations. These aspects have been threatened within the international system: wars are fought, lost, or won in order to establish them. The extinction of the GDR, the USSR, and Czechoslovakia, all serve as examples to this. The preservation of states is guaranteed within international law (for example, by instruments stipulating the principle of non-intervention) but this does not necessarily mean that its existence is as well?⁴¹

All this means that the ultimate guarantee of the legal personality of the state (including its sovereignty) lies within proliferation of the state itself. To this end, states protect their legal personalities through exercising self defence by use of their own resources (such as military means).

As one can see, unlike derived personalities, the legal personalities of states rest on a much more

⁴¹ Kohen, M.G “The Notion of State Survival in International Law”p303,*International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press:1999

vulnerable, changeable and volatile ground. However, this does not mean that the sovereignty of the state in question is ever destroyed; it is merely transformed into different forms. Because sovereignty is determined by competence (which, as the previous sections show, is measured with different tools and in different ways) this allows for variations on the meaning of the term. Accordingly, the following section addresses the dynamic nature of sovereignty and the bearing this has on the sovereignty concept.

3 Relative/Functional Sovereignty

Sovereignty is the most contested and debated concept under international law. As Oppenheim states, “There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.”⁴² One even called for its riddance, branding it as the “S-word”, while calling for “its perpetual banishment from international legal discourse.”⁴³ These view points show the highly problematic nature of the concept.

And so, “...a concept with as broad an analytical sweep as sovereignty must be periodically re-examined. It evolves as the international community evolves.”⁴⁴ This is perhaps due to the fact that since sovereignty is an instance of statehood, it must follow state experience and practice. New contexts (which emerge as a result of changing state praxis) will affect the substance, purpose, and function of sovereignty. How can the variegated nature of sovereignty be explained?

As many have noted, “the term, “sovereignty”, by itself, gives us no clues as to its creation, how it is maintained, its changing character, or indeed how it is terminated.”⁴⁵ In order to explore the substantive aspects of the concept, one must examine the operational elements within the concept itself. What are the different operational aspects of the term?

The previous section shows that the legal personality of states is determined by the notion of competence (for example, the ability to control the internal domain). Sovereignty then, is a natural consequence of such a personality: a state must be sovereign in order to fulfil the criteria to statehood, after which the entity in question may become a legal subject with full personality.

Sovereignty then, becomes functional: an entity is sovereign *in order to* fulfil certain goals. In the previous case, the entity in question (the state) is sovereign in order to be deemed as an independent body worthy of considerable political status (the title of statehood) and its benefits. For a new state, “safety, security, identity, basic values, and aspirations both derive from its sovereign independence.”⁴⁶

⁴² Oppenheim, L., cited in T “The Changing Character of Sovereignty in International Law and International Relations” p1 43 *Colum. J. Transnat'l L.* 141 (2004-2005)

⁴³ Henkin, L *The Mythology of Sovereignty*, NEWSL. (ASIL). March 1993

⁴⁴ Nagan, W, and Hammer, C, “The Changing Character of Sovereignty in International Law and International Relations” p 43 *Colum. J. Transnat'l L.* 141:2004-2005

⁴⁵ *Ibid*

⁴⁶ *Ibid*

Thus, state sovereignty works towards the protection of those aspects.

Consequently, sovereignty exists in order to fulfil a certain purpose. This element of the sovereignty concept is one aspect which makes the concept so dynamic. As the following sections will show, the purpose of having and exercising sovereign statehood is open to many differing views.

As a direct result, competence (when coupled with this dynamic, functional nature of sovereignty) also becomes a fluid concept. How does one define competence? The answer to this is determined according to purpose of sovereignty. For example, the purpose of sovereignty may be the ability to exercise independence as a state. Then, competence will be measured in terms of matching this goal: domestic jurisdiction, (strong) government, and a defined territory.

Brownlie sums this up accordingly: Sovereignty then, is used to describe “the legal competence which states have in general, to refer to a *particular function* of this competence, or *to provide a rationale* [purpose] for a particular aspect of the competence.”⁴⁷ States have certain abilities (competences) for a functional reason: in order to fulfil the ends of sovereignty. For example, a state has the right to jurisdiction in order to protect its boundaries. Here, the protection of boundaries works towards the ends of sovereignty; in this case the goal of sovereignty is to maintain an independent state.

This is the context in which the sovereignty concept is placed: “state effectiveness”: a notion which changes according to how one determines the function of sovereignty. As one will see, the notion of state effectiveness is largely dependant on context; measuring the effectiveness of a state depends on one's own definition of what an effective state should be. The state is made sovereign in order to be effective. The specific purpose of this effectiveness is open to interpretation. This gives rise to functional/relative conceptions of the term sovereignty.

All these aspects of sovereignty is what makes the concept so variegated: competence and state effectiveness is measured in different ways, and the purpose of sovereignty is also open to different interpretations. Thus, the purpose/function of sovereignty, the notion of competence, and the meaning of “state effectiveness” all act as the operational elements of the concept of sovereignty, and this is what gives rise to varied interpretations of the term.

⁴⁷ Brownlie, p293

3.1 The UN and Sovereignty

Article 1 of the UNCH states the following:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means...adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights .. and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems...⁴⁸

Pursuant to these goals, the language of the rest of the Charter discusses sovereignty in this light; that is, sovereignty as working towards the furthering of international law and international cooperation. Interestingly enough, sovereignty still entails independence, but the attainment, maintenance and purpose of independence is what has changed. It is with this underlining idea that the sovereignty concept is reconfigured in the UN context.

A state is independent (effective) so that it can act on the international plane. State effectiveness (here, in the form of independence), is measured by the state's ability to act on the international plain *inorder* to maintain international stability.

As a consequence to this particular conception of sovereignty, independence exists *inorder* to fulfil the goals of international peace and cooperation. Sovereignty is “rather the right and capacity to participate in the United Nations itself, working in concert with other nations” to achieve the realisation of common goals.⁴⁹ Pursuant to this, the rights and duties of states are tailored according to these goal. Thus, because of the state's involvement on the international plane, certain rights and duties have come to encompass: “equality dignity, independence, territorial and personal authority, intercourse, self preservation, non intervention and jurisdiction.”⁵⁰

As a result, independence also entails the right to self defence in certain circumstances, and the mechanism of consent/obligation in international law (that is, before a state is obligated to a treaty, it

⁴⁸ Derived from <<http://www.un.org/en/documents/charter/chapter1.shtml>> on 5 January 2010

⁴⁹ Slaughter, Ann M, “Security, Solidarity, and Sovereignty: the Grand Themes of UN Reform”, p 620. *American Journal of International Law*:2005,pps 619-632.

⁵⁰ Oppenheim, L, *International Law, Vol 1: Peace* (9th Ed) p331. Longman:1992

must show its specific consent to it) and so forth. Thus, territorial independence and other elements of sovereignty are maintained by the UN Charter itself: “the notion of territorial integrity means both territorial preservation and territorial sovereignty, and political independence requires both exclusive internal and equal external sovereignty.”⁵¹

Sovereignty and the rights constituent to it ensure that the state does not become marginalised in any way when it enters the international sphere. Correlative to these rights are corresponding duties to respect these rights as exercised by other states. This particular language of rights and duties is “essential in the maintenance of a reasonably stable system of competing states.”⁵² In this way, international cooperation and stability is encouraged because of a particular understanding of the sovereign state: specifically, that of the sovereign state as a co-legislator in the international community.

Sovereignty becomes an organizing concept with basic, traditional elements in order to control and balance relations between states.⁵³ Pursuant to this, all states enjoy sovereign equality, thus the division between strong states (enjoying unbridled power) and weak states is diminished: “sovereignty develops from an uncertain principle of naked power distribution to a more formal, regulable legal mechanism.”⁵⁴ The purpose of sovereignty (in this case, international cooperation) shapes the substance of sovereignty (the rights, duties and thus competence of the state) as determined by legal mechanisms such as the UN Charter.

Thus, the principles of the UN (international peace, cooperation and security) creates a new conception of sovereignty. There is a direct influence of norms and values on sovereignty because “the body of international norms associated with state sovereignty [are] upheld by global political and legal institutions.”⁵⁵

Sovereignty now exists in order to facilitate the purposes of the UN. Pursuant to the purpose of the body, certain things are decided on by the UN (such as instances of threats to the peace, and issues of “international concern”). Because of this, matters which may have been deemed as belonging within the domestic domain (and thus, protected by the state's right to internal jurisdiction) are now matters of international concern: meaning the rights of the state in question must be altered in order to allow

⁵¹ Elden, S, “Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders” p11. SAIS Review, John Hopkins University Press:2006.

⁵² Shaw, p 192

⁵³ Simpson, G,p41

⁵⁴ Cass, D.Z “Navigating the Newstream: Recent Scholarship in International Law” p344, *Nordic Journal of International Law*:1996.

⁵⁵ Reno, W. “How Sovereignty Matters: International Markets and the Political Economy of Local Policies in Weak States” p 274, in *Intervention and Transnationalism in Africa: Global-Local Networks of Power*, Cambridge University Press:2002.

for UN action.

The rights and duties of the state is transformed to fit into the UN's particular understanding of sovereignty. For example, the state now has the obligation to protect the peace, and use whatever means possible to maintain it (especially if it is incurred upon). This will invariably have an effect on the sovereignty of that state, because the sovereignty of the state in question—in terms of rights and duties—is determined in accordance with maintaining international peace and security.

In this process, state power is changed. Under the perspective of sovereignty in relations to international institutional arrangements (such as the UN) “sovereignty was to be understood as the realm of private freedom that international law left to the state.”⁵⁶ Accordingly, general limitations on state behaviour are mentioned in the UN Charter, including regarding the use of force. Force may only be carried out during instances of self defence, and even the exercise of such self defence must be in constant co-existence with the principles and purposes of the UN. Article 51 of the UNCH clearly shows this:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Similarly, the right to non-intervention must co-exist with the purposes of the UN. As Article 2 states,

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

Chapter VII outlines UN action in respect to breaches of the peace. Under these measures, the UN may use the means of the organization in order to preserve international peace and security. Chapter VII measures allows the UN and the Security Council in particular to “act even when the object of its

⁵⁶ Williams, J.F *Chapters on Current International Law and the League of Nations*, pps 10-11,64-65,69. Longman: 1929

action is “essentially within the domestic jurisdiction of a state.”⁵⁷ This means the right of non-intervention is not absolute: it may be changed in order to fit this measure.

Thus, the state is obliged to obey charter rules, and its sovereignty is based on this obligation. State action is “constrained by the existence of international law itself.”⁵⁸ This is especially specified by the conditionality of membership in the organisation found in Article 4 of the Charter:

Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations

The requirements of “peace-loving” and acceptance of obligations as specified in the Charter qualifies the notion of state effectiveness. It is only through showing the ability and competence to exercise these principles that a state can be deemed as Member of the UN (an organisation which, in effect, acts as “gatekeepers” to statehood, because membership in this organisation is more or less necessary if one is to be seen as a state).

Candidates for membership are assessed “in the judgement of the Organization”, and then if they are “able and willing to carry out these obligations” they are then accepted as recognised states within the largest multi-national organisation in the world. And so, “in signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities.”

Added to the sovereignty concept is a reconfiguration of the rights and duties of states. Consequently, competence (the rights and duties of the state) is now measured in an entirely different way: it is measured according to the intent and means to further international peace and security. In this light, “greater effort must be made to enhance the capacity of States to exercise their sovereignty responsibly.”⁵⁹

State effectiveness is ensured so that it can be a stable agent on the international plane, furthering international peace and security. Sovereignty is tailored according to stability in the international sphere. As a result, the purpose of sovereignty (the facilitation of international peace and cooperation) determines the competence of states (its specific rights and duties). Again, one can see the direct link between purpose/function on one side, and competence on the other.

⁵⁷ Franck, T.M *Fairness in International Law and Institutions*, p221. Clarendon Press: 1995

⁵⁸ Simpson, G, p41

⁵⁹ *Ibid.*, p18

3.2 “R2P” and Sovereignty

If one is sovereign, that means one has the power to hold large responsibility, such as ensuring the rights of nationals. The R2P conception on sovereignty stems from the idea that only the state has the capacity and competence to meet the various demands of human beings. This leads to the idea of sovereignty as responsibility, however “there is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties.”⁶⁰ Sovereignty involves then, a balancing of the interests and demands of those that have use for or are effected by its exercise.

Here, sovereignty becomes an extension of the rights of the people, and thus sovereignty has become distanced with absolute sovereignty because “the idea of sovereignty as identified with State absolutism has been incrementally changed by rooting its conceptual basis not only in the monopoly of effective power, but that the power of sovereignty is normatively based on a predicate of authority and legitimacy, which is rooted in the people's expectations.”⁶¹ Sovereignty becomes a means which allows for the structuring of relations (in this case, the relationship between the state and its people), and in this way, sovereignty becomes something which is relative.⁶²

The state's sovereignty is based on meeting the expectations of its people. If it fails on this, the state's right to internal jurisdiction is lost, and humanitarian intervention will follow. This is somewhat controversial because the principle of non-intervention is a fundamental in international law and inter-state relations. So, R2P has found a “loop hole” by reconfiguring the basic understanding of sovereignty. Through this, intervention is legitimised.

The demands of the people must be intimately linked with the notion of sovereignty itself. Because of the intimate relationship between the two concepts, if one fails, the other loses its substance as well. The demands of the people serve as the basis and maintenance of sovereignty, because “these demands, which are often rooted in the aspirations of the people, laws to transparency, responsibility, accountability, and a commitment that the Rule of Law-in its widest sense- must be an intrinsic component of the nature, scope, and practical functions of sovereignty.”⁶³

As one can see, the function and purpose of sovereignty has changed because “the primary

⁶⁰ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, p 13. Ottawa: International Development Research Centre, 2001, derived from www.iciss.ca/pdf/Commission-Report.pdf, on 5 January 2010,

⁶¹ Ibid

⁶² Simpson, G, p41.

⁶³ Nagan, W, and Hammer, C, “The Changing Character of Sovereignty in International Law and International Relations”p 38

responsibility for the protection of its people lies with the state itself.”⁶⁴ Because the state is the source of the protection of human rights for the individual, state sovereignty is secured so that the basic rights of people are protected. As UN Secretary General Kofi Annan states, “state sovereignty is being redefined—not least by the forces of globalization and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa.”⁶⁵

Sovereignty is determined by the individual, not the state, and thus the concerns of the individual is taken into account. Universal jurisdiction is focused upon, instead of internal jurisdiction, so state's right to internal jurisdiction is affected. This is because this is a better, more enveloping way of treating the individual in the fairest way possible.

The state is to do everything possible in order to implement, respect, and maintain the rights of the people. This automatically qualifies the obligations of the state. Parallel to this, the state's rights are also affected. For example, non-intervention and a monopoly over jurisdiction are no longer strictly internal issues, because issues human rights transcend national borders: “where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”⁶⁶ The idea of absolute sovereignty and the permanence of state's rights gives way to new conceptions of sovereignty which “have attacked this notion of territorial integrity, challenging either state borders themselves or their sanctity.”⁶⁷

Thus, the purpose of sovereignty (in this case, the protection of the rights of the people) has a direct effect on the competence (rights and duties) of the state. Respect for human rights will set the boundaries of permissible action by states. And so, “in modern international law, sovereignty functions, therefore, not merely on the basis of rights but as the source of responsibility, accountability and liability and as the basis of international cooperation.”⁶⁸

To conclude, these different conceptions of sovereignty show that sovereignty itself acts as a response to the existing political climate and its challenges. After the horrors of WWII, the UN was faced with the task of facilitating international relations and obligation in order to prevent a war of that scale from ever happening again. And so, “sovereignty has no fixed content, but is wholly dependent

