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Bounding the Sovereign:
Humanitarianism and the Decline of Sovereign Immunity

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Introduction

This paper seeks to draw attention to a neglected but essential element of institutions, their boundaries.² Boundaries permit actors to organize the world around them into categories and groups and to establish arenas of authority or jurisdiction. Scholars too often assume that boundaries between groups are firm and clear, and assume that these distinctions form the basis for social hierarchies and divisions of labor.³ However, the *nature of* boundaries is no less important to institutional operation and social organization than is the fact of their existence. As the first step in a larger research program, this paper addresses the importance that *the existence and nature of* boundaries has in creating and regulating social organization, but also the political significance that *the changes in* boundaries has. Examples from international laws regarding state sovereignty, human rights, and humanitarian law highlight what boundaries do and how they vary, as well as to raise a set of theoretical questions to guide further investigation.

Interest in institutional boundaries stems from puzzles arising out of IR research. IR theorists' ability to understand and explain institutional change largely turns on the manner in which they conceptualize the boundaries of key institutions, in particular those of the sovereign state. This paper marks a first effort at laying out the rationale for an investigation of institutional boundaries in international relations in order to develop a research program that examines how and why boundaries matter as well how they arise

² I draw significantly on my previous collaboration with John Leslie in the discussion of institutional boundaries. See John C. Leslie and Anne L. Clunan, "Bounding Institutional Authority in Comparative Politics and International Relations," Prepared for delivery at the 2004 Annual Meeting of the American Political Science Association, September 2 - September 5, 2004. Copyright by the American Political Science Association. My thanks to John Leslie for permission to rely on that collaboration here.

³ Explanations of nationalism such as those of Deutsch, Gellner, Haas, Benedict Anderson are obvious exceptions to this.

institutional boundaries even less well-defined, as “various units.” This neglect of the limits that boundaries place on the authority relations inside of and across institutions represents a significant gap in these literatures and our understanding of institutions. Institutions are embedded in “societies”⁶ with other institutions and, because actors navigate not only within institutions but also between them, it is important to understand not only how the “rules of the game” work, but also how far they extend.⁷ By recognizing that institutions create not only authority relations but also “jurisdictions” we can increase our understanding of how institutions come into being, how they change or reproduce, and how they shape the behavior of actors.

Institutional boundaries and institutional origins

The new economic and historical institutionalisms arose to explain cooperation in circumstance where there is strategic interaction and cooperation is problematic, but their neglect of boundaries causes them to limit their understanding of the forms of cooperation.⁸ The central problem for the new institutionalisms was how to explain cooperation among actors with common interests but different preferences. For rational choice institutionalists, conflict is a dysfunctional consequence of information asymmetries, transaction costs, and coordination problems that institutions permit actors to overcome. An assumed universal definition of rationality or utility, however, often bridges these conflicts, extending boundaries out infinitely. Clever institutional designers, it is implied, can always find the common ground and manage conflicts.

⁶ Note that “society” and “social” refer to particular groupings of actors. “Society” can refer to the community of individuals bounded by a state or it can refer to the anarchic “society” of nation states.

⁷ Mark Granovetter, “Economic Action and Social Structure: The Problem of Embeddedness,” in *American Journal of Sociology* Vol.91, No.3 (November 1985), pp.481-510.

⁸ Douglass North, *Institutions, Institutional Change, and Economic Performance*, (Cambridge, UK: Cambridge University Press, 1990), p.16.

the focus on reproduction of institutional forms tends to blur the impact that a small change in institutional boundary may have for other institutions in society.

Recognition that institutional construction is socially embedded points to the dual role that boundaries play “inside” and “outside” institutions and the “critical” nature of the junctures in which they are created. They designate who may or must conform to rules defining authority “within” an institution. The creation of sovereign boundaries designates some people, those on the territory of the sovereign, as subject to its rules. An institution of ethnic identity generates rules about how the group’s members must behave to continue to belong to the group. But they also demarcate the extent of those rules and how an institution and its members interact with other institutions. Creating an ethnic group also implies certain accepted ways of behaving towards those outside the group.¹² Drawing sovereign boundaries entails recognizing *lack* of authority over aliens as well as citizens abroad. Defining such relations is critical not only to the institution’s own survival but also to the survival of other institutions and, perhaps, the survival of society.¹³ This interdependence points to the fact that the boundaries of important institutions are likely to crystallize at the same time and as part of a larger process. Actors reach “settlements” that create full-fledged cooperation in some institutions even as they embed conflicting values in other institutions that exist parallel to one another. In establishing one area of authority and jurisdiction where certain actors have certain powers and roles, boundaries also create the negative of the institution in establishing realms where such authority, jurisdiction, powers and roles do not apply. Subsequently,

¹² James D. Fearon and David D. Laitin, “Explaining Interethnic Cooperation,” *The American Political Science Review*, Vol. 90, No. 4. (Dec., 1996), pp. 715-735.

