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REVIEW ESSAY: WHO KILLED SOVEREIGNTY? OR: CHANGING NORMS CONCERNING SOVEREIGNTY IN INTERNATIONAL LAW

ANTONIO F. PEREZ*

I. INTRODUCTION

One of the oldest distinctions in philosophical discourse is that between “words about words” and “words about things.”¹ Much scholarship among international lawyers and political scientists, as well as table-talk of diplomats and other practitioners concerning the somewhat airy concept of sovereignty, has suffered all too much from a failure to appreciate the confusion that flows from treating a word as though it were a fact. Now come to the table two pairs of scholars with contrasting interpretations of the central word of international law, sovereignty: at one end, international lawyers Abram and Antonia Handler Chayes; and at the other, political scientists Michael Ross Fowler and Julie Marie Bunck. Ironically, however, the lawyers unveil a “new sovereignty” by employing a variety of social science methodologies to explicate a non-legal, “managerial” approach to the study of the transfer of state authority to international institutions. In a converse irony, the political scientists have appropriated the international lawyer’s interpretive canon, parsing international judicial and arbitral decisions and combing state practice as evidence of customary international law, to advance an essentially traditional conception of sovereignty as state sovereignty.

What accounts for this role reversal? Would each set of scholars be better off cabined in their own disciplines? Happily, the answer to the second of these questions is a resounding “no,” both for Fowler and Buck’s *Law, Power, and the Sovereign State*² and for Abram and Antonia Handler Chayes’ *The New Sovereignty: Compliance with International*

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¹ See BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 155, 826-836 (1945)(discussing Russell’s own philosophy of logical analysis).

² MICHAEL R. FOWLER & JULIE M. BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY (1995).

Regulatory Agreements.³ Both volumes reveal aspects of the emerging international system and the issues we must all grapple with as we seek to understand it. More important, their respective efforts to move beyond their own disciplines says something about the current level of dissatisfaction within their respective disciplines. This essay maintains that the lawyers and political scientists are reaching out to insights they perceive in each others' disciplines because neither the "legal" nor the "managerial" conception of sovereignty is an adequate rendering of sovereignty's meaning in international affairs.⁴ Each discipline thus intuitively borrows from insights that appear to fill the theoretical gaps of its own methodology. Political scientists, who are ordinarily concerned with "systems" and their "management" because they focus on problems from the perspective of collective governance, here reach for "legal" rhetoric that defines the relation of the individual state to the system of states. International lawyers, whose traditional ken is defining in "legal" terms the scope of freedom or area of "private autonomy" individuals may exercise, here look to "management" of the overall "system" as a way to reconcile collective state needs with individual state freedom. In the end, it is simply astonishing to see international relations theorists advance a defense of sovereignty in terms of its utility in fostering reliable international commitments,⁵ while international lawyers deprecate legal conceptions such as performance and breach of commitments.⁶

There is nothing wrong, of course, with the academic effort to explicate the relationship between the individual and the collective in terms of sovereignty. But neither the new sovereignty of membership of states in international institutions nor the old sovereignty of state autonomy over its resources and subjects can provide complete accounts of international life or of its future course. Rather, both fail to relate individual interests to collective needs, with the political scientists favoring individual autonomy and the lawyers defending collective needs. A theory of sovereignty should rather mediate between these competing considerations through the representation of individual interests in collective governance, perhaps even through a theory of popular sovereignty; but, in the case of these two books, the political scientists effectively endorse the power of the military and bureaucratic groups

³ ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

⁴ Cf. Laura S. Underkuffler, *Essay: On Property*, 100 *YALE L.J.* 127, 129 (Underkuffler argues that the domestic law concept of "property, in the historical view, did not represent the autonomous sphere of the individual to be asserted against the collective; rather, it embodied and reflected the inherent tension between the individual and the collective. This tension—now seen as something external to the concept of property—was in fact internal to it.").

⁵ FOWLER, *supra* note 2, at 162.

⁶ CHAYES, *supra* note 3, at 22.

currently dominating most state structures and the lawyers explicitly buttress the role of transnational scientific and cultural elites. This anti-democratic blind spot may well explain the current malaise in the two professions, with political scientists spilling ink on regime theory that international lawyers see as international law and international relations theory and lawyers killing tree after tree to develop a law of international institutions that political scientists see as idealist claptrap. In the end, this impoverished discourse can only widen the gap between the formal governing authority of international institutions, such as the World Trade Organization or Security Council, and their democratic legitimacy.⁷ Would it not be more interesting to think about how individuals, rather than states, fit into the emerging governing institutions of the post-Cold War world?

The limits of the usefulness of these two approaches to the study of sovereignty can best be seen in the context of a case that requires attention to both the old and new sovereignties: the international response to North Korea's attempt to acquire nuclear weapons. Interestingly, both Fowler and Bunck and the Chayes mention the North Korean case in passing. The political scientists emphasize the sovereign rights of members of the international community to protect their security by denying nuclear weapons to North Korea. The international lawyers focus on the international community's progress in managing the problem by socializing an intransigent state.⁸ As this essay will show, both the traditional legal rhetoric of performance and breach and the new rhetoric of management of noncompliance within the nonproliferation regime are necessary perspectives for describing and explaining the flow of events. The North Korean case will reveal, perhaps more starkly than most cases, that the premise of state sovereignty or permanent membership of a particular state in the international system cannot go unchallenged. Both the state sovereignty rhetoric of performance and breach and the membership rhetoric of management of noncompliance are superimposed on the basic substratum of state legitimacy, so that the question of the sovereignty of the people of North Korea is never far from the surface in the response to the Korean nuclear issue. A better theory of sovereignty in international law must eventually address this deficiency in both the old and new sovereignties.

⁷ See, e.g., Jose E. Alvarez, *The Once and Future Security Council*, 18 WASH. U. L. Q. 5, 6 (1995) (discussing the "Democracy Deficit" undercutting recent Security Council efforts at world governance).

⁸ Compare *infra* note 35 with *infra* note 62.

II. THE OLD SOVEREIGNTY

The classical conception of sovereignty, as every beginning student of international law recalls, draws on the political ideology and experience of 17th century Europe, the so-called Westphalian conception.⁹ Feudal conceptions of economy and society reflected the contingent nature of property relations between king, lords, and serfs.¹⁰ By contrast, the Westphalian conception's basic premise was the absolute authority of the state, particularly the monarch, over its subjects. As political scientist John Ruggie has argued, this conception was connected to the emerging market economy of early modern Europe and the pre-capitalist focus on absolute conceptions of private property it engendered.¹¹ This early modern theory of absolute property rights thus generated a particular view of "sovereignty" emphasizing the ownership by the king or (ultimately after the dissolution of monarchy) the state of all rights incidental to an absolute conception of property; that is, the right to use, exclude others' use, and alienate subjects. Thus, as more limited conceptions of state sovereignty evolved, such concepts as "condominium" and "mandate" were best understood as, respectively, kinds of joint ownerships and trusts drawn from the civil law tradition.¹² Thus property became a kind of ruling ideology in international law.

In the earliest socialist critique of capitalism, critical and rhetorical emphasis was placed on the sense in which transformation of the person's labor into an alienable property interest resulted in an alienation of the self.¹³ Of course, a more modern conception of property rights unpacks the concept of property as a "bundle" of legally-protectible

⁹ RICHARD A. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 35 (1981)(describing a jurisprudence built around the "will" of the sovereign); THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970)(describing Westphalian jurisprudence of decentralized sovereignty). For a discussion of the transformation of the Westphalian conception into the U.N. Charter conception of the international legal order, see Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 32 (R. Falk & C. Black eds., 1969).

¹⁰ See J.E.A. JOLLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 139 (4th ed. 1961) (citing F. POLLOCK & W. MAITLAND, 1 HISTORY OF ENGLISH LAW 69). In the feudal regime, the king asserted "lordship over every acre of land in England, by however many degrees of tenure it was separated from the throne." *Id.*

¹¹ See JOHN G. RUGGIE, CONTINUITY AND TRANSFORMATION IN THE WORLD POLITY: TOWARD A NEOREALIST SYNTHESIS, IN NEOREALISM AND ITS CRITICS 131, 145 (Robert O. Keohane ed., 1986)(arguing that the principle linking constitutive units in the international system is sovereignty, just as the principle linking constitutive units in the modern state system is property, but that neither principle accounts for how change occurs within states or in the international system).

¹² See generally HERSH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).

¹³ See KARL MARX, ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS, IN EARLY WRITINGS 279, 322-34 (1975)(chapter of First Manuscript on "Estranged Labor," where Marx first articulated his theory of alienation and private property as the expression of alienated labor).

interests in the use or disposition of socially valuable resources.¹⁴ The modern theory of property rights also focuses on the distributional, as well as the efficiency dimensions of property-right allocation and enforcement.¹⁵ Theories of property, it is now recognized, cannot be divorced from considerations of procedural justice¹⁶ (and, under a certain view, substantive justice as well).¹⁷

Fowler and Bunck articulate two conceptions of sovereignty based on these theories of property; one they call the "Chunk" theory of sovereignty; the other the "Basket" theory. Under the Chunk theory, sovereignty is "monolithic" and "possessed 'in full or not at all'."¹⁸ This conception draws from the absolute conception of property that emerged at the beginning of the Westphalian system, a point which, as we shall see, Fowler and Bunck give altogether too little attention.¹⁹ Under the Chunk theory, they argue, international commitments are not a cession of sovereignty but rather simply manifestations of its exercise.²⁰ They then contrast the Chunk theory with the Basket theory, under which sovereignty is a "basket of rights and duties" such that "theorists empirically investigate the contents of each political community's basket

¹⁴ See generally DUKEMINIER & KRIER, *PROPERTY* 86 (3d ed. 1993)(stating that property "consists of a number of disparate rights, a 'bundle' of them: the right to use, the right to exclude, the right to transfer"); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 U.C.L.A. L. REV. 711 (1996) (exhaustively analyzing competing approaches to the "bundle of rights" conception of property). Penner locates the origins of the "bundle of rights" thesis in Wesley Hohfeld's analysis of right-duty correlatives. Penner, *supra* at 712 n.3 (citing WESLEY HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER ESSAYS* (Walter W. Cook, ed. 1923)).