⁶⁴ International Commission on Intervention and State Sovereignty, p13

⁶⁵ Annan, Kofi, “Two Concepts of Sovereignty,” *The Economist*, 18 September 1999, derived from <http://www.un.org/News/ossg/sg/stories/kaecon.html> on 5 January 2010

⁶⁶ International Commission on Intervention and State Sovereignty, p 15

⁶⁷ Elden, Stuart, p13

⁶⁸ Schrijver, N. “The Changing Nature of State Sovereignty”, p 98 *The British Year Book of International Law, Vol 70*.

on the development of international relations.”⁶⁹

This approach led to a reorientation of sovereignty: one that was based on international cooperation, peace and security. Likewise, R2P's conception on sovereignty is a direct result of the growing occurrences of internal war (civil war is now more common than inter-state war): “and as civil wars increasingly seem, as the Secretary General has observed, anything but civil, so too has our notion of what is “essentially domestic” changed.”⁷⁰ All this culminates in a reconfiguration of sovereignty: one that is based on state responsibility to protect its own citizens.

These “revolutions in sovereignty”⁷¹ have an effect on the rights and duties of states because they become tailored to the specific function of sovereignty. And so, political events “prompt states to create new international actors and to assign new tasks to existing actors,”⁷² changing the purpose of sovereignty in the process.

All these conceptions of sovereignty carry varied interpretations of the term “state effectiveness.” State effectiveness is based on the “preservation of the role of the nation state in international relations.”⁷³ So, the state is to preserve its role so that it can remain effective, in order to fulfil its sovereign function. The terms “state effectiveness” and “competence” allow for varying interpretations of sovereignty and varying results regarding the function of sovereignty in practice.

What happens when these terms are based on the actual existence of the state? Here, the function of sovereignty is to preserve the state itself, and this means that competence will be measured in line with this. The state's competence (abilities) must match up with the goal of preserving the existence of the state. This is what leads to the extreme instance of the sovereignty concept.

⁶⁹ Koskenniemi, M, *The Gentler Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, p 173. Cambridge University Press: 2001

⁷⁰ Franck, T.M *Fairness in International Law and Institutions*, p220. Clarendon Press: 1995

⁷¹ Gregory, F.H et al “Sovereignty: Essential, Variegated, or Irrelevant?” p2. *American Society of International Law: 2005*.

⁷² Ibid, p 2

⁷³ Hammer, C. and Nagan, W.P “The Changing Character of Sovereignty in International Relations”, p 53

4 “Extreme” Sovereignty

As the previous conceptions of sovereignty, this particular conception of sovereignty is also based on tangible political realities. Nevertheless, the way in which sovereignty is qualified here is markedly different, leading to the “extreme” context in which the sovereignty concept is placed. As Koskenniemi notes, “exceptional situations” have been brought about into the compass of international law because of the increase of deformalization.⁷⁴ This “deformalization” it seems, is made possible by the influence of political actors and their norms, values and experience. Interestingly enough, the emergent conception of sovereignty here is still based on the same elements and factors that made up for the previous conceptions; that is, political considerations.

Because law is not a closed system and allows for the influence of other factors (such as ethics or political actors) “there is more between heaven and earth than prohibitions and permission.”⁷⁵ This allows for new contexts in which a legal attribute—such as sovereignty—may be placed. This new context is the result of state experience, views, and practice. The following case studies show how states—in their response to the political climate—use sovereignty as a means of attaining, maintaining and proliferating state interest.

The state interest here is that of state existence, which includes state proliferation and maintenance. Surveying state existence and its problems will require a discussion concerning threats and current problems posed to the state, and the ways in which the state attempts to “solve” these issues. The following case studies discusses threats and problems posed to the state, while illuminating the various ways in which nuclear weapons increases the competence of states, thus “solving” the nations' problems.

⁷⁴ Koskenniemi, M., “The Lady Doth Protest Too Much”,p 160, *The Modern Law Review Limited*: 2002.

⁷⁵ Dekker, I.F and Werner, W.G,p 247

4.1 India

India is often called a “growing giant” because of its leading position in the developing world. It has a very large and expanding population, a growing GDP, and one of the largest armies in the world. India is aware of its potential as a next superpower, but has yet to be deemed as such. In its plight to achieve this status, the country has been vying for a seat in the UNSC while seeking improved ties with the US and China. In this context, there is an added need for India to prove itself as a stable and competent state. The importance of state functionalism is even stressed by a direct statement from an Indian official, who states that the nation's “strategic thought” is borne of “the mechanism of a functional state.”⁷⁶

In this light, one cannot ignore India's historical experience; an experience which has certainly created vulnerability and instability. The country has been under British colonial rule, and even after achieving independence, its borders were still highly contested and are still under dispute (as the situation in Kashmir shows). Also, the country was outside the Cold War paradigm and thus, did not have the assurances that the leading Cold War nations (the US and Russia) could provide. As a result, “states [such as India] that persisted in their efforts to achieve nuclear-weapon status were those that faced security challenges but could not expect guaranteed protection from a superpower.”⁷⁷

During its history, India was seldom a master of its territorial or political existence. Also, one cannot ignore the known “nuclear neighbourhood” surrounding India (Pakistan and China are known nuclear powers), increasing the country's vulnerability. As a consequence, India has taken the “crucial decision to opt for self-reliance, and freedom of thought and action.”⁷⁸

The country's current foreign policy is a culmination of all these factors. The overall goals of India's foreign policy are to increase national security by fostering national strength and national pride within the people: India's strategic thought intimately ties the state, society, and the citizen: “The nature of this state, its relationship with Indian society and with the citizen, has a direct bearing on India's total national commitment, and hence also its national endeavor.”⁷⁹ As a result, state pride (as sensed by India's nationals) is integral to the proliferation of the country.

India address these issues in its Defense Policy, which outlines the following goals:

⁷⁶ Singh, J. S “What Constitutes National Security in a Changing World Order: India's Strategic Thought”. *CASI Occasional Paper* (6): 1998 Derived from

<http://www.indianembassy.org/pic/js/js%28what_constitutes_national%29.htm> on 6 January 2010

⁷⁷ Gowan, Peter “Twilight of the Treaty?”, p44 *New Left Review* 25. New Left Review Ltd, July/Aug 2008.

⁷⁸ “Evolution of India's Nuclear Policy” *Embassy of India (Washington D.C)*. Derived from

<<http://www.indianembassy.org/pic/nuclearpolicy.htm>> on 6 January 2010

⁷⁹ Singh, J. S “What Constitutes National Security in a Changing World Order: India's Strategic Thought”

-To *defend our National Territory* over land, sea and air, encompassing among others the inviolability of our land borders...

-To *secure an internal environment* whereby our Nation State is insured against any threats to its unity or progress...

-To be able to *exercise a degree of influence* over the nations in our immediate neighbourhood to promote harmonious relationships in tune with our national interests...⁸⁰

Thus, India's foreign policy works in order to directly increase and secure state capability. Of course, this demands a survey of state competence; that is, the limits of state action (the rights and duties of the state).

It is of India's view that included in permissible state action is the “sovereign right” to assess threats posed to the country: “India believes that it is the sovereign right of every nation to make a judgement regarding its supreme national interests and exercise its sovereign choice. We subscribe to the principle of equal and legitimate security interests of nations and consider it a sovereign right”, and India will take “all necessary steps” to assure the national security of the nation.⁸¹

Assessing threats and implementing results to such threats are, in fact, a “sovereign function,”⁸² meaning the state's sovereignty exists in order to allow this. Assessing the existence of threats, how to treat these threats (and with what that means) requires the competence and abilities that sovereignty grants. Sovereignty then, works towards this specific function. If sovereignty is working toward this function, the competence of the state must match this. This is where India's attainment of nuclear weapons becomes highly pertinent.

India's attainment of nuclear weapons can be said to be a result of assessing the country's security situation and responding accordingly. During an interview, India's Prime Minister stated the following (in response to what compelled India to carry out nuclear testing):

Important measures that are guided by national security considerations don't follow immediate compulsions. Rather, they are guided by long-term imperatives based on a sound appraisal of regional and global security realities. It is important for us and the world to know that by conducting the latest tests, India has responded to a stark regional and global reality that has evolved over the past 50 years.⁸³

80 Ibid, [my emphasis]

81 “Evolution of India's Nuclear Policy” *Embassy of India (Washington D.C)*

82 Singh, J in an interview with Jim Lehrer of PBS. On June 11, 1998. Derived from <http://www.indianembassy.org/pic/js/js%28pbs%29.htm> on 6 January 2010

83 Ibid

The Prime Minister is suggesting that the attainment of nuclear weapons was a direct and seemingly natural result of India's particular history and its problems. The acquisition of nuclear weapons are included in the parameters of permissible state action; that is, the rights and duties of the state. This is because the state has the duty to protect and maintain the security of the people and the statecraft. In exercising its sovereign function, the state is required to assess its political reality and actualise a necessary response.

4.2 North Korea

North Korea is another country which faces current problems in regards to territorial and political autonomy. The country was liberated from Japan following WWII, but after the Korean War, the peninsula was divided into what is now known as North and South Korea. During the war, the US occupied North Korea and actively backed South Korea in order to curb the perceived (socialist) threat from North Korea. Thus, the country is often called a “buffer state” as the nation lies between multiple competing nations.⁸⁴ Like India, the country's history reveals that North Korea was often not the master of its own fate. For example, in North Korea's view the US continues to actively undermine and threaten the country's political integrity and independence.

During George Bush's presidency, North Korea was branded as a member of the “Axis of Evil” and this led to negative results for the country. Sanctions by the UN and US led to the growing political and economic alienation of North Korea. North Korea deems the US as an active intervenor in the political system of the country (that of socialism) because, in the country's view, the US is attempting to curtail this political system in the nation. Indeed, there is a pervasive sense of paranoia in North Korea, and the fear of impending invasion is strong.⁸⁵

For these reasons, North Korea sees American action as an example of “US imperialism”, and the UN sanctions as “an intolerable mockery of the dignity of the Korean people and an arrogant criminal act of wantonly violating its sovereignty.”⁸⁶ Thus, the principal threats posed to Korea are the undermining of its political independence through “external aggression” by the US and other international actors (such as the UN).⁸⁷ Thus, North Korea's drive for self defense and independence

⁸⁴ Hagström, L, and Karelid, L, *Nordkorea och kärnvapenfrågan*, p4. Utrikespolitiska institutet:2005

⁸⁵ Ibid, p 10

⁸⁶ “DPRK Foreign Minister Vehemently Refutes UNSC's Presidential Statement.” April 14,2009. derived from Central News Agency of DPRK, < <http://www.kcna.co.jp/index-e.htm>>

⁸⁷ North Korea: “Statement on NPT Withdrawal” derived from <<http://www.atomicarchive.com/Docs/Deterrence/DPRKNPTstatement.shtml>> on 6 January 2010

were “aimed at one fundamental goal-regime preservation.”⁸⁸

Integral to this sense of national security is national pride and dignity. Indeed, successful nuclear testing was to be marked and “specially recorded in the nation's history.”⁸⁹ These issues were touched upon in press releases following nuclear testing, which described the totality of the celebrations regarding the success of the tests. These celebrations involved the participation of many: “present there were leading officials of local party and power organs and working people's organizations, service persons of the Korean People's Army, working people, youth and students.”⁹⁰

These sentiments are felt because the achievement of nuclear status is a direct result of state capability and power. Nuclear weapons make it possible for a state to tip the balance of power in its region through the inner workings of the state itself: “nuclear technology makes it possible, for the first time in history, to shift the balance of power solely through developments *within* the territory of another sovereign state.”⁹¹ Power is gained by the state's own means and capability.

As a result of this pride, unity and faith within the nation increases. Nuclear weapons act as of strength confirmation not only externally (in the eyes of other neighbouring countries) but internally, for the people of the nation itself, because the attainment of nuclear weapons “shows [the] people of [the] country that no concessions will be made on the path supreme national interests and sovereignty”.⁹² Similarly, the political integrity of the country would also be protected by nuclear weapons. In a direct statement following nuclear testing, an official said the test would “contribute to safeguard the sovereignty of the country and the nation and socialism.”⁹³

Nuclear weapons also act as important political tools in other ways. Because of North Korea's growing alienation, the country realises the growing need to forge relations with other countries through any means possible, while gaining security guarantees in the process. Other countries, led by the US, have been coaxing North Korea into talks in order to foster nuclear non-proliferation.

Before agreeing to these talks, North Korea makes a series of demands, including:

88 Mazarr, M. *North Korea and the Bomb: A Case Study in Nonproliferation*, p 17. St. Martin's Press: 1995

89 “More Meetings Held to Hail Second Successful Nuclear Test.” June 3, 2009. derived from Central News Agency of DPRK, < <http://www.kcna.co.jp/index-e.htm> >

90 Ibid.

91 Kissinger, H, *Nuclear Weapons and American Foreign Policy*, p 10. Harper for the Council of Foreign Relations: 1957

92 “More Meetings Held to Hail Second Successful Nuclear Test.” June 3, 2009. derived from Central News Agency of DPRK, < <http://www.kcna.co.jp/index-e.htm> >

93 “North Korea Conducts Nuclear Tests” derived from <<http://news.bbc.co.uk/2/hi/8066615.stm>> on 6 January 2010

a formal U.S.-North Korean non-aggression pact... extensive concessions by the United States and Japan..removal of North Korea from the U.S. list of terrorist-supporting states, supply of electricity, several billion dollars in “compensation” from Japan, restoration of nuclear reactors and an end to U.S. economic sanctions and US interference in North Korea’s economic relations with other countries.⁹⁴

North Korea has stated that it will only work towards nuclear non-proliferation if these conditions are met.⁹⁵ One can see that there is a direct link between nuclear weapons and political and economic gain. North Korea carries out nuclear test but nevertheless is “expected to relinquish [its weapons] in return for aid and security, which has always been its intention.”⁹⁶ Nuclear weapons prove as an invaluable tool even when not used and so “the ultimate evil becomes an ultimate irony: value based on non-use.”⁹⁷

As a response to this, the eventual Agreed Framework (established between the US and North Korea) works towards the achievement of these demands. The framework works towards the “normalization of political and economic relations”⁹⁸ between the two parties and thus includes a number of political and economic benefits as well as security guarantees.

Under the Framework , the US agrees to funding North Korea in respect to the building and restoration of power plants, reducing trade barriers, diplomatic relations and representation, and even a security guarantee wherein the US will “provide formal assurances to the DPRK, against the threat or use of nuclear weapons by the US. ...also will work towards denuclearization of Korean Peninsula, ensuring North Korean monopoly in region.”⁹⁹

In these ways, nuclear weapons work as political tools which are used to make direct gains for the state, thus maintaining the dignity, security, economy and political integrity of the state itself. Ironically, through US aid, the regime's survival becomes more secure and is maintained by the use of nuclear weapons as an instrumental negotiation tactic.¹⁰⁰

Just like India, North Korea—in exercising its sovereign function—assessed the threats posed to the country and responded accordingly. Political integrity is integral to the state's existence, and thus, its sovereignty. State competence (rights and duties) must match up to the protection of political integrity.

94 “North Korea's Nuclear Weapons Program.”CRS Issue Brief for Congress. Derived from <<http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/proliferation/north-korea/PDFs/46412.pdf>> on 6 January 2010.

95 “Agreed Framework Between the United States of America and the Democratic People's Republic of Korea. Derived from<http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/proliferation/north-korea/agreed-framework-us-korea_1994-10-21.htm> on 6 January 2010

96 Dombey, N., “Prospect for the NPT”, p44 *New Left Review* 25. New Left Review Ltd, July/Aug 2008.

97 Granoff, J., “Nuclear Weapons, Ethics, Morals, and Law,pps 1434 *Brigham Young University Law Review*: 2000.

98 Agreed Framework

99 Agreed Framework

100 Hagström, L, and Karelid, L, *Nordkorea och kärnvapenfrågan*, p17. Utrikespolitiska institutet:2005

In this way, perceived attacks to political integrity drove North Korea to the nuclear option as a way of maintaining and protecting the state.

4.3 Israel

The foundation of Israel has been particularly volatile since its inception after the Six Day War of 1967. Even prior to that, the creation of a Jewish homeland has been met with many obstacles, as “the creation of the State of Israel in 1948 was preceded by more than 50 years of efforts by Zionist leaders to establish a sovereign nation as a homeland for Jews.”¹⁰¹ The resultant borders after years of war are still highly contested by Israel's neighbours; including a sizeable amount of Arab nations. Subsequent ground attacks on Israel have included the Yom Kippur War of 1973, and numerous attacks carried out by individuals in the form of suicide bombings carried out in order to harm Israeli citizens.

Israel is thus surrounded by a particularly hostile neighbourhood, and is comparatively very small in population to those around it. Israel comprises about 5,000,000 citizens in the midst of 22 Arab states (including 144,000,000 people).¹⁰² Historical events such as the Holocaust highlights the vulnerability of the Israeli nation; accentuating the ingrained sense of vulnerability felt by the nation of Israel.¹⁰³ With these stakes, Israeli strategic thought includes the view that the country “cannot afford to lose a single war.”¹⁰⁴

One can see that the threats and problems posed to Israel are existential in nature. Such threats pertain to the actual people of the Israeli state. Because of the hardships the nation has endured in order to achieve statehood, state “survival” is not a given for Israel. Israeli statehood and its continuance are liable to special circumstances, because “Israel can not afford to be a 'normal' state. It must, instead, feel that national survival is problematic.”¹⁰⁵ Because national survival has been a pervasive issue since Israel's conception, “the notion that Israel should explore the nuclear vision was as old as the state itself.”¹⁰⁶

Therefore, issues of “national survival” (in terms of the lives of the people) and how to address it

¹⁰¹ “Strategic Doctrine”. Derived from <<http://www.fas.org/nuke/guide/israel/doctrine/>> on 6 January 2010

¹⁰² Beres, L.R, “Israel's Strategic Future: The Final Report of Project Daniel”. Derived from <<http://www.acpr.org.il/ENGLISH-NATIV/03-ISSUE/daniel-3.>> on 6 January 2010.

¹⁰³ Abram, G et.al, *Massförstörelsevapen och säkerhetspolitik*, p 13. Utrikesdepartementet, Enheten för Mellanöstern och Nordafrika:2000

¹⁰⁴ Beres, L.R, “Israel's Strategic Future”

¹⁰⁵ Ibid.

¹⁰⁶ Cohen, A, “Israel and the Bomb Revisited”p7

is a tangible reality. As a result, state proliferation and existence is brought to the forefront. State sovereignty—something that has been fought for for years—is tied closely to all this, and is thus of particularly high importance.

Israeli strategic thought is driven by its specific state experience:

“Israel’s unchanging imperative is to survive in a very hostile neighborhood. Facing both state and non-state enemies in the Arab/Islamic world, some of whom remain relentlessly genocidal toward Israel, the Jewish state must now prepare to systematically harness all resources needed to endure. Above all, this means constructing the optimal conceptual foundations for national strategic survival.”¹⁰⁷.

For these reasons, at the core of Israeli defense is the protection of its citizens; the nationals who are integral to the existence of the state. In order to achieve this end, Israeli defense includes projecting nuclear deterrent capability. Deterrence refers to the “threat of counter-employment..a threat of reprisal in kind.”¹⁰⁸ Israeli strategic thought applies deterrence because “the best way to avoid losing a war is to not fight it in the first place,” and if such deterrence would fail, then escalation should be prevented, and Israel should determine the war's outcome “quickly and decisively.”¹⁰⁹ Nuclear weapons and how they are used (or in this case, not used) is thus a formidable tool of high importance: “ a nuclear deterrent is still a potent defence for lesser states, against regime change or invasion.”¹¹⁰

An example of this defense policy in practice is illustrated by the Yom Kippur War. This war was fought nearly a month, involving Israel on one side, against a coalition of formidable Arab states, including Iraq, Egypt, and Syria. Casualty rates were rising high, and indeed the Defense Minister told the Prime Minister that what was happening was the “impending collapse of the state of Israel.”¹¹¹ And so, the nuclear option became a decision to be enforced.

Nuclear bombs were assembled, poised and ready for use when it was deemed as necessary, targeting both Egypt and Syria.¹¹² As a response to this nuclear alert, the US immediately sent supplies to the Israeli forces in order to aid the war effort. Henry Kissinger (then Secretary of State), for varying political reasons, did not want Israel to opt for the nuclear option, and thus, did what was needed in order to prevent this from happening:

Kissinger has allegedly stated that “the reason for the U.S. airlift was that the Israelis were close to

¹⁰⁷ Beres, L.R, “Israel's Strategic Future”

¹⁰⁸ Freedman, L. *The Evolution of Nuclear Strategy*, p37 (3rd Ed), Palgrave:Macmillan:2003.

¹⁰⁹ Hersh, op. cit., 217, 222-226, and Weissman and Krosney, op. Cit., 107 extracted from “The Third Temple's Holy of Holies:Israel's Nuclear Weapons” < <http://www.au.af.mil/au/awc/awcgate/cpc-pubs/farr.htm>> on 6 January 2010

¹¹⁰ Watkins, Susan “Lulling Nuclear Protest: The Non-Proliferation Treaty”, p26 *New Left Review* 54. New Left Review Ltd

¹¹¹ Farr, W.D “The Third Temple's Holy of Holies:Israel's Nuclear Weapons”

¹¹² Ibid

“going nuclear.”¹¹³In this way, Israel had assured continued US aid in the war effort. Nuclear weapons and nuclear capability are used as “bargaining assets” in order to receive conventional weaponry.¹¹⁴

In one of the few open statements regarding Israel's nuclear arsenal, Prime Minister Peres has openly stated why Israel has use for nuclear weapons. The Prime Minister stated that the nation has a nuclear option in order to “have a not have a Hiroshima, but an Oslo...”¹¹⁵ The Oslo Accords made major progress in resolving the Arab-Israeli conflict. In saying this, Peres is insinuating that nuclear weapons work as a means of resolving what lies at the heart of the conflict: borders and the maintenance of them. Nuclear weapons have become a means for attaining and maintaining the interests and of the state.

In the case of Israel, nuclear weapons are directly tied to augmenting the competence of the state, so that it can carry out its sovereign function: that of protecting the people of the state itself, and its borders. Nuclear weapons have proven to be a veritable political tool which, in the case of Israel, has ensured military aid and political strength (in the form of deterrence). In light of this, few other dare to attack the state, and the existence of the state is strengthened. Nuclear weapons, unlike any other tool, provides the competence required to maintain this.

To conclude, one can see that these nations are using the political (nuclear weapons) to augment what is found in the legal (sovereignty). Interestingly enough, legal arguments (such as the right to self defense) are also used to support the use of political means. This cyclical inter-relationship leads to the politicization of law and the legalising of politics.

Nuclear weapons and their use in inter-state relations represent—in a very interesting and complex way—the dynamic inter-relationship between the legal and the political. Because of this, nuclear weapons “are also, at least in part, a production of the law, which harness the resources of territories into states and measure competition among sovereign 'equals' or which offer a lexicon for permissible state force.”¹¹⁶

¹¹³ Hersh, op. cit., 230-231. from Farr, W.D, “The Third Temple's Holy of Holies: Israel's Nuclear Weapons”

¹¹⁴ Jabber, F. *Israel and Nuclear Weapons: Present Option and Future Strategies*, p 124. Chatto and Windus Ltd for International Institute for Strategic Studies: 1971

¹¹⁵ “Peres Admits to Nuclear Capability”. Tuesday, July 14, 1998 extracted from <http://www.fas.org/news/israel/980714-israel1.htm>

¹¹⁶ Kennedy, David, “The Nuclear Weapons Case” p 470, *International Court of Justice and Nuclear Weapons*. Cambridge University Press: 1999

5 Conclusion

What governs sovereignty then: the legal, or the political? The previous sections show how problematic and complex it is to reach a definitive answer to this question. Through the text, one can see that the concept is influenced, governed and determined by a mix of the legal and the extra-legal.

Legal instruments, regimes, and treaties do not arise spontaneously, but as the result of processes within the political sphere. Also, political actors actively affect the creation, implementation and application of aspects traditionally drawn from the legal world. The emergence of both the UN and R2P's conceptions of sovereignty are both examples of this. A concept such as sovereignty functions within legal and political levels, and this has an invariable effect on the substantive nature of sovereignty.

Certain operational elements of sovereignty make the concept highly malleable. Words such as “state effectiveness”, “competence” and “function” must be placed within a specific context before the sovereignty concept can be understood. Sovereignty arises as a necessity; it exists in order to fulfil a certain goal. In turn, this aspect of sovereignty will shape and form the competence allotted to actors in order to fulfil their sovereign function. The malleable nature of sovereignty is what allows for the role of politics as a shaper and moulder of sovereignty.

The nuclearised conception of sovereignty applies these aspects of sovereignty in a seemingly “extreme” context. Nevertheless, this particular conception is based on the same operational elements that the other conceptions of sovereignty are: notions such as state effectiveness, competence, and function still have a place within nuclearised sovereignty. The specific context applied is what gives rise to variation. Here, “state effectiveness”, competence and function is measured in terms of maintaining state existence, and this is what accommodates the nuclear option.

State sovereignty (in the form of domestic jurisdiction, defined borders, permanent population) is founded, enshrined, and protected by multiple instruments within the legal regime. Sovereignty arises as a virtue of full legal personality (statehood) meaning the status of statehood is something that is attained after fulfilling certain criteria within law. The problem though, is that states—by exercising their sovereignty—will choose how to maintain and protect their sovereignty, and this may come from the extra-legal and political.

The concept of nuclearised sovereignty exemplifies just how difficult it is to separate between law and politics. “state effectiveness”, competence and “sovereign function” are all terms which are

enumerated within international law. Nuclear weapons (a political tool of the highest significance) are merely used as means for the protection and maintenance of factors founded in law.

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