¹³ This has been the focus of the population ecology school in organizational theory. See Hannan and Freeman (1987).

Institutional boundaries do a number of things: they protect the institution; they provide institutional continuity; they define who a member of the institutional club is; they establish rights of institutions, placing them in particular positions vis-à-vis each other within a society; and they constrain actors' behavior across and within institutions. As such, it is the boundaries of institutions that make social order possible.¹⁶ Boundaries are established to shield institutions from external pressures and influences as much as to create internal authority relations. They help ensure institutional survival because they provide a measure of security and a legal or normative basis on which to challenge incursions and violations.¹⁷ Sovereignty functions in this manner at the international level, helping to ensure the survival of weak states.¹⁸ Domestically, the boundaries of US non-profit status allow 501(c)(3) organizations to guard against their take-over by potentially more powerful political interests, serving thereby to enable institutional survival as well as broader social goals of public interest. Boundaries also help to guarantee institutional continuity by designating the institution rather than actors within it as the carrier of autonomy. Just as political parties are recognized to still exist despite changes in party leadership or platform, states do not cease to exist when their governments change or are not recognized.¹⁹

Institutional boundaries serve social order by determining whether and how institutions “fit” into the societies of which they are part. In short, boundaries define how settlements regulating conflicts and cooperation *within* an institution conform to broader

¹⁶ Holsti (2004), pp. 116-118.

¹⁷ Holsti (2004), pp. 116-117.

¹⁸ Jackson (1990) and Holsti (2004).

¹⁹ Holsti (2004), p. 117.

Rules defining boundaries bring individuals in line with the decision-making mechanisms that make collective action possible within the institution.²³ At the same time they force individual behavior to conform to rules governing relationships between one institution and others. They provide authoritative rules about behavior that tell individuals how to navigate complex social environments where groups and institutions pursue different preferences.²⁴ The government of Iran was cast out by international society for failing to prevent and then approving the actions of militant students, not government officials, actions which were contrary to international society's values of maintaining inter-state interaction and the equal inviolability of sovereigns. Iran was punished for not forcing its individual citizens to conform to the rules governing relations among states within international society. While Iran continues to pursue values at odds with many other states, it no longer pursues behaviors that directly challenge the core values of an international society of sovereign states.²⁵ Institutional boundaries force individual behavior to conform to higher-level values embedded in social structure. The boundaries of institutions, therefore, reflect conflicts and compromises not only between the members of an institution, but also between the protagonists of different values in society.

Institutions win legitimacy and broader support by reinforcing social values.²⁶ By organizing social space and transmitting the hierarchy of societal values through to the

²³ Ira Katznelson, "Periodization and Preferences: Reflections on Purposive Action in Comparative Historical Social Science," in James Mahoney and Dietrich Rueschemeyer, eds., *Comparative Historical Analysis in the Social Sciences* (Cambridge University Press, 2002), p.295; Charles Taylor, "Modernity and Identity," in Joan W. Scott and Debra Keates, eds., *Schools of Thought*, (Princeton, NJ: Princeton University Press, 2001), p.139-53.

²⁴ Frederik Barth, "Introduction," in *idem.*, ed., *Ethnic Groups and Boundaries* (Oslo: Universitaetsforlaget, 1969), pp.15-17; Katznelson, (2002), p.295.

²⁵ Brownlie (2003), p. 342.

²⁶ Mary Douglas, *How Institutions Think* (Syracuse: Syracuse University Press, 1986).

a broader frame of ordering and preserving fundamental societal values such as freedom of expression, religion, association and assembly. Thus, because boundaries project “settlements” about societal values over individuals’ behavior, institutions acquire legitimacy and broad support in the societies of which they are part.

Institutional boundaries, variance, and behavior

The new institutionalisms’ neglect of boundaries also blinds them to important effects of institutions on actor behavior. A central focus of historical institutionalists, in particular, has been explaining how actors construct similar institutions differently in different places.³¹ Likewise, constructivists have sought to explain how variations on the institution of the nation-state affect the nature of inter-state interaction.³² Differing institutional structures then become an explanation for variance in actor behavior. The historical institutionalist and constructivist argument about the origins of behavioral variance can be applied to institutional boundaries. Doing so provides insights into behaviors that an exclusive focus on authority relations within institutions might overlook.