¹⁵ See Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964)(focusing on the distributional consequences of state largess).

¹⁶ See JOHN RAWLS, *A THEORY OF JUSTICE* 118-61 (1971)(relating the legitimacy of substantive distributional outcomes in a theory of justice concerning domestic distribution of important social goods to the procedural conditions under which the distribution is achieved).

¹⁷ See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982)(critiquing Rawls and arguing that it is impossible to fashion an entirely procedural political theory of liberalism, since principles of justice require some vision of the good).

¹⁸ FOWLER, *supra* note 2, at 64 (citing and quoting INIS L. CLAUDE, JR., *NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM* 32 (1955)).

¹⁹ See *infra* text accompanying notes 24-34.

²⁰ FOWLER, *supra* note 2, at 98. Interestingly, for a formulation of Chunk theory, the authors rely on the current Director General of the International Atomic Energy Agency and a former professor of international law, Hans Blix, whom they regard as a Basket theorist. Blix states that "[t]he voluntary assumption of treaty obligations should not be regarded as a limitation upon but rather as an expression of the state's sovereignty." *Id.* (citing HANS BLIX, *SOVEREIGNTY, AGGRESSION, AND NEUTRALITY* 11 (1970)). This is because the voluntary cession of the sovereign right is implicitly premised on the ceding state's initial entitlement to possess and exercise the ceded right. But Blix's argument need not be limited to treaties, since customary law equally involves the transfer based on tacit consent of such entitlements and even new states might be said to have consented, although perhaps only on a hypothetical basis, to limits on their sovereignty under customary law. See LEA BRILMAYER, *AMERICAN HEGEMONY* 62-142 (1995)(developing arguments grounded on consent and hypothetical consent to collective intervention under American leadership in the internal affairs of states).

of attributes to determine the extent of that actor's corresponding rights and obligations."²¹ They further maintain that their review of the evidence demonstrates that the Chunk and Basket theories are not, as they are applied in diplomatic practice, complementary concepts expressing different aspects of a single theory of sovereignty, but are rather competing concepts that yield conflicting results in actual cases.²²

To international lawyers, however, the ocean which Fowler and Bunck believe separates the Chunk and Basket conceptions of sovereignty may be no more than a creek. Both approaches are property-based

²¹ FOWLER, *supra* note 2, at 70. Again, Fowler and Bunck rely on Director General Blix's formulation:

As ownership is described as a bundle of rights, sovereignty may perhaps be described as a bundle of competencies. There is no inherent reason against the voluntary acceptance of limitations upon the freedom of action in one field or in several fields, upon one or more of the competencies in the bundle. Of course, such limitations do reduce the freedom of action of the state and thereby nibble at the sovereignty—as the concept is defined here. Most of the freedom will remain, however.

Id. at 71 (citing Blix, *supra* note 20, at 11-12).

²² *Id.* at 82. The evidence the authors rely on to establish the dichotomy between the two conceptions includes, to list only a few, the *Case Concerning the Nationality Decrees Issued In Tunis and Morocco* [Gr. Br./Fr.], P.C.I.J. (Ser. B.), No. 4, at 6 (1923)(holding that France could not exercise its sovereignty over Tunis and Morocco and persons therein to classify British subjects as French nationals subject to French military service in a manner inconsistent with France's treaty obligations to Great Britain); the *Right of Passage over Indian Territory* [Port. v. India], 1960 I.C.J. 6 (Judgment)(giving effect to traditional Portuguese right of access to territorial enclave but not expanding it to include a right of passage of Portuguese armed forces through Indian territory to the enclave without Indian consent); the establishment of the Panama Canal Zone under the Hay-Varilla Treaty of 1903; and the U.S. lease in perpetuity starting in 1903 of Guantanamo Bay from Cuba.

conceptions of sovereignty.²³ Indeed, both seem to entail a theory of property mainly as a “relation . . . between an owner and a thing,” rather than “between the owner and other individuals in reference to things.”²⁴ It might have been possible for Fowler and Bunck to develop a property-based theory of sovereignty, particularly a Basket theory, that would account for the relationships persons have with each other in respect of objects of state and transnational institutional power. However, in their review of state practice and legal decisions, Fowler and Bunck treat the state as though it were a claimant with an entitlement to property rights over a given territory and the persons and resources within that territory, leaving little space for a theory of popular sovereignty.

Moreover, their essentially Langdellian interpretive strategy tends to foreclose the study of democratic considerations. They explicitly seek to discern which of the two theories of sovereignty most accurately accounts for the data points of state behavior. They attempt, in their own words, to give some substance to the word sovereignty that, like a

²³ Of course, the distinction between a theory of sovereignty, like the basket theory, that broadly permits alienation of sovereign rights, and one that, like the Chunk theory, treats sovereign rights as essential to the preservation of a state's sovereignty does not need to be expressed in terms of property. See, e.g., David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607 (1995). Wippman considers whether a state's contemporaneous consent to foreign intervention in its civil war can be dispensed with if prior consent has not been effectively revoked. *Id.* He suggests that under a freedom of contract model, a state might be free to bargain away its sovereign rights, including the right against foreign intervention in a future civil war. *Id.* at 616-18. This approach is thus compatible with the Basket theory. Wippman also considers a *jus cogens* model of sovereignty, under which certain sovereign rights are so much at the core of sovereignty that they may not be alienated. *Id.* at 618-23. *Jus cogens* in international law functions in ways quite similar to public policy or *ordre publique* in common and civil municipal legal systems as a limit to the freedom of contract. Cf. Geoff Watson, *Death of Treaty*, 55 OHIO ST. L. J. 781, 817 (1994); see also ARTHUR T. VON MEHREN AND JAMES R. GORDLY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW*, 802-05 (2d ed. 1977). The *jus cogens* model seems congruent with the Chunk theory, although they might yield radically different results in application given vagueness in any formulations that depend on identifying the “core” elements of sovereignty.

Indeed, the difficulty in stating what is at the center of sovereignty under a contract theory parallels the most important challenge to hypothetical contract models of moral justification. John Rawls has famously argued that individuals would agree to certain principles of justice to govern the basic structure of their state when reasoning in a version of a hypothetical state of nature, with only minimal assumptions about persons' initial attributes and what would be important to them in an agreed society. JOHN RAWLS, *A THEORY OF JUSTICE* 136-50 (1971). However, Rawls' minimal assumptions, Michael Sandel has replied, fail to account for values, drawn primarily from participation in communities, that are the “core” of human personality. See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). Contract-based theories of sovereignty, thus, as Wippman rightly recognizes, demand a deeper inquiry into the identity of the sovereign and the claims of its constituent communities. Wippman, *supra* at 623-32. This review essay draws similar conclusions, in terms of property-based legal vocabulary.

²⁴ See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (relying on a social conception of property rights to argue in favor of a redistributive role for the state in the communal control of resources to further the public interest); cf. Underkuffler, *supra* note 4, at 129 (pointing to the dual role of property in defining a sphere of private autonomy and a sphere of collective interests, but arguing that the two aspects are connected, rather than separate, concepts).

“Banquo’s ghost of the academic feast,” hovers over the stage of international politics.²⁵ Yet the material out of which they would give substance to Banquo’s ghost is itself rather airy stuff that seems divorced from flesh and blood. Indeed, they treat the rights of states as though they were of legal weight, indistinguishable from that which would attach to similar claims by natural persons.²⁶ In all fairness, Fowler and Bunck purport to employ an explicitly positivist methodology free of normativity in order to take the study of sovereignty to a more precise level. Yet one wonders whether a more complete, accurate, and useful, account of sovereignty can be achieved without addressing the role of the various constituencies within states. After all, groups defined in terms of status and interest comprise states at least as much as certain groups owe their existence to the protection they receive from the existence of states. Indeed, Fowler and Bunck might have taken into account the moral status of claims that groups comprising states (whether one calls them “nations” or “peoples”) may have to a separate identity within a state structure and the ability to command resources that state power can assure.²⁷ Fowler and Bunck’s limited discussion of Marxist, international organization, supranationalist, and human rights critiques of sovereignty²⁸ do not do justice to the descriptive and predictive power of some of these approaches in explicating the meaning of sovereignty in the new international order where groups find expression of their powers not only

²⁵ FOWLER, *supra* note 2, at 3.

²⁶ See, e.g., *G.M. Leasing Corp. v. U.S.*, 429 U.S. 338 (1977)(affirming corporations’ Fourth Amendment right to freedom from unreasonable searches and seizures); *First Nat. City Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)(recognizing corporations’ First Amendment right to freedom of expression). But cf. L. Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 487 (1987) (distinguishing between the constitutional rights of aliens and the constitutional rights of foreign states).

²⁷ See generally Lea Brilmayer, *The Moral Significance of Nationalism*, 71 NOTRE DAME L. REV. 7, 30 (1995)(observing that we regularly differentiate in the recognition of rights among various categories of juridical persons and between natural and juridical persons depending on the status of the particular entity). Brilmayer argues, however, that, with some minor qualifications, the best approach to the moral status of nationalism is to frame groups’ claims so that they are “independent of the status of the entity making them.” *Id.* at 11. For example, a way to articulate Baltic claims to statehood is to focus on the historical wrong committed against the Baltic nations through their forcible annexation by the former Soviet Union rather than in terms of cultural or other unique dimensions of their existence which merit preservation. *Id.* at 12. In sum, Brilmayer advances a kind of “neutral principles” approach to the moral claims of groups to preferential resource allocations in which corrective justice serves as the principle under which sovereign claims would be recognized. Cf. H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1973)(arguing for reasoning that is “genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved”). Arguably, however, Brilmayer’s formalistic commitment to corrective justice would still require an assessment of whether the victim of a past wrong suffered that harm as a collective entity. Thus, status questions would seem to be inevitable.

²⁸ FOWLER, *supra* note 2, at 128-140.

within but also without states.²⁹ A better approach in understanding the sources of international disorder would then employ the internal politics model, which is now considered essential to any adequate account of state behavior.³⁰

But no matter how hard they try, Fowler and Bunck are unable to avoid the internal politics dimension of sovereignty, although they reach this point through a circuitous path. They recognize from their empirical approach that "becoming an accepted member of the ranks of sovereign states is something like joining an exclusive club," so that "it is ultimately the international community that determines whether a particular political entity qualifies as a sovereign state."³¹ The importance of recognition in the current state system leads them to observe a preference among state leaders for employing the Basket theory of sovereignty.³² Fowler and Bunck then infer from this fact that our theory of sovereignty should soften its commitment to the doctrine of sovereign equality, one of the core elements of the traditional doctrine of sovereignty they have described as Chunk theory, because it undercuts the ability of the international system to ensure order.³³ Finally, and ironically in a book that pays precious little attention to the domestic sources of international behavior, Fowler and Bunck conclude that sovereignty's principal modern justification is its original rationale in the anarchic pre-Westphalian system that ravaged Europe in civil and

²⁹ See, e.g., THE COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBORHOOD* 25-26, 30-35 (1995) (suggesting that transnational interest groups such as labor, business, the press and political parties play an increasing role in global governance).

³⁰ KENNETH WALTZ, *MAN, THE STATE, AND WAR* 80-123 (1959) (developing three models for explaining the sources of interstate conflict, including one focusing on the domestic, political and economic structure of states as a predictor of their propensity toward international violence); cf. *Correspondence: The Democratic Peace*, 19 *INT'L SECURITY* 164-84 (Spring 1995) (an exchange of views among Bruce Russett, Christopher Layne, David E. Spiro, and Michael Doyle debating the thesis that democratic states are less likely to engage in international violence than non-democratic states).

³¹ FOWLER, *supra* note 2, at 62. Remarkably, the authors do not allude to the long-standing debate between proponents of the "declaratory" and "constitutive" theories of state recognition in modern international law. See, e.g., HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1946) (distinguishing between the view, on the one hand, that an entity meeting the objective criteria of statehood is a subject of international law with legal rights and duties regardless of whether other states recognize it as such and, on the other, that the act of recognition by currently recognized states transforms the entity into a subject of international law). Nor, for that matter, do they address the recent extraordinary developments relating to collective recognition by the international community through the United Nations, see Michael Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 *CORNELL J. INT'L L.* 129 (1995); or the then EC and United States adoption of new criteria concerning international obligations regarding internal affairs as preconditions for recognition of the republics emerging from former Yugoslavia and Soviet Union. See LOUIS HENKIN, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 250-55 (3d ed. 1993). Arguably, this recent practice raises the profile of the dimension of internal sovereignty and its relation to external sovereignty in ways that Fowler and Bunck do not seem to appreciate.

³² FOWLER, *supra* note 2, at 124.

³³ *Id.* at 148.

international wars during the 16th and 17th centuries. That is, state sovereignty assures order in a world where "terrorists, narcotics traffickers, and insurgents," among others, will be the chief sources of "international turmoil."³⁴ Yet insurgency, terrorism, and underground economies are, if anything, manifestations of internal tensions in the structure of the "sovereignty" of any particular state.

Perhaps there is power to Fowler and Bunck's point that conflicts, such as the international effort to prevent North Korea's acquisition of a nuclear weapons capability, will continue to be understood best as contests of power between sovereign states.³⁵ Their intellectual project may well be to strengthen the theology of sovereignty as a bulwark against international disorder and outlaw states. If Fowler and Bunck really were lawyers, one would have to call them unreconstructed Austinians. Their understanding of sovereignty as a legal concept ultimately boils down to a theory that only power matters.³⁶ Accordingly, these political scientists' explication of the modern role of sovereignty fails to address adequately the internal and moral dimensions of state sovereignty. We are left with nothing more than the image of the state as some "brooding omnipresence."³⁷ One might have thought that the authors' empirical finding concerning the importance of recognition would suggest that acceptance in this "exclusive club" of states is based on something more than *machtropolitik*. It is here that the international lawyers begin to lend more substance to Banquo's ghost at the academic feast.

III. THE NEW SOVEREIGNTY

In a magnificent synthetic effort, Abram and Antonia Handler Chayes have betrayed the profession of international lawyers, perhaps rendering obsolete its tired old methodology of *pacta sunt servanda*, under which a material breach of a treaty gives rise to rights to responsive

³⁴ *Id.* at 155.

³⁵ *Id.* at 157.

³⁶ See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1965). Indeed, Fowler and Bunck's Austinian jurisprudence flows inevitably from their traditional "realist" perspective in the study of international relations, which tends to minimize the role of international institutions as autonomous actors. See, e.g., John T. Mearsheimer, *The False Promise of International Institutions* 19 *INT'L SECURITY* 5 (Winter 1994/95).

³⁷ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). It is again ironic that Fowler and Bunck see to ignore the central tenet of Holmesian jurisprudence to see law as the reflection of concrete social interests rather than abstracted concepts, even as they explicitly rely the Holmesian jurisprudential insight that words, such as sovereignty, are merely the "skin of a living thought." FOWLER, *supra* note 2, at 83 (citing *Towne v. Eisner*, 245 U.S. 372, 376 (1918)). Surely an adequate understanding of sovereignty must account for interests of social groups and the individuals constituting them rather than the intellectual construct of the state.

measures.³⁸ The old methodology would treat a “‘cause’ of noncompliance” as a lawyer’s “defense” to a claim of material breach that would otherwise give the nonbreaching party a right to terminate the agreement. In contrast, the Chayes prefer to consider such causes from the perspective of regime management,³⁹ analyzed in terms of “the acceptable level of compliance”⁴⁰ that would obviate “defection.”⁴¹ They argue that the problem of “changing interests over the life of a treaty can be handled by changes in the acceptable level of compliance rather than by defection.”⁴² Because they believe the “principal source of noncompliance is not willful disobedience but the lack of capability or clarity or priority,” it follows that “coercive enforcement is as misguided as it is costly.”⁴³ Thus, “the fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public.”⁴⁴ Discursive “enforcement” thus becomes for the Chayes the

³⁸ Vienna Convention on the Law of Treaties, May 23, 1969, art. 60, 1155 U.N.T.S. 331, 346 (with the precise options available to a nondefaulting party depending on whether the treaty is bilateral or multilateral and, in the latter case, on whether the nondefaulting party is specially affected by the breach).

³⁹ CHAYES, *supra* note 3, at 10.

⁴⁰ *Id.* at 17.

⁴¹ In regime theory, drawing on the game-theoretic perspective which informs much of the rational actor analysis of the behavior of regime participants, defection serves as a proxy for material breach or withdrawal from the regime. See, e.g., Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989)(focusing particularly on the rational choice, game-theoretic perspective); see also Ann-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993)(arguing that international lawyers and international relations theorists “should aspire to a common vocabulary and framework of analysis that would allow the sharing of insights and information”).

⁴² CHAYES, *supra* note 3, at 20.

⁴³ *Id.* at 22. The Chayes are remarkably sanguine about the efficacy of transparency-generating features of international regimes in reducing the incentives to defection that one would anticipate from the game-theoretic perspective, arguing that if “reassurance works for arms control, where stakes are highest, it is not too surprising to discover the same process at work in more mundane settings.” *Id.* at 147.

⁴⁴ *Id.* at 24. Indeed, relying on Abram Chayes’ earlier account of the role of public justification in international politics, see ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 104 (1987). The authors now call international organizations the “focused and intensified arena of public justification.” *Id.* at 125. Discursive justification is, in their view, deeply rooted in their understanding of law as persuasion, for in “the new sovereignty, there are too many audiences, foreign and domestic, too many relationships present and potential, too many linkages to too many other issues” for the need for persuasion “to be ignored.” *Id.* at 119. See also FRIEDRICH KRATOCHWIL, *RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL AFFAIRS* 214 (1989)(calling legal reasoning “the process by which assent can be gained to value judgments on reasoned rather than idiosyncratic grounds”). The Chayes’ vision of the character of international law, thus, harkens back to a tradition that philosophically is most closely associated with Immanuel Kant’s conditions for peace among nations, see IMMANUEL KANT, *PERPETUAL PEACE* 85, 93-98 (1795)(Lewis W. Beck ed. & trans., 1963), and practically with Woodrow Wilson’s insistence on open agreements that would stand the test of public opinion. See EDWARD H. CARR, *THE TWENTY YEARS’ CRISIS 1919-*

new *deus ex machina* in the international system. Thus, “sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.”⁴⁵

A critical assumption underlying this methodology is that discursive justification is as much a characteristic of international law as it is of domestic law.⁴⁶ The Chayes reject the account of regime theorists who focus on how international institutions facilitate cooperation by reducing transaction costs,⁴⁷ and argue that “what is left out of this institutionalist account is the active role of the regime in modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the regime.”⁴⁸ In this discursive process, the Chayes place particular importance on mechanisms for “systematic review and assessment of individual members’ performance” that would generate a “compelling dynamic, engaging the parties in an increasingly detailed and comprehensive dialogue, not only to identify areas where compliance is

1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 32 (1946)(discussing Wilson’s belief in “the compelling power of reason through the voice of the people”).

⁴⁵ CHAYES, *supra* note 3, at 27.

⁴⁶ The assumption is framed as follows:

States (though they must speak through human agents) characteristically talk as though they regard themselves to be bound by applicable legal norms, as do other collective bodies such as corporations. Domestic and international laws treat states (as well as certain other kinds of collective bodies) as “artificial persons” with legal rights and obligations, some of them judicially enforceable. And students of state behavior, whether in the academy, the press, or public life, assume that states respond to interests, incentives, and penalties in much the same way that individuals do. It is no more difficult to explain that states as such feel a general obligation to follow legal norms than to explain why they respond to ‘self-interest.’

Id. at 118 (footnotes omitted). In a single footnote qualifying their remarks, the Chayes rely on Friedrich Kratochwil’s argument that, “[w]hile neither I nor anyone else can deny significant differences between individual choices and those filtered through a group or organizational channels, the simplifying assumption here is that the initial metaphor is heuristically fruitful and that it leads us to the discovery of important new insights.” *Id.* at 346 (citing KRATOCHWIL, *supra* note 44, at 10-11).

Thus, what appears to be a statement of fact in the text becomes in the footnotes nothing more than a convenient fiction. It is remarkable that so thorough and provocative a book is built on a “metaphor” or “simplifying assumption,” without a more “discursive” justification or a discussion of the limits, understood or potential, of the heuristic selected.

⁴⁷ *Id.* at 229 (citing ROBERT KEOHANE, AFTER HEGEMONY, COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 88 (1984); ORAN O. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT POLITICS IN A STATELESS SOCIETY 1-3 (1994)). For a recent example of international law literature employing rational actor models, see Richard Morrison, *Efficient Breach of International Agreements*, 23 DENV. J. INT’L L. & POL’Y 183 (1994)(employing rational actor analysis, in particular the theory of efficient breach, to account for patterns of compliance in international agreements).

⁴⁸ CHAYES, *supra* note 3, at 229.

unsatisfactory, but also to develop ways of improving performance in the future.”⁴⁹ Much of this process, they argue, places at stake the reputational interests of states and their diplomatic agents for truth-telling, and arguably invokes the coercive power of shame in assuring compliance with international commitments.⁵⁰

Yet discourse and data are not, as the Chayes recognize, enough to forge a new sovereignty. The new sovereignty of membership in international institutions requires international institutions worthy of the name. It is here that the Chayes betray their deepest convictions. They argue that international organizations must “shield . . . domestic bureaucracies with responsibilities within the area of concern . . . from the control of central foreign policy-making authorities and from other pressures that might militate against compliance with the organization’s mandate.”⁵¹ They hold out the alliance between domestic experts and their foreign and international bureaucratic counterparts, “expert management” in other words, and high party involvement as the “common characteristic of successful organizations.”⁵² These experts are defined by their membership in an expert or “epistemic” community, and they “use their positions of power to implement the shared beliefs and policy orientation of the community.”⁵³

Yet these new Platonic Guardians have little, if any, connection to the broader community that must play a role in democratic political

⁴⁹ *Id.* at 229, 249.

⁵⁰ To buttress their claim, the Chayes report their conversation with Ambassador Richard J. Smith, lead U.S. negotiator for the Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1541, entered into force January 1, 1989 (Protocol to the Vienna Convention for the Protection of the Ozone Layer, 26 I.L.M. 1516, entered into force September 22, 1988); as amended by Adjustment and Amendments to the Montreal Protocol on Substances That Deplete the Ozone Layer, entered into force March 7, 1991 (the London Amendments); and Adjustments and Amendments to the Montreal Protocol on Substances That Deplete the Ozone Layer, 32 I.L.M. 874 (1992)(the Copenhagen Amendments). Smith asserts that revoking a commitment the U.S. had made earlier in the negotiating process concerning U.S. foreign aid to facilitate compliance with ozone reduction targets by less developed countries was “the hardest thing he had ever had to do.” CHAYES, *supra* note 3, at 274. The Chayes believe that policymakers are similarly subject to the effects of “social opprobrium.” *Id.* (citing Oran Young, *Effectiveness of International Institutions: Hard Case and Critical Variables*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 117 (James Rosenau and Ernst Otto Czempiel, eds., 1992)). While this is no doubt a perceptive account of the *modus operandi* of most diplomats, and perhaps even a few policymakers, it is not clear that social constraints concerning shame over lack of truth-telling is as pervasive a cross-cultural characteristic as the Chayes would hope.

⁵¹ CHAYES, *supra* note 3, at 280.

⁵² *Id.* at 284. The Chayes place particular emphasis on the notion of a “transgovernmental elite network” in terms of the concept of “epistemic communities.” *Id.* at 279-82 (relying, in particular, on the work of Peter Haas).

⁵³ *Id.* at 281.

legitimization.⁵⁴ James Madison saw the politics of “interest groups” as an essential feature for the flourishing of liberty in the transfer of sovereignty from fifty separate states to a central government.⁵⁵ Astonishingly, interest groups seem to play no role whatsoever in the Chayes’ cookbook for the new sovereignty, despite their academic training in a legal culture that has elevated Madisonian federalism to the highest pinnacle of received wisdom.⁵⁶ The Chayes might have remedied this defect by finding a democratic dimension in transnational nongovernmental organizations (NGOs), which they regard as “remedies” for the “deficiencies of public organizations.”⁵⁷ But even here, they treat NGOs as essentially elite-centered institutions, “organizations (usually not for profit) of people united by their orientation toward a particular public policy issue rather than their ‘selfish’ individual interests.”⁵⁸ There is, under the the Chayes’ vision of the new sovereignty, no theoretical home for elite representation of non-elites and their “selfish” interests—for a theory of popular sovereignty.

Whatever one thinks about Platonic Guardianship as a mode of transnational governance, there is yet another downside to the Chayes’ move toward technocratic elitism. The new sovereignty of “membership in good standing” is woefully ill-equipped to address fundamental value conflicts. Indeed, the Chayes seem to acknowledge this point by alluding to the destabilizing effect that fundamental value conflicts have placed

⁵⁴ The problem of “popular sovereignty” rears its ugly head in the Chayes’ account only indirectly in a footnote in which, again relying on Peter Haas’ work, they observe:

Epistemic communities are distinguished from ordinary interest groups and bureaucracies along four dimensions: shared principles, causal beliefs, validity tests, and policy orientation. While the members of interest groups may have shared principles and interests, they do not have a common knowledge base or causal beliefs. Bureaucrats, however, may have none of these attributes in common with their colleagues.

Id. at 403 (citing Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, in *KNOWLEDGE, POWER, AND INTERNATIONAL POLICY COORDINATION*, 46 INT’L ORG. 201 (Peter Haas ed., Winter 1992)(Special Issue)).

⁵⁵ JAMES MADISON, *THE FEDERALIST*, NO. 10 77-84 (Clinton Rossiter, ed. 1961)(considering the politics of “faction” in assuring liberty and in enhancing federal authority).

⁵⁶ See, e.g., Gerald Gunther, *CASES & MATERIALS ON CONSTITUTIONAL LAW* (9th ed. 1975).

⁵⁷ CHAYES, *supra* note 3, at 211. Indeed, the Chayes argue that “NGO’s seem to be able to go over the heads of governments to mobilize a process of public shaming and reputational pressure unrelated to vote getting or other aspects of domestic political power.” *Id.* at 269 (emphasis added).

⁵⁸ *Id.* at 252. While the Chayes may be right about the limited role that individuals can play in pursuing their selfish interests in most existing international organizations, it is worth noting that the World Bank has recently created an institutional mechanism for private persons to complain that they have been adversely affected by the Bank’s failure to comply with its operational procedures. See Daniel Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT’L L. 553 (1994).

on the International Convention for the Regulation of Whaling (ICRW).⁵⁹ In that case, some supporters of the moratorium on whale hunting regarded the ban as "essential to the preservation of endangered whale species," an instrumental objective for the larger purpose of continuing the practice of whale hunting. Meanwhile, others saw it as a reflection of "a new conception of the purpose of the organization, a purpose that is itself the product of a new 'deep environmentalist' approach that regards commercial whaling as morally unacceptable."⁶⁰ But what the Chayes may see as a discrepancy may well be at the core of the international system. The new sovereignty thus is predicated on the players preferring to keep the game going, even at the price of losing hand after hand. Sometimes, however, as the saga of the ICRW reveals, when the stakes are raised high enough, the players will be prepared to take their chips home, or credibly threaten to do so, in order to change the rules of the game to make it one they can win. How complete then is a conception of sovereignty that minimizes the role of fundamental values? We might question how satisfying the Chayes' offering to the academic feast will be in the long run.

IV. A SYNTHESIS OF THE OLD AND NEW SOVEREIGNTIES

Both Fowler and Bunck and the Chayes make passing reference to the international community's efforts to constrain North Korea's attempt to acquire nuclear weapons. The political scientists cite North Korea as a case, like Iraq, in which "the international community would like to remove the right to develop [nuclear] weapons from the baskets of [sovereignty] of aggressive states."⁶¹ Meanwhile, the international lawyers see the North Korean case as support for their thesis that membership in good standing is so important that "[n]ot even the so-called hermit state of North Korea has been completely able to resist . . . escalating pressure."⁶² Which view is right? Is the conflict between the international community and North Korea best understood as a power contest between sovereign states concerning the performance of legal obligations or is it a process of socialization in which North Korea

⁵⁹ International Convention for the Regulation of Whaling, November 10, 1948, 161 U.N.T.S. 72.

⁶⁰ CHAYES, *supra* note 3, at 130. Notably, the new conception seems to have prevailed through the entry into the organization of states without significant commercial whaling interests and the threat of coercive measures by an NGO, Greenpeace, against states that did not share Greenpeace's moral commitments. *Id.* at 263-64.

⁶¹ *Id.* at 157. They see the case as one that clashes "with the notion that states enjoy a sovereign right to determine what measures ought to be taken to provide for national defense." *Id.*

⁶² *Id.* at 28.

becomes a member in good standing in the international community? The answer is both.

North Korea, as is now widely known, attempted during the late 1980s and early 1990s to embark on a program of nuclear weapons development after it adhered to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).⁶³ The North Koreans breached the NPT virtually from the moment they signed by delaying completion of the required safeguards agreement with the International Atomic Energy Agency until 1992,⁶⁴ more than half a decade late.⁶⁵ In March 1993, North Korea attempted to exercise its right to withdraw from the NPT, after the IAEA had asserted its right under the safeguards agreement to inspect certain suspect sites at which the IAEA believed North Korea had engaged in unsafeguarded nuclear activities. North Korea, under significant international pressure,⁶⁶ "suspended its notice of withdrawal from the NPT only hours before it was to take effect."⁶⁷ This left the

⁶³ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 487, 729 U.N.T.S. 17 (hereinafter NPT). Under article II of the NPT, non-nuclear weapons state parties—that is, all states that have not "detonated a nuclear explosive device" before January 1, 1967, within the meaning of article XI—may not "manufacture or acquire" nuclear weapons. North Korea's activities were clearly such that other NPT parties were concerned about the possibility of this imminent breach of this crucial obligation; see generally MICHAEL J. MAZARR, NORTH KOREA AND THE BOMB: A CASE STUDY IN NONPROLIFERATION (1995); MITCHELL REISS, BRIDLED AMBITION: WHY COUNTRIES CONSTRAIN THEIR NUCLEAR CAPABILITIES 239-319 (1995). That said, even though it may not be certain that North Korea actually crossed the threshold of "manufacture" of nuclear weapons rather than merely engaged in steps "preparatory" to manufacture, which would not technically have violated the non-acquisition obligation. See generally MOHAMMED I. SHAKER, 1 THE NUCLEAR NONPROLIFERATION TREATY 249 (1980) (the authoritative commentator on the NPT pointing out that the NPT does not bar "attempts" to acquire nuclear weapons).

⁶⁴ Article III of the NPT requires conclusion of the safeguards agreement, under which the IAEA verifies compliance with the peaceful use commitment under the NPT relating to nuclear fuel cycle activities of non-nuclear weapon states, within 360 days of a state's adherence to the Treaty. See NPT, *supra* note 63, at art. III(4); see Agreement Between the Government of the Democratic People's Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/403 (May 1992) (entered into force April 10, 1992, reprinted in 33 I.L.M. 315 (1994)). At the same time, North and South Korea entered into a Joint Declaration on Denuclearization of the Korean Peninsula, January 20, 1992 (entered into force, February 19, 1992); translated and reprinted in IAEA Doc. GOV/INF 660 and 33 I.L.M. 569 (1994), under which North Korea went beyond its NPT commitment not to engage in certain nuclear activities, such as enrichment or reprocessing—which produce weapons-usable nuclear material—outside of safeguards with a commitment not to "possess facilities" for enrichment or reprocessing.

⁶⁵ North Korea became a party to the NPT on December 12, 1985. See The United Nations and Nuclear Non-Proliferation 180 (United Nations Bluebook Series, Volume III). Other states party to the NPT also have not signed the required safeguards agreement, *id.* at 177-79, however, none is known to have engaged in fuel cycle activities for the length of time North Korea did without having complied with this obligations.

⁶⁶ See generally Antonio F. Perez, *Survival of Rights Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 34 VA. J. INT'L L. 749 (1994).

⁶⁷ *Id.* at 751 n.9 (discussing legal effect of "suspension" of notice of withdrawal).

international community with a dilemma. On the one hand, it could pursue to its logical completion a legally-based strategy of insisting on compliance by North Korea with its obligation to virtually the whole international community under the NPT, and to the IAEA under North Korea's Safeguards Agreement, to permit inspection of the two suspect sites. On the other hand, it could pursue a strategy of bringing North Korea into "acceptable compliance" with the NPT regime and the Joint Declaration for the Denuclearization of the Korean Peninsula. This apparent dilemma, however, like the tension between property-based and management-based conceptions of sovereignty, was a false dichotomy, for the international community pursued both approaches in tandem.

In October 1994, the United States and North Korea concluded an Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula,⁶⁸ under which the United States undertook to make arrangements to provide North Korea with a light-water reactor power plant project having a total generating capacity by a target date of 2003 of approximately 2,000 megawatts. In exchange North Korea, upon receipt of assurances for the provision of light-water reactors and for arrangements for interim energy alternatives, would freeze its graphite-moderated reactors and related facilities, and ultimately dismantle them.⁶⁹ As Secretary of State Warren Christopher later made clear in testimony before the Senate Foreign Relations Committee, the substitution of "proliferation resistant, light-water reactors" would reduce the risk of North Korea's peaceful nuclear activities leading to the production of weapons-usable nuclear material.⁷⁰ That said, Christopher did not ignore the legal dimension of the dispute, pointing out that North Korean compliance with the IAEA's earlier special inspection request was an essential part of the

⁶⁸ The Agreed Framework to Negotiate Resolution of the Nuclear Issue on the Korean Peninsula, dated October 20, 1994, reprinted in 34 I.L.M. 603 (1995)(hereinafter Agreed Framework).

⁶⁹ Marian Nash, *Contemporary Practice of the United States: Peaceful Uses of Nuclear Energy: United States—Democratic People's Republic of Korea*, 89 AM. J. INT'L L. 96, 119 (1995). The Agreed Framework is not considered an international agreement. It is, rather, merely a political "undertaking" by the United States, as was made clear by its chief U.S. negotiator Robert Gallucci in testimony before Congress. See Testimony of Ambassador-at-Large Robert Gallucci Before the East Asian and Pacific Sub-Committee of the Senate Foreign Relations Committee on U.S.-North Korea Nuclear Agreement, Federal News Service (Dec. 1, 1994)(observing that the United States was therefore not legally-obligated to make available funds for the provision of the light-water based reactors the Agreed Framework envisioned would ultimately be made available to North Korea or for interim energy supplies to substitute from nuclear energy North Korea claimed it had forborne through closing down its graphite-based reactors).

⁷⁰ Marian Nash, *Contemporary Practice of the United States Relating to International Law: Peaceful Uses of Nuclear Energy*, 89 AM. J. INT'L L. 366, 373 (1995)(reporting testimony of Secretary of State Christopher Before the Senate Committee on Foreign Relations on January 24, 1995).

Agreed Framework.⁷¹ As the Chayes might observe, Secretary Christopher deferred to the technical judgment of the IAEA as to what inspections were necessary for it to carry out its mandate under the IAEA-North Korea Safeguards Agreement.⁷² On the other hand, Secretary Christopher ultimately justified the U.S.'s willingness to accept a delay in North Korea's compliance, as Fowler and Bunck would point out, in terms of the "national security" requirements of the United States.⁷³

Although the Agreed Framework was initially the fruit of U.S.-North Korea bilateral negotiations—in a sense, a contest of sovereign wills between the two states, which had fought a terrible war a generation earlier—its key procedural element was, as the Chayes might observe, that the U.S. would organize "an international consortium" to finance and supply the light-water reactors project.⁷⁴ Efforts to create the consortium bore fruit in the conclusion on March 9, 1995 of the Japan-Republic of Korea-United States Agreement on the Establishment of the Korean Peninsula Energy Development Organization (KEDO).⁷⁵ The establishment of KEDO thus signaled a move toward institutionalizing the international response to North Korea's nuclear gambit, since

⁷¹ *Id.* at 374 (stating that "the most important benefit that the North will receive under the Agreed Framework, the sensitive nuclear components for [light-water reactors], will not be provided until the North fully complies with its safeguards obligations, which includes accounting for its past activities").

⁷² *Id.* at 375. ("Let me now address the question of when the North would account for its past activities. It was vital to secure an unambiguous commitment from the North to accept whatever measures the IAEA deemed necessary—including special inspections—to account for its past nuclear activities.") In view of legally non-binding character of the Agreed Framework, Christopher must have regarded a "political" commitment as sufficient under the circumstances. See *supra* note 68 (Ambassador Gallucci's testimony before Congress to the effect that the Agreed Framework was not binding under international law); see generally Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).

⁷³ Nash, *supra* note 69, at 375. ("From a national security perspective, when those inspections were conducted was less critical. The information to be obtained is not perishable. We encourage the North to accept those inspections even before they are required to under the Framework. But the more pressing security imperative was to stop plutonium production and secure an agreement to dismantle North Korea's nuclear program.")

⁷⁴ See Nash, *supra* note 68, at 120 (excerpts from the Agreed Framework). This is not to say that the strategy articulated by Secretary Christopher involved a radical break between addressing the North Korean situation as a bilateral U.S.-North Korea or North Korea/South Korea problem and instead as a conflict between North Korea and international organizations alone. As part of the Agreed Framework, North Korea agreed to "resume its dialogue with the Republic of Korea," and the United States, in order to facilitate implementation of the Agreed Framework, decided to "open a liaison office in Pyongyang" just as North Korea decided to open an equivalent office in Washington. See Nash, *supra* note 69, at 373 (testimony by Secretary Christopher); see also Nash, *supra* note 68, at 121 (excerpting provision II of the Agreed Framework). Also, Christopher noted, North Korea was "moving forward in discussions with the IAEA to enact additional verification measures" but North Korea was also "cooperating with American experts to ensure safe storage of the spent fuel at its Yongbyon nuclear plant —cooperation which has included the first visit by American technicians to Yongbyon." Nash, *supra* note 69, at 374. Bilateral and multilateral tracks thus were equally important parts of the Agreed Framework.

⁷⁵ 34 I.L.M. 608 (1995)(hereinafter KEDO Agreement).

implementation of the Agreed Framework was now seen as KEDO's responsibility.⁷⁶

Fowler and Bunck might argue that KEDO is simply a vehicle for the U.S., South Korea and Japan to coordinate their bilateral policies toward their common enemy.⁷⁷ For example, it might be suggested that KEDO is merely an effort by the U.S., Japan and Korea to shield their own assets from nuclear-related liability by creating an international dummy corporation. Article XIII(b) of the KEDO Agreement provides that "No Member shall be liable, by reason of its status or participation as a Member, for acts, omissions, or obligations of the Organization."⁷⁸ But this language does not completely shift international responsibility from KEDO's members to KEDO.⁷⁹ A better explanation, given the

⁷⁶ As chief U.S. negotiator Ambassador Robert Gallucci observed in connection with a plea for international contributions to KEDO so that KEDO could "fulfill its obligations." *U.S. Resuming Work Under N. Korea Pact*, WASH. POST, June 16, 1995, at A17.

⁷⁷ Articles VI(a), (b), and (e) provide, respectively, that "[t]he authority to carry out the functions of the Organization shall be vested in the Executive Board," that "[t]he Executive Board shall consist of one representative of each of the original Members," and that "[d]ecisions of the Executive Board shall be made by a consensus of the representatives of all the original Members." KEDO Agreement, *supra* note 74, at 612. Article V(a) defines "the original members" as the U.S., Japan, and South Korea, so that each therefore maintains a veto on KEDO's activities. *Id.* Each state will, in theory, be able to assure itself that KEDO does not take action that conflicts with its core, sovereign interests. Other states, by contrast, which under Article V(b) may with Executive Board approval become members if they "support the purposes of [KEDO] and offer assistance," will be represented in the General Conference, which under Article VII has only recommendatory powers. *Id.*

⁷⁸ KEDO Agreement, *supra* note 74, at 615. In its Agreement on Supply of a Light-Water Reactor Project to the Democratic People's Republic of Korea between the Korean Peninsula Energy Development Organization and the Government of the People's Republic of Korea, art. XI, entered into force December 15, 1995) (on file with the author)(hereinafter KEDO-North Korea Agreement), KEDO did not secure any legal commitment from North Korea with respect to claims against KEDO's members. Rather, it secured a commitment from North Korea not to bring claims "against KEDO, its contractors and subcontractors, and their respective personnel arising out of any nuclear damage or loss." *id.* at art. XI(3), and to "enter into an indemnity agreement" and "secure nuclear liability insurance or other financial security to protect KEDO, its contractors and subcontractors" against "any third party claims in any court or forum arising from activities undertaken pursuant" to the KEDO-North Korea Agreement from "nuclear damage or loss occurring inside or outside the territory" of North Korea. *Id.* at art. XI(2). The liability clauses of the KEDO-North Korea agreement generally track the provisions of the Vienna Convention on Nuclear Liability for Nuclear Damage, done at Vienna, May 21, 1963, 2 I.L.M. 727 (1963); and the law of most with major civil nuclear power programs; *see, e.g.*, the U.S. Price-Anderson Act, 42 U.S.C. sec. 2210, Public Law No. 85256, 71 Stat. 576 (1988) as amended (amending the Atomic Energy Act of 1954); in that they channel liability for nuclear damage to the operator of the nuclear installation regardless of the operator's fault or, subject to certain exceptions for "gross negligence" or "intent to cause harm," the fault of third parties. *See* KEDO-North Korea Agreement *supra*, art. XI(1) and (5). In sum, KEDO's behavior in this area is consistent with that of an actor independent of the states creating it, with the caveat that state members must have influenced KEDO to some degree in securing indemnification from North Korea with respect to KEDO's contractors and subcontractors, which are likely to be nationals of members of KEDO.

⁷⁹ For example, Article XIII(b) of the KEDO Agreement does not preclude international responsibility for each of the Member's own conduct that is not based on "its status or participation as a Member." Thus, claims against KEDO members might be based in part on KEDO-related

limited effect of this language, is probably KEDO's need to soften the concern of potential contributors to KEDO concerning this issue.⁸⁰ Moreover, the nuclear liability-related commitments KEDO subsequently secured from North Korea are more consistent with the behavior of an independent actor rather than merely a front for U.S., Japan and North Korean interests.

Fowler and Bunck, taking a legalistic approach, might even argue that KEDO has only limited international legal capacity, which Article XIII(a) of the KEDO Agreement defines as follows:

To carry out its purposes and functions, [KEDO] shall possess legal capacity and, in particular, the capacity to: (1) contract; (2) lease or rent real property; (3) acquire and dispose of personal property; and (4) institute legal proceedings. Members may accord [KEDO] such legal capacity in accordance with their respective laws and regulations where necessary for [KEDO] to carry out its purposes and functions.⁸¹

Thus, the KEDO Agreement provides that KEDO's legal capacity is not expressly an "international" legal capacity, so that KEDO might be a creature of domestic law. Each of the illustrative capacities listed are, moreover, activities that are ordinarily undertaken pursuant to domestic, not international, law.

But reading the illustrative list of legal capacities in Article XIII(a) as limits on KEDO's international capacity, in a misplaced application of the *ejusdem generis* canon of interpretation, would be like a reading of a constitution as though it were a tax code. The use of permissive rather

activities when those activities, such as intelligence collection, would arguably be outside the ambit of KEDO's enumerated purposes. In addition, it would not appear that KEDO could affect the legal relationship that KEDO members could have with respect to non-members of KEDO, including claims those non-members would have against KEDO's members (such as a PRC claim that the light-water reactor built by KEDO in North Korea caused damage in China) unless international responsibility arose in connection with activities for which the non-member accepted the applicability of the Agreement. Finally, Article XIII(b) does not expressly state whether it refers to liability under international law, the applicable domestic law, or both. Conceivably, KEDO members might be liable under applicable domestic law even if no international responsibility arises pursuant to article XIII(b).

⁸⁰ It is better to read Article XIII(b) as an effort to encourage other states to become members of KEDO by minimizing the risk of their exposure for nuclear-related liability. A similar problem has stalled assistance from the West to Eastern Europe and the former Soviet Union for safety-related improvements to nuclear reactors there. See Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning Operational Safety Enhancements, Risk Reduction Measures and Nuclear Safety Regulation For Civil Nuclear Facilities in the Russian Federation, December 16, 1993, art. IV (providing, *inter alia*, that the Russian Federation would bring no claims against, and indemnify from third-party claims, the U.S. and U.S. contractors for civil liability for nuclear damage arising from U.S. activities under the Agreement) (on file with the author).

⁸¹ KEDO Agreement, *supra* note 74, at 615.

than mandatory language with respect to "legal capacity," which serves as code for the domestic grant of the privileges and immunities that would otherwise be conferred on international organizations and their agents under international law, should be read in a broader context. The U.S. Executive Branch needed, for completely different reasons, to leave the question of privileges and immunities open until congressional implementing legislation could be enacted.⁸¹ The understanding of the U.S. Congress of these KEDO provisions certainly would not comport with a restrictive and overtechnical reading.⁸²

Moreover, it is clear that KEDO can enter into treaties with states and other international organizations. Articles III(e) and (g) provide that KEDO may "cooperate and enter into agreements, contracts, or other arrangements with appropriate financial institutions, as may be agreed upon, for the handling of funds received by [KEDO] or designated for projects of [KEDO]" and "conclude or enter into agreements, contracts, or other arrangements, including loan agreements, with states, international organizations, or other appropriate entities, as may be necessary for achieving the purposes and exercising the functions of [KEDO]."⁸³ KEDO's broad objectives include not only "providing for the financing" for the new reactors "based on the Korean standard nuclear power plant model"⁸⁴ and "for the supply of interim energy alternatives"⁸⁵

⁸¹ The permissive language with respect to privileges and immunities of KEDO within member states reflects only the peculiarities of domestic implementation of international law, which in the case of the United States requires a congressional authorization either specifically approving privileges and immunities for the international organizations or furnishing assistance to that organization, in which event the President is authorized by proclamation to give effect to the organization's international legal status as a matter of domestic law by conferring the applicable privileges and immunities to the organization and its representatives. See International Organization Immunities Act, as amended, 22 U.S.C. § 288 (1988) (defining an "international organization" as "a public international organization in which the United States participates pursuant to any [article II] treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall be designated by the President through appropriate Executive Order as being entitled to enjoy the privileges, exemptions, and immunities herein provided").

⁸² As a colloquy between Assistant Secretary of State for International Organization Affairs and Representatives Bennett and Callahan makes clear, the Congress perceived that bans in annual legislation making appropriations for U.S. foreign assistance on direct or indirect U.S. assistance to North Korea would preclude an ironclad commitment on U.S. support for KEDO until the next appropriations cycle. See Testimony of Assistant Secretary of State Douglas Bennett Before Foreign Operations Subcommittee of the House Appropriations Committee, Federal News Service, March 15, 1995, available in LEXIS, News Library, Fednew File. Because the privileges and immunities issue, at least for the U.S., is deeply connected ultimately with legislative appropriation for assistance to KEDO, Article XIII(b)'s permissive language with respect to privileges and immunities should be read *in pari materia* with Article XIII(d), which provides that "Implementation of this Agreement in the Member' territories shall be in accordance with the laws and regulations, including budgetary appropriations, of such Members." KEDO Agreement, *supra* note 74, at 616.

⁸³ See KEDO Agreement, *supra* note 74, Arts. III (e) & (g), at 610.

⁸⁴ The KEDO Agreement further provides that financing would be provided "pursuant to a supply agreement to be concluded between [KEDO] and [North Korea]." *Id.* at 610. The South Korean demand that the reactor model would be based on that employed in South Korea was a critical

but also "provid[ing] for the implementation of any other measures deemed necessary to accomplish the foregoing or otherwise to carry out the objectives of the Agreed Framework."⁸⁶ This latter authorization gives KEDO vast potential for growth, given the broad objectives of the Agreed Framework concerning peace and security on the Korean Peninsula.⁸⁷ As the Chayes might argue, given the flexibility they find in discursive legitimation of evolving strategies in the management of compliance in international regimes, KEDO's competence is free to grow as necessary to serve its purposes.

But how KEDO will exercise this independent international capacity is, as Fowler and Bunck might observe, the more telling question. In fact, KEDO exercised its capacity to enter into an international agreement when on December 15, 1995 it entered into the "supply agreement" between itself and North Korea contemplated in the KEDO Agreement⁸⁸ as an international agreement rather than simply a contract under domestic law.⁸⁹ Thus, when KEDO secured the commitment of North Korea "reaffirming that [North Korea] shall perform its obligations under the relevant provisions of [the Agreed Framework of October 21, 1994],"⁹⁰ it arguably transformed North Korea's "political" obligations under the Agreed Framework into "international law" obligations. KEDO also arguably reinstated the methods of the old sovereignty, whereby the breach of North Korea's safeguards obligations to the IAEA was transformed into a new legal obligation for North Korea ultimately to accept special inspections.⁹¹ If

barrier to North Korea's negotiations with KEDO. See *Riches to Rogues*, WASH. POST, Apr. 20, 1995, at A21 (Op-Ed)(noting that the original target date for conclusion of the supply contract with North Korea would be missed because of this issue); see also Leon Mangasarian, *U.S. Official Seeks E.U. Aid for Nuclear Accord with N. Korea*, DEUTSCHE PRESS-AGENTUR, Feb. 8, 1995 (attributing North Korea's attitude to "national pride").

⁸⁵ These "energy alternatives" were to be provided specifically "in lieu of the energy from [North Korea's] graphite-moderated reactors pending construction of the first light-water reactor unit." KEDO Agreement, *supra* note 74, at 610.

⁸⁶ *Id.*

⁸⁷ See Nash, *supra* note 68, at 121.

⁸⁸ KEDO Agreement, *supra* note 74, art. II(a)(1), at 610.

⁸⁹ See KEDO-North Korea Agreement, *supra* note 77, at art. XVII(1) (stating that "[t]his Agreement shall constitute an international agreement between KEDO and [North Korea], and shall be binding on both sides under international law.>").

⁹⁰ *Id.* at preambular para. 4.

⁹¹ Although one might argue that the "reaffirmation" reaffirms only the political nature of North Korea's commitments under the Agreed Framework, or that preambular language does not ordinarily create substantive obligations but is used instead to determine the object and purpose of operative language in international agreement, see e.g. case concerning rights of Nationals in Morocco, I.C.J. Reports, 176, 196 (relying on pre-ambular language for evidence of object and purpose), other clauses in the KEDO-North Korea Agreement specifically implement the Agreed Framework as a matter of international law. Article III(1) provides that "as specified in the Agreed Framework, the provision of the [light-water reactor] project and the performance of the steps specified in Annex 3 are mutually conditioned." Annex 3 defines the steps to be performed by North

so, KEDO's legal rights may well be less than the IAEA's, which has consistently maintained its right to immediate special inspections.⁹² Thus, as the Chayes might point out, KEDO may have redefined the standard of compliance for North Korea's "membership in good standing" as something less than the *status quo ante* under the nonproliferation legal regime.

Fowler and Bunck might reply, however, that the North Korea's breach of its legal obligations remains the pivotal concept in framing the international response. In that sense, the traditional theory of sovereignty under which North Korea has ceded the nuclear stick in its "bundle of rights" would be reaffirmed. They could point to the fact that, in implementing the Agreed Framework, full compliance with North Korea's legal obligations under the IAEA Safeguards Agreement is required by the existing nonproliferation regime for implementing the light-water reactor transfer project. Implementation of the transfer project would entail nuclear-related exports, and these would need to comply with international and,⁹³ where applicable, domestic law.⁹⁴ North Korea's failure to permit

Korea in connection with the provision of the light-water reactor project, including continuing the "freeze on its graphite moderated reactors and related facilities and provide full cooperation with the IAEA in its monitoring of the freeze" and permitting immediate "resumption of ad hoc and routine inspections under [North Korea's] safeguards agreement with the IAEA with respect to facilities not subject to the freeze." KEDO-North Korea Agreement, *supra* note 77, at Annex 3(2) & (6).

⁹² The KEDO-North Korea Agreement may well even concede from KEDO's standpoint—and perhaps even create an estoppel indirectly against the U.S., Japan and South Korea, since KEDO's entry into the agreement was based on the consensus decision of its members—that North Korea's refusal to accept special inspections of the two suspect sites requested by the IAEA was not a material breach of the IAEA-North Korea Safeguards Agreement. Annex III(7) of the KEDO-North Korea Agreement specifically provides that it is only "when a significant portion of the [light-water reactor] project is completed"—a concept defined in terms of technical criteria set forth in Annex 4—"but before the delivery of key nuclear components" that North Korea "will come into full compliance with its IAEA safeguards agreement, including all steps that may be deemed necessary by the IAEA." These steps certainly will include the "special inspection" previously requested by the IAEA. The U.S. Congress in appropriating funds for U.S. participation in KEDO may well have made the same concession in not requiring full North Korean Compliance with all applicable safeguards obligations as a condition of U.S. assistance to KEDO, and through KEDO, North Korea. *See* Foreign Operations, Export Financing and, thus Related Programs Appropriations Act, FY 1996, P.L. 104-107, 110 Stat. 704 (adopted Feb. 12, 1996) (appropriating funds subject to the condition that, *inter alia*, the President determines and certifies to Congress that North Korea is "maintaining the freeze on its nuclear activities as required in the Agreed Framework").

⁹³ The criteria set forth in the KEDO-North Korea Agreement for North Korea's compliance seem to reflect less KEDO's interest in securing North Korea's fulfillment of its safeguards obligations than the needs of the states whose contractors will participate in the project. NPT parties are required under article III of the NPT not to export nuclear material (reactor fuel) or any of the items on the so-called "trigger list" of material or equipment "especially designed or prepared for the production, use or processing of nuclear material" without IAEA Safeguards on the exported nuclear fuel or trigger list items. *See* NPT, *supra* note 63, at art. III(2); *see also* Communications Received From Members Regarding the Export of Nuclear Material and of Certain Categories of Equipment and Other Material, IAEA Doc. INFIRC/254 (1978)(the so-called Trigger List of the Nuclear Suppliers Group or NSG); *see* KEDO-North Korea Agreement, *supra* note 77, at Annex 3(4)(specifically referring to the Export Trigger List of the NSG). Going beyond the requirements

the special inspection requested by the IAEA could, under the nonproliferation legal regime, complicate implementation of the light-water reactor project, particularly since the IAEA has firmly maintained that North Korea's noncompliance was of sufficient gravity to go to the heart of the safeguards regime.⁹⁵ In the end, however, the old sovereignty of performance and breach has its limits, since there is no guarantee that KEDO and North Korea will be able to rely on judicial means to settle their disputes,⁹⁶ or that internationally sanctioned coercion would be a plausible enforcement option.

Yet, the best way to think about KEDO's relationship with North Korea, given the combination of old and new sovereignty concepts in its current arrangements, may involve focusing on KEDO's ability, as a full-fledged international organization with an international legal personality to develop an independent relationship with North Korea over the course of time. KEDO's independent relationship with North Korea could

of the NPT, but as a matter of political commitment, the NSG members have stated that they will not make Trigger List exports, even if the exported items would be subject to safeguards in the recipient country, unless IAEA safeguards are also being applied on all peaceful nuclear activities, so-called Fullscope Safeguards, within the recipient country. See IAEA Doc. INFCIRC/405 (May 1992).

⁹⁴ Annex 3(4) of the KEDO-North Korea Agreement, in fact, provides that "in the event that U.S. firms will be providing the key nuclear components, the U.S. and [North Korea] will conclude a bilateral agreement on peaceful nuclear cooperation prior to delivery of such components." Such agreements, pursuant to section 123 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. sec. 2153[hereinafter AEA], may not be concluded without certain assurances from the cooperating country. These commitments, it turns out, are *mutatis mutandis* contained in article XIII of the KEDO-North Korea Agreement, which in that agreement consist of North Korean assurances relating to "peaceful, non-explosive use" of transferred items and nuclear material "used therein or produced through the use" of such items;" "physical protection" of nuclear reactors and material; "IAEA safeguards" on transferred reactors and nuclear material as well as on "nuclear material used therein or produced through the use of such items" for their "useful life;" no "reprocess[ing] or increase [in] the enrichment level" of transferred nuclear material or nuclear material "used in or produced through the use" of transferred items; and no retransfer to third parties by North Korea of "any nuclear equipment or technology or nuclear material transferred . . . or any nuclear material used therein or produced through the use of such items" without KEDO's consent. See KEDO-North Korea Agreement, *supra* note 77, at art. XIII(1),(3),(4),(5), and (6). Also under sections 126 and 128 of the AEA, exports of most nuclear-related items could not be licensed if North Korea were in "material breach" of its IAEA Safeguards Agreement. Accordingly, North Korea's "full compliance" with its IAEA Safeguards obligations would be, as is contemplated in the KEDO-North Korea Agreement, a condition precedent of U.S. participation in the light-water reactor supply project.

⁹⁵ See Report on the Implementation of the Agreement Between the Agency and the Democratic People's Republic of Korea for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. GOV/2636 (Feb. 25, 1993), reprinted in Report of the International Atomic Energy Agency: Compliance with Arms Limitation and Disarmament Agreements: Note by the Secretary General, U.N. GAOR, 48th Sess., Annex 3, at 52, U.N. Doc. A/48/133 (S/25556)(1993)).

⁹⁶ KEDO-North Korea Agreement, *supra* note 77, at art. XV. Under article XV(1), the parties have expressly favored dispute resolution through "consultations," and have established an institutional structure, entitled the "coordinating committee," to do so. Moreover, article XV(2) permits dispute resolution by an arbitral tribunal only "with the consent of the other side."

evolve both in terms of its legal rights against North Korea and in terms of its management of the underlying problem concerning North Korea's nuclear ambitions and the threat that poses. KEDO's behavior thus may diverge somewhat from the specific intentions of KEDO's original members at the time KEDO was created as well as from KEDO's members' current and future views.⁹⁷ It is not without significance that KEDO is headquartered in New York, where it might develop an institutional culture under the influence of other international organizations, rather than Washington, where it might be perceived to be an instrument of the U.S. Government.⁹⁸ Nevertheless, it is recognized that "the U.S. will serve as the principal point of contact with [North Korea]" for the light-water reactor project."⁹⁹ Indeed, different points of view seem to be emerging in KEDO's relationship with its members regarding whether the KEDO role will be a permanent feature of the international response to North Korea's nuclear program, since KEDO's existence is predicated, oddly enough, on North Korea's own survival as a state.¹⁰⁰ Conceivably, as more members join KEDO and contribute to its efforts, pressure may increase for it to follow in the wake of the remarkably independent behavior of the U.N. and IAEA in their response

⁹⁷ For example, the KEDO Agreement provided that the "Korean standard nuclear plant model." See KEDO Agreement, *supra* note 74, at art. II(a)(1). The KEDO-North Korea Agreement provides that "the reactor model, selected by KEDO, will be the advanced version of U.S.-origin technology currently under production." See KEDO-North Korea Agreement, *supra* note 77, at art. I(1). It appears KEDO has secured North Korea's agreement to a reactor model compatible with the Korean standard, which is U.S. designed, but without using a formulation offensive to North Korea.

⁹⁸ See Leon Mangasarian, *supra* note 84 (indicating that KEDO would be headquartered in New York); see also The New Transatlantic Agenda, Vol. 6, No. 49 U.S. Department of State Dispatch, 894, 895-96, Dec. 4, 1995 (recording the agreement of US-EU Summit to "provide support to the Korean Energy Development Organization, underscoring our shared desire to resolve important nonproliferation challenges throughout the world."). The larger thrust of the provisions of KEDO Agreement is thus to create an international organization that will manage the guts of the international community's relationship with North Korea in respect of transforming its nuclear program.

⁹⁹ KEDO-North Korea Agreement, *supra* note 77, at preambular para. 4.

¹⁰⁰ A difference of view among the original members of KEDO as to whether North Korea's itself will survive the Agreed Framework's implementation already seems to be brewing, with the Washington Post reporting recently, in connection with conclusion of the KEDO-North Korea Agreement, that:

[a]lthough pleased by the completion of the deal, senior U.S. officials remain skeptical that its terms will be fulfilled. 'Five years from now, North Korea is not going to be there,' a senior Defense Department official said last week, referring to a U.S. intelligence assessment that North Korea's economic troubles could topple its leadership and force unification with South Korea. . . . That forecast is rejected by South Korean officials, however, who say the North may be able to remain intact for longer than a decade.

John Goshko, *North Korea Signs Nuclear Accord; Accord Calls for Construction of Two Light-Water Reactors*, WASH. POST, Dec. 16, 1995, at A17 (staff writer R. Jeffrey Smith contributed to the report). It may be that KEDO's ongoing interaction with North Korea will affect the members' perceptions of the North Korean regime and its future prospects.

to the North Korean nuclear weapons crisis.¹⁰¹

The old sovereignty presumes the existence of North Korea. Otherwise, North Korea would not be entitled to surrender its right to nuclear weapons or to claim the right to retain them as a matter of survival. The new sovereignty also presumes the existence of North Korea. Otherwise, North Korea could not express its sovereignty as a participant in international governance through multilateral institutions. Yet North Korea's existence is ultimately a question answered by the interest and values of the people of North Korea (and perhaps of both Koreas). Thus, KEDO, as well as other international institutions, may need to develop a relationship with the Korean peoples before the fundamental questions of Korean sovereignty driving the North Korean nuclear crisis can be resolved.

V. IN SUM: GAPS IN THE THEORETICAL LANDSCAPE AND THE PRIMACY OF POLITICS

Neither the property nor the membership conceptions of sovereignty are without merit. Yet, as both the political scientists and the international lawyers may well recognize, neither is complete. It is this very incompleteness that drives political scientists to search for property values to uncover the foundations of the international system and international lawyers to search for membership values to reveal the mechanisms of its governance. The property conception, if it gives priority to relations between owners and their property rather than the relations between owners and non-owners in relation to property,¹⁰² emphasizes the role of initial material resource allocations in the distribution of international power. But a membership conception, if it gives priority to membership in expert-knowledge communities,¹⁰³ emphasizes the role of initial human resource allocations in the

¹⁰¹ Michael J. Mazarr has argued:

The international institutions at the forefront of the nonproliferation campaign—the International Atomic Energy Agency backed by the U.N. Security Council—have developed into often effective means of pursuing national interest through supranational means. The North Korean case suggests that global agencies can indeed become strong, independent actors. At several points, it was difficult to tell whether it was the IAEA or policy makers in Seoul or Washington who were dictating the agenda of the crisis.

See Michael J. Mazarr, *Going Just a Little Nuclear: Non Proliferation Lessons from North Korea*, 20 INT'L SECURITY 92, 107 (Fall 1995). Mazarr also notes that the U.S., having stated it would seek Security Council sanctions against North Korea if the IAEA Director General declared that the "continuity of safeguards" had been broken, was in the unseemly situation of "imploing" the IAEA not to make that finding to avoid having to seek U.N. sanctions. *Id.* at 107-08, n.26.

¹⁰² See Cohen, *supra* note 23.

¹⁰³ See Haas, *supra* note 54.

distribution of international power. Both run the risk of ignoring the bottom-up pressures that drive transformation in the international system.

Perhaps students of the old and new sovereignties could split the difference and agree that the transformation from heterogeneity to homogeneity takes place in the shadow of value conflicts, with each transformative step taken through a process of careful management. But a property-conception of sovereignty reinforces diversity, since ownership is preferentially absolute; a membership-based conception reinforces conformity, since "good standing" requires observance of community expectations of compliance. The positions seem irreconcilable.

Is sovereignty then only a word and not a real thing? Diversity and conformity are inevitably in dynamic tension in the transformation of a world of independent sovereign states into an interdependent post-sovereign world, just as they are intentioned in municipal law where the theory of property serves to mediate the individualist and collectivist requirements of social organization.¹⁰⁴ Perhaps the best theory of sovereignty might perform a similar function in international law. Neither the model of "community of sovereign states" nor one built around "communities of knowledge-based experts" could capture the complexity of the tension between autonomy and collectivism. Rather, transformation must occur in a process that appeals to the domestic interest groups that find their needs met through transnational institutions: a political process, in short, built around a politics of interests of groups, not reified states, and managed by politicians, not technocratic experts. And isn't that, anyway, what we mean by sovereignty in the age of democratic triumphalism?¹⁰⁵ The debate about the place of sovereignty, then, like the debate about the role of property in the modern state,¹⁰⁶ is not about to be resolved; it is, rather, the expression of an inevitable contingency in the nature of things—of rips in the fabric of international governance that can be re sewn only by human action in the political realm.

¹⁰⁴ See generally Underkuffler, *supra* note 4, at 142.

¹⁰⁵ See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN PAGE* (1992) (arguing that world history has reached an endpoint in which democratic capitalism has triumphed, philosophically and practically, over all other theories and modes of social organization); and W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990) (arguing that the relevant conception of sovereignty in the new world order is "popular sovereignty"). But see Fareed Zakaria, *A Conversation with Lew Kuan Yew*, FOREIGN AFFS. 109 (March/April 1994), vol. 73, No. 2 (Singapore's longtime leader expressing offering a critical view of the West's commitment to individual rights over society's interests); and Kishore Mahbubani, *The Pacific Way*, FOREIGN AFFS. 100 (January/February 1995), vol. 74, No. 1 (Permanent Secretary of Singapore's Ministry of Foreign Affairs advancing the view that with East Asia having arrived in the world arena, the next stage in the development of world economy and society will entail a cultural fusion of Eastern and Western traditions).

¹⁰⁶ See Underkuffler, *supra* note 4, at 147 (stating that "rethinking" the theory of property becomes a way to rethink our "vision" of the relationship between individual and collective life).

Sovereignty, in sum, is not primarily, as Fowler and Bunck might posit, “a word about things”—that is, the things owned by the sovereign state. Neither is it mostly, as Abram and Antonia Handler Chayes divine, “a word about words”—that is, the discourse through which states participate in international governance. Rather, sovereignty must be about how persons, who in the past have been objects of state ownership, become subjects who come to speak for themselves.