Sovereignty in Contemporary International Society

Indrek Grauberg

Researcher of Tallinn University Law School,

PhD candidate, London University King′s Collage

We are living in a world where there exist a lot of different ideologies, political orders and religions all of which, more or less, claim to be universal. There is the western world, with its liberal values, market economy, democracy and Christianity. There is a part of world which according to its geographical location is called the eastern world, but is mostly influenced by and follows western ideological, political and cultural values. The eastern world, with its completely different value system yet often with very strong market economies, often boasts bigger economical growth then west. There is a middle-east, highly influenced by religious beliefs and struggling to build up a society where peace and stability finally could be found. There is the so-called third world, what Jackson defines as a world of 'Quasi-States', where the majority of states suffer under poverty, and where states have lost their supreme power to control the activities and relations taking place within its territory. It's not always very easy to tell where one world with its political, social and cultural values ends and another begins.

For a long time the concept of sovereignty has been one of the main principles of state and international law. However during the past 20 or so years, ambiguity and inconsistency have emerged in the traditional discussion of sovereignty. The evolution of the sovereign state has been influenced by both the process of globalization and the rapid development of technology, as well as the emergence of several supranational organizations and close forms of cooperation. As a result, sovereignty has become one of the most discussed concepts, mainly in Europe and especially in Eastern Europe. More and more people are talking about the limitation or even the demise of sovereignty. The main questions are: how do we define sovereignty, and what is the sovereignty of international law? How has it changed in a world where the sovereignty of individuals and groups is sometimes considered more important than national sovereignty? Such changes in understanding sovereignty have seriously challenged classical understanding of the state in international law as well as in other social sciences. On the other hand, in international law, we haven't dealt with several other important questions that touch on essential matters of sovereignty. For example, is a use of force which breaches the sovereignty of another state, but whose purpose it is to protect some universal values, for example fundamental human rights, in accord with norms of international law? Is the choice of legal norms and practical actions dependent more on values that are indeed universal or are they mostly dictated by political, strategic or economic interests? This is one of the main problems of our contemporary globalizing world and the concept of sovereignty is quite central in the search for answers to it.

In Western society, we can historically talk about three big paradigmatic upheavals, where society's model changed entirely through all of its main spheres – economy, cultural-value and political-legal systems. The first big upheaval falls into 3rd-4th century, when antique model of society started to give

way to medieval traditional or premodern model of society. Antique and medieval thinkers originated from the understanding that social life must be in line with ethical-religious norms. That's why great attention was paid to the relations between the individual and the state. Aristotle, for example, thought that people need the state in to it makes their life better. The transition from Greek politeia to medieval society can be considered as paradigmatic shift in the understandings of society's political order. The second big upheaval, when the accent of politics shifted from the general good and morality to power and its execution (Machiavelli), falls into 15th – 16th centuries. At that time, a strong opposition formed against the medieval model of society and people started to look for new values. J. Bodin's concept of sovereignty also falls into the 16th century. New values and perceptions of the state and society's new way of management made way to the new model of society and state. This led to the development of the modern concept of sovereignty in the context of the paradigm on 17th – 18th century.

The theoretical basis for the concepts of modern nationhood and sovereignty in international law derive greatly from the 19th century theory of constitutional law. Jellinek, who discussed the state through three parameters – territory, population and government spoke, like Hegel, about two aspects of the state: actual and normative[1]. Jellinek associated the identity of states mainly with public-political and historical facts which remain outside legal-theoretical discussions. However, already in the 19th century there was a discussion going on whether the state, once de facto emerged, also immediately became a subject of international law, or whether for the latter to happen recognition by other states was needed.

In 1933, the Montevideo Convention on the Rights and Duties of State[2], in which the declarative approach to the state dominates, Jellinek's three-parameter theory is developed further in a way that it turned into four-parameter theory. A state, as the subject of international law, is defined in a way, where it must have a consistent population, fixed territory, government and the ability to enter into relations with other states. Therefore, the main features of a modern state are people and the authority of the state and territory, because bringing up the fourth parameter is justifiably considered as superfluous. When a state has a functional government, it means that when a state is sovereign, and has ascendency over its territory, it is also capable of entering into international relations.

Beginning in the 18th century, one can talk about two views of state power, and also about two mechanisms of state operation – one is legal or *de jure*, the other political or *de facto*. *De facto* sovereignty refers to the actual power over its territory (although, in our contemporary world, there are actually few states that are able to realise *de facto* sovereignty, only if it's possible to consider sovereignty absolute at all). One could cite many examples of problems connected to protection of *de facto* sovereignty in today's world. In Africa, there is a constant struggle between *de jure* sovereign states for actual or *de facto* supremacy. Fukuyama has called such countries, which have significant problems with controlling their territory, weak countries. Weakness is thereat connected mainly to the state's strength to implement and enact certain policies for ensuring the state's sovereignty. In Fukuyama's opinion, weak states endanger sovereignty "on which the entire international order after the Peace of Westphalia is based on".[3] Hence, these states could be a serious threat to peace and stability. This, in turn, increases the probability that "some other state in this international system decides, in the name of normalising the situation, regardless of the opposition of weak states, to intervene into their internal matters by force"[4]. The issues of protecting state's borders have been considered as important mainly because territory is one of the manifested forms of a state as the subject of law. A state, as the subject of law, can operate only in an enclosed area. Hence, states are

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[1] G. Jellinek, Allgemeine Staatslehre, 3rd ed., 1920, p. 286

[2] http://www.cosmopolitikos.com/Documents/Montevideo%20(1933).pdf

[3] Francis Fukuyama State-building : governance and world order in the twenty-first century. London: Profile Books, 2004. p. 109

[4] ibid. 109

trying to protect their territorial integrity temperamentally. The principle of territoriality is also written into the constitution of the majority of states. For example, according to section 2 of chapter I of the Constitution of the Republic of Estonia, the land, territorial waters and airspace of the Estonian state are an inseparable and indivisible whole. Estonia is politically a unitary state wherein the division of territory into administrative units shall be provided by law. This principle of the unity of state means that according to the constitution, there cannot be national-territorial units in the composition of the Republic of Estonia. On the other hand, territory is a spatial prerequisite for the implementation of a state's power towards the population of the corresponding territory. From this aspect, territory can be taken as an object.

While in a modern industrial society, borders indicate where the jurisdiction of one or another state begins and ends, in a contemporary postmodernising and globalising world, people are more and more open to the idea that borders are becoming unimportant in their physical as well as the theoretical understanding. For example, in Lyotard's view, today information has become more important than territory. In the near future, states will fight more over information than over territory to achieve control over cheap sources of labour and raw materials in order to ensure international power.[5] There is a view that economic and monetary power is already aggregated into the hands of different multinational corporations. It has been also stressed that land is no longer the main unit of production in contemporary society, since one is dealing with entering into global virtual states. Therefore, the relative importance of territory has decreased in exercising state sovereignty.[6] One can agree with the aforementioned, but not completely. When one considers important resources such as petroleum, gas and electricity, the development of contemporary society can depend on a state's territory and land holdings as much as in prior times. Of course, one does not need to drive to Saudi Arabia to fuel up the car; one does not have to live in the country that produces electricity to use it. However, the profit of the mentioned sector of the economy will still end up in the budget of certain states through taxes. One could argue that the states that depend largely on their geopolitical location are not postmodern. Nevertheless, this does not justify the position that the principle of territoriality has not yet exhausted itself.

International law has set several limitations on sovereignty since the 1930s and 1940s. The creation of the League of Nations and the United Nations after World War II, and the adoption of the Universal Declaration of Human Rights in 1948 and the entry into force of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1976 are but a few examples of these limitation. Serious barriers have also been set to the facility of *de jure* sovereignty. In accordance with the Kellogg-Briand Pact of 1928, may not carry on invasions. Today's weapons of mass destruction made fighting a self-destructive activity a long time ago, which is a serious threat to the peace of the entire world.

The paradigm of the modern state started to gain wider criticism from the 1960s, when it became obvious that many edifying ideas are losing their former topicality in a contemporary and rapidly changing world. The world started to become more and more utilitarian and pragmatic. The criticism antipathetic to modern paradigm declared the end of great stories. Let them be the stories of freedom, truth or sovereignty.[7]

Recently, people have started to more and more say that great stories will be replaced by little stories. It means that there is no point in talking about one great and objective truth. Truth depends on differences of world-view and purposes of knowledge. The latter is connected to the problems of

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[5] Jean-François Lyotard, The Differend: Phrases in Dispute. Minneapolis: University of Minnesota Press 1985.

[6] Peter van Ham. European Integration and the Postmodern Condition: Governance, Democracy, Identity. London: Routledge 2001; Richard N. Rosecrance. Action and Reaction in World Politics: International Systems in Perspective. Westport, Conn.: Greenwood Press. 1977.

[7] Jean-François Lyotard. 1984. The Postmodern Condition: A Report on Knowledge. Manchester: Manchester University Press.

power and legitimacy.[8] It is rather the truth that works, not what is theoretically correct. In Rorty's opinion, it is more a question of practice than theory. In this kind of discussion, we could ask: maybe we shouldn't discuss sovereignty in ontological framework anymore, but rather in a constructive framework. This means that it is not important what people understand as sovereignty, but whether the usage of the concept of sovereignty helps to regulate extremely complicated international relations this way, sovereignty would probably help in securing peace and security in the contemporary world. In Rorty's opinion, before defining sovereignty, one should understand that language is just a tool to achieve the purpose.[9] At the same time, by referring to Kuhn and Dilthey, Rorty recommends giving up the idea that science produces adequate models of reality. Scientific discourse should be taken as one language among others. The main question is what kind of tool helps us better to achieve the purpose. If sovereignty is important in justifying the purpose of peace and security, this concept should under no circumstances be given up. Still we can imagine to ourselves that… 'Once upon a time there was a mighty state. As a sovereign unit, it exercised supreme law making and law forcing authority with in a delineated territory and constituted the supreme object of political allegiance. In the external domain too, it was recognized as an inviolable and authoritative by other discrete, equal in status and independent states'.[10] Probably Thomas Hobbes had a similar dream about the sovereign state, when he described it as a most powerful monster called a Leviathan, which has unlimited power (whether an individual or an assembly such as a parliament to control everything and every kind of activity in its territory). For Hobbes there was no way in which legal limits on sovereign power could be imposed without undermining the ability of the state to maintain order.[11] This means that sovereignty is not restricted by a constitution, by the laws of its predecessors, or by custom, and no areas of law or behaviour are reserved as being outside its control; *eg.*parents are not guaranteed the right to decide some matters in the upbringing of their children independently of sovereign power, municipalities are not guaranteed freedom from its interference in some local matters, *etc*. But in reality its very doubtful to think that any, even the most great empires like the Roman, Swedish or British, have had absolute authority without any external circumstances to enforce laws, to make their strategic development plans, to build up their military force etc. Alan James writes: 'anyone with even the most cursory acquaintance with international law knows that sovereign states' do not have complete domestic autonomy – of the sort Krasner feeds into *his* conception of Westphalian sovereignty.'[12] Other great sovereignties theorist such as Bodin said 'If we insist however that absolute power means exemption from all law whatsoever, there is no prince in the world who can be regarded as sovereign, since all the princes of the earth are subject to the laws of God and of nature, and even to certain human laws common to all nations'.[13] Even Vattel, who is known as a strong supporter of sovereignty's absoluteness and principle of non-intervention, stated: 'if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid'.[14] In the same sense Konrad Schemann starts his article "Europe and the Loss of

[8] Richard Rorty. 1979. Philosophy and the Mirror of Nature. Princeton: Princeton University Press.

[9] Michel Foucault. 1980. Two Lecturers - ibid. pp. 78-108.

[10] Kostakapolulu, Dora. Floating Sovereignty: A Pathology or a Nessecary Meens of State Evolution? Oxford J Legal Studies, SPRING 2002; 22: 135-156.

[11] T. Hobbes. Leviathan (Penguin Classics 1985) Part I ch 13.

[12] Alan James, Sovereign Statehood: The Basis of International Society (London: Allen & Unwin, 1986), p. 229.

[13] Jean Bodin, Six Books on the Commonwealth, abridged and translated by M. J. Tooley (Oxford: Blackwell, 1967), pp. 25, 28.

[14] Emmeric de Vattel, The Law of Nations, trans. by C. G. Fenwick (Washington, DC: Carnegie Institution, 1916), II, iii, 56.)

Sovereignty": 'The concept of sovereignty plays too large a part in contemporary discussion. No nation is sovereign in the sense that it is free to do what it wants within its own borders and not subject to influences from outside. It is not self evident either that political systems have to be hierarchically organized or that there should be one final arbiter of law for all decisions. There are advantages in having different centers of power for decisions affecting differing matters. There is a case for the co-existence of overlapping power centers and for sharing in decision-making and being prepared to live with a decision which does not in itself reflect the wishes of your State. There are advantages in being part of a larger conglomerate. The State can then have some influence and control over what goes on outside its boundaries'.[15] If in theory we can assume that the state has the unlimited power, there is still one power that is stronger, also mentioned by Bodin, that's a force of nature. As Werner Scholtz succinctly writes 'It is important to remember that the biosphere does not respect sovereignty as devised by mankind'.[16] Forces of nature and global environmental issues are also one of the main factors which weaken the concept of absolute state sovereignty - by forcing states to cooperate on global environmental issues, to form certain organization protecting their common interests. Camilleri and Falk aptly illustrate the challenge to sovereignty as they opine: '[I]t becomes steadily clearer that the "sovereign state" as an institution is not adequately equipped to embody ecological principles. Its approach to the ecological dilemma is confounded by its institutional interests, instrumental role and domain of authority, which are at odds with ecological principles and global ethos required for planetary management. … [I]t is the system of sovereign states as a whole that is emerging as poorly equipped to meet the challenge posed by mounting ecological disruption.'[17] An interesting aspect of sovereignty is that for the state to function as a sovereign entity recognition by other states is necessary. Stephen Krasner writes: 'The principles of autonomy and recognition based on territoriality and juridical autonomy can be breached through conventions, contracts, coercion, or imposition. The four modalities through which autonomy and territoriality can be compromised are distinguished by whether they are pareto-improving or not, and contingent or not. Conventions and contracts are pareto-improving, that is, they make at least one party better off without making anyone worse off. Rulers are not forced into such arrangements. They enter them voluntarily because compromising the principles of the sovereign state model is more attractive than honoring them. Coercion and imposition leave at least one of the actors worse off; they are not pareto-improving. Contracts and coercion involve contingent behavior; the actions of one ruler depend upon what the other does. Conventions and imposition do not involve contingent behavior'.[18] Hinsley writes: 'The claim of a sovereign state to exercise final authority within its own boundaries depends logically on the extension of this same right to all states, and states therefore constitute each other as sovereign'.[19] But the idea that one actor can constitute another as sovereign is at its root contractictory (contradictory?). Myall refers to this as a 'paradox of state sovereignty - power and recognition – exist in critical tension'.[20] This need for recognition clearly indicates that purportedly sovereign states are actually actors embedded in a matrix of structured social processes.Therefore, in today's rapidly changing world, sovereignty is obtaining a more and more relative meaning, one which is related to factual pressure from the outside as well as to ever increasing amounts of normative limitations. The author of this paper agrees with those who think

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[15] KONRAD SCHIEMANN, EUROPE AND THE LOSS OF SOVEREIGNTY.

[16] Scholts, Warner. CUSTODIAL SOVEREIGNTY: RECONCILING SOVEREIGNTY AND GLOBAL ENVIRONMENTAL CHALLENGES AMONGST THE VESTIGES OF COLONIALISM. Netherlands International Law Review, Volume 55, Issue 03, Dec 2008, pp 323-341 doi: 10.1017/S0165070X08003239, Published online by Cambridge University Press 23 Dec 2008.

[17] J.A. Camilleri and J. Falk, The End of Sovereignty? The Politics of a Shrinking and Fragmenting World (Aldershot, Edward Elgar 1992) p. 192.

[18] S. D. Krasner. Rethinking the sovereign state model. Review of International Studies (2001), 27, 17-42.

[19] Hinsley, F.H. Sovereignty. Cambridge. Cambridge University Press. 1986.

[20] Myall, J. Nationalism and International Society. Cambridge: Cambridge University Press 1990.

that the protection of common interest has always meant that people are partly subordinated to external will and limitations. For example, let's take the subordination of the defence policy of the members of the European Union, including Estonia, to common interests – security and defence policy of the European Union. In contemporary society, there is maybe even more of this subordination in its legal meaning than there was previously. To subordinate somebody to a foreign will, in the opinion of Foucault, one uses not only law but also force. A question arises, in what kind of situation would the use of force be justified? Is NATO's war against terrorism in Afghanistan justified? If this war has the purpose of protecting peace and security in the contemporary world, then one may believe that the war is justified. But if the main purpose is to transport the main values of Western society to a culture and society that differs from the West to achieve hegemony, then, of course, the war is not justified. We think that the given question falls back to different understandings of a state and sovereignty, society and freedom. "Western civilization depends on the idea of citizenship that is … rooted in territorial jurisdiction and national loyalty. But in contrast, Islam, which has been, until recently, remote from the Western world and without the ability to project its message, has been founded on an ideal godliness, which is entirely global in its significance, and which regards territorial jurisdiction and national loyalty as compromises with no intrinsic legitimacy of their own".[21] From the Western perspective, the essence of nationhood consists in enforcing the order, i.e., capability of sending someone who is wearing a uniform and armed against people to make them obey the laws. From this aspect, with the USA and several Western states, one is dealing with very strong countries. These states have institutions for controlling the execution of law, to regulate everything from traffic laws to providing fundamental rights.[22] In Foucault's opinion, the power is never, even in an absolutely sovereign state and centralised monarchy, aggregated into one center.[23] Therefore, the power must be caught in its extremes, in its last divergences, where it becomes capillary.[24] Hence, according to Foucault, one should study power and sovereignty not so much from the aspect of 'in which country can such things happen', but rather from the angle of 'which country consists of people who do such things'. Subordinating people to its power is possible only through a punishing and disciplining system. Reputedly, the state has taken over such subordination techniques from the church. Norms are necessary for controlling and classifying people. But norms do not only subordinate people to the state, through which people are being subjected. People are also being objected through norms, which means that they are being thrown out from some kind of system. Such justification of the subordination of norms can be also transferred to international society. States that do not meet certain international norms have been called failed states. From the perspective of the modern state model, in our example, Afghanistan is this kind of state. Therefore, a sovereign state gets it legitimate justification from legal norms that have been recognised by international society. They give a political power the right to rule within a certain territory.[25] At the same time, there are views that states develop nationhood and exercise authority regardless of what is the legitimate base of their action.[26] One example is the Soviet Union, which, regardless of its weak base of legitimacy, was able to participate for nearly 70 years in the "super league" of world states as one of the main players. Besides, legitimately imposed power has always the danger of exceeding its authority. In a democratic state, the misuse of powers is almost always related to violation of terms of social contract that have been fixed

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[21]   Roger Scruton. The West and the Rest. Wilmington, Del: ISI Books. 2002. p. 126.

[22]   Francis Fukuyama State-building: governance and world order in the twenty-first century. London: Profile Books, 2004.

[23]   Michel Foucault. Madness and Civilization: A History of Insanity in the Age of Reason. London, New York: Routledge. 2002.

[24]   Michel Foucault. Madness and Civilization: A History of Insanity in the Age of Reason. London, New York: Routledge. 2002.

[25]   Jellinek, The Paris Commune of 1871. London: Gollancz. 1937.

[26]   Samuel P. Huntington. Political Order in Changing Societies. New Haven; London: Yale U. P, 1968.

in the constitution. In this way, the authority turns into oppression.[27] From the postmodern sovereignty perspective, sovereignty should be discussed from the aspect of some kind of subject's purposes and interests. The purposes and wishes of any subject – let it be a state, a social group or an individual – are those that are the basis for instability and relativity in contemporary society. Accepting society's diversity, fragmentariness and differences supports the position that the contemporary world is multilevel multicultural. Globalization of the world today and paradigmatic changes in Western society unavoidably brings along a totally new situation in the global community and also in international legislation. Under conditions of globalization, and the mentioned multicultural community functioning at different levels, there can be characterized by a situation, in which even religious traditions are no more limited to their historic borders but have become global as well in many respects. Modern information and communication technology has made information about different religions globally available. Accordingly, adherents of diverse religions can be found anywhere.[28] 'The homes of millions are pulsating with some combination of advanced communication technologies: satellite dishes or cable TV, DVD and VCR players, desktop computers, laptops, modems, CD players, streaming video, cell phones, palm pilots, instant messaging, voice mail. Supposedly we are now part of a "global village": all these technologies compose a new, electronic nervous system that radiates out around the world, connecting people and cultures in unprecedented and more intimate ways'.[29] We can say that today's world is facing a sort of devolution, in a sense that world is becoming smaller. There are very few (to a certain extent North Korea and Iran) regions in a world which are completely isolated from the rest of the world. Thanks to the internet and communication technology, it is much harder for states to contain its citizen's knowledge within their territory and to keep them isolated. Even if Iran and North Korea might be economically, politically and legally isolated from international society, their citizens still can watch satellite television and gain the information about ongoing life and the developments of the world from behind their iron curtain. That also weakens the state's internal stability and frequently forces states to take rather brutal actions against their people to control them. The endeavour to be politically different breeds isolation, isolation leads to violent acts towards citizens, violence breeds conflicts and all together it breeds stagnation. As professor Müllerson writes: 'Those societies, which have closed themselves to outside influence, like China some hundreds of years ago, the Soviet Union not so long ago, or North Korea of today may have indeed retained their cultures more or less intact, but they did all stagnate in their proud isolation'.[30]

As a result, the cultural-religious background of the entire world has changed. Our globalising world has created a new situation in society regarding legislation. It becomes evident primarily in international legislation, which cannot be based on the Western model(s) of society and state solely, and has to treat the world from a much wider multicultural and religious point of view. When, for example, trying to clarify the concept of sovereignty, we certainly have to consider the fact that there is also the Islamic state model existing side by side with the post-modern Western model of state. As the General Declaration of Human Rights was adopted, no country declared itself an Islamic state; today, however, there are several of them. Actually, in those days Saudi Arabia was an established Islamic country already. It is important to stress the fact that fights for Islamic states have intensified, especially in recent decades. These processes can be observed even in the North Caucasian region as well as in Europe, let alone traditional Islamic territories in Arabia. Samil Bassayev, who became famous in the war between Russia and Chechnya, liked to repeatedly stress in his media interviews that the main thing they need at the moment is independence for all North-Caucasian region, not only

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[27]   Foucault, M. 1980, ibid, pp. 78- 108.

[28]   A. Toynbee, www.sikh-religion.de/html/internationale- meinungen.html, 31.10.2005

[29]   Susan J. Douglas. The Turn Within: The Irony of Technology in a Globalized World. American Quarterly, Volume 58, Number 3, September 2006, pp. 619-638.
[30]   R. Müllerson, From E Unum Pluribus to E Pluribus Unum in the Journey from an African Village to Global Village? Multiculturalism and International Law Essays in Honour of Edward McWhinney Edited by Sienho Yee Jacques-Yvan Morin LEIDEN • BOSTON 2009

independence for Chechnya. According to Bassayev, the establishment of a Dagestan Islamic state would only be one small step on the road towards the foundation of a pan-North-Caucasian Islamic state in the territory belonging presently to Russia. At the same time we have to bear in mind that formally, or *de iure,* considering the aspect of sovereignty, the majority of countries based on Islamic sharia legislation are still secular states, based on constitutional jurisdiction and not on Koran. From the sovereignty aspect *de facto* in those cases we actually have to specify them as Islamic states. The establishment of an Islamic state in the heart of Europe would be an unprecedented step today. Prime Minister of Serbs in Bosnia- Herzegovina M. Dodik has repeatedly warned leaders of the European Union: in case the West would support Kosovo's declaration of independence, they have to be aware of the possibility of the establishment of an Islamic state in the territory of Europe. Considering the statements above we may claim that aspirations to guarantee peace and security in the modern world depend more and more on the ability of the international community and international legislation, of estimating the religious and multicultural character of the context for functioning legislation. Therefore, international legal instruments whose application affects sovereignty of states (e.g., universal human rights documents) have to take account of different values and normative contexts.