These explanations of institutional variance extend neatly to institutional boundaries. Although all institutional boundaries organize social settlements over individual behavior, similar institutions can have different rules that govern their

³¹ Kathleen Thelen and Sven Steinmo, “Historical Institutionalism in Comparative Politics,” in Sven Steinmo, Kathleen Thelen, and Frank Longstreth, *Structuring Politics* (Cambridge U.K. and New York: Cambridge University Press, 1992).

³² John Gerard Ruggie, “Territoriality and Beyond: Problematizing Modernity in International Relations,” *International Organization* 47, no. 1 (1993), Thomas Risse-Kappen, *Cooperation Among Democracies* (Princeton: Princeton University Press, 1995), Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics*, 1st ed. (New York: Columbia University Press, 1996), Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

institution and whether they permit actors within the institution to wield influence in other arenas. Does society condone through particular boundary regulations the influence of some actors or institutions on the decision making of other institutions or not? How do authority relations inside the institution mesh with the hierarchies that govern other institutions and society itself? Do boundary regulations create privileged channels of influence for some types of actors or do they seek to limit them, forcing contests to influence institutional decision making into more transparent or competitive arenas? These questions are not new, but the concerns of an “old” institutionalism of Montesquieu and Madison.

This “old” institutionalism recognized explicitly that institutional boundaries are mechanisms that enforce societies’ preferences over individual behavior, elevating some values while subordinating others. While the “old” institutionalism focused on the boundaries of formal governmental institutions, however, the problem of boundaries extending wherever there are institutions. Classically, four mechanisms have permitted actors to influence decision making across institutional boundaries: 1) formal rules that specify such influence (often backed up by state power); 2) control over resources critical to an institution; 3) the personal union of decision-making roles in different institutions; and 4) ideological affinity. Boundaries that proscribe such mechanisms are relatively impermeable, such as anti-trust laws that prohibit collusion among firms or campaign financing and conflict-of-interest rules. Those that condone them are more permeable, such as the overlapping jurisdictions of federal states.

The relative permeability of institutional boundaries touches on many types of behavioral outcomes. Boundary regulations have perhaps their greatest impact on the

from international relations that demonstrate how, by creating or blocking channels of influence between actors in different arenas, institutional boundaries create different patterns of behavior and social order.

Redefining Sovereignty: Universal Jurisdiction's Challenge to Sovereign Immunity

International relations scholarship has much to contribute to the elaboration of the role of institutional boundaries on cooperation and conflict. IR theorists' focus on state sovereignty in particular directly bears on the theoretical importance of institutional boundaries. State sovereignty is at root a set of rules about institutional boundaries that divide political and territorial space.³⁵ There is substantial debate within the IR literature as to whether the international political order is moving from one institutionalized as a sovereign state system to one that is either an international or transnational society.³⁶ The question in this debate for IR theorists is whether the boundaries of state sovereignty are eroding, and yielding to some new set of institutions and relationships.

State sovereignty has two components that neatly map the intuitive notion of boundaries: internal sovereignty and external sovereignty.³⁷ Internally, the classical state sovereign has exclusive authority over a particular territory, in other words freedom from

³⁵ This focus on sovereignty on a set of rules is emphasized by the English School and constructivists. See in particular Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 1977), Friedrich V. Kratochwil, *Rules, Norms, and Decisions* (Cambridge: Cambridge University Press, 1989). and K. J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge: Cambridge University Press, 2004).

³⁶ Karl W. Deutsch, *Nationalism and Social Communication* (Cambridge: MIT Press, 1953), Ernst B. Haas, *Beyond the Nation State* (Stanford: Stanford University Press, 1964), Ernst B. Haas, "Reason and Change in International Life," *Journal of International Affairs* 44 (1990), Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations.", Alexander Wendt, "Collective Identity Formation and the International State," *American Political Science Review* 88 (1994), Wendt, *Social Theory of International Politics*, Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), Thomas J. Biersteker and Cynthia Weber, eds., *State Sovereignty as Social Construct*. (New York: Cambridge University Press, 1996).

³⁷ Bull, *The Anarchical Society*., ch. 1. Robert Jackson denotes these as negative and positive sovereignty in *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990), pp. 26-31.

well as to make reparations for wrongful acts.⁴⁰ The most important obligation is to refrain from interfering in the internal affairs of other states, as this would violate a state's right to internal sovereignty.

The erosion of the institution of internal sovereignty has received a lot of attention in the academic literature. The notion of exclusive authority over a territory was questioned first by the literature on the impact of interdependence, then the newer focus on globalization's erosion of state control.⁴¹ These works focus on the *de facto* erosion of internal sovereignty. Here the focus is on the reduced capacity of the state to control what occurs within its borders under the strains of increasing economic and information flows. As Stephen Krasner notes, such *de facto* challenges to internal sovereignty are not particularly new. He therefore argues against over-exaggerating the erosion of state sovereignty. Following the realist tradition, he views sovereignty less as a constitutive institution creating a society of sovereign states but rather as a cognitive script enacted whenever powerful actors deem it useful.⁴² Krasner argues that international institutions are fundamentally less institutionalized and path dependent than domestic institutions. As Krasner says,

Compromising the sovereign state model is always available as a policy option because there is no authority structure to prevent it: nothing can preclude rulers

⁴⁰ International law has codified the legal rights and responsibilities of states. For a primer in states' rights and responsibilities, see Barry Carter, Phillip R. Trimble, and Curtis A. Bradley, eds., *International Law*, 4th ed. (NY: Aspen Publishers, 2003).

⁴¹ and Distant Proximities (Princeton: Princeton University Press, 2003); Robert O. Keohane and Joseph S. Nye, *Power and Interdependence*, 2nd ed. (New York: Harper Collins Publishers, 1989), James Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (Princeton, NJ: Princeton University Press, 1990), Susan Strange, *The Retreat of the State* (Cambridge: Cambridge University Press, 1996), Jessica Tuchman Mathews, "Power Shift," *Foreign Affairs* Jan/Feb 1997, , and Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

⁴² Stephen D. Krasner, "Westphalia and All That," in *Ideas and Foreign Policy*, ed. Judith Goldstein and Robert O. Keohane (Ithaca: Cornell University Press, 1993).

expectations of humanitarian conduct,” in effect placing sovereign states within a broader web of international societal institutions.⁴⁵

The human rights regime has changed the boundary of state sovereignty in two ways. First, because certain human rights are understood to be universal, it has reduced the legitimate scope of all states’ internal sovereignty, in effect shrinking the exclusive jurisdiction of the state and increasing their accountability to other states. The past few years have seen efforts to institutionalize a new boundary, one of “contingent sovereignty,” that links sovereign authority directly to the treatment of citizens.⁴⁶ Second, it has given individual human beings legal personality to confront states. While at the time of their creation international conventions may have been entered into cynically and deemed to have little real significance, today these conventions have altered the capacity of individuals to act at the international level. They have also changed the ability of states to act with legal impunity at home.⁴⁷ A few examples help make this shift in the institutional boundaries evident.

Sovereign Immunity Confronts Extraterritorial Jurisdiction: The Pinochet Precedent
Increasingly, sovereigns are no longer able to claim absolute immunity from other states’ interference within their own boundaries or even beyond their borders. This applies both to the agents of the sovereign state as a whole, and to the head of state. The classical institution of state sovereignty conferred absolute immunity from laws and courts within

⁴⁵ Jackson (1990), p. 141.

⁴⁶ See United Nations, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (New York: United Nations, 2004) <http://www.un.org/secureworld/report2.pdf>, and United Nations, *In Larger Freedom: Towards Development, Security and Human Rights For All: Report of the Secretary General* (New York: United Nations, 2005), <http://www.un.org/largerfreedom/contents.htm>.

⁴⁷ Krasner (2001) and Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism* (Princeton: Princeton University Press, 2001).

of States and Their Property. The restriction to exclude private property transactions (*jure gestionis*) from governmental actions (*jure imperii*) is easily explained through rationalist accounts of reciprocal policy coordination though it was never easy to practice.⁵¹ What is less easily explained from a straightforward rationalist manner is why states now increasingly exclude official human rights abuses from immunity. A shift in boundaries has placed gross human rights abuses under extraterritorial jurisdiction, removing states' exclusive jurisdiction over the persons on their territory. This boundary shift has become the center of a battle royal between governments and judiciaries.

1998 was a seminal year for international human rights. The arrest and 17 month detention of General Augusto Pinochet in London on a Spanish warrant set a precedent that has again reduced the boundaries of sovereignty immunity.⁵² As a consequence, individual legal access to state officials dramatically increased and the privileges of state sovereigns have been further eroded. The mere act of serving a former head of state with an arrest warrant was an historic event, as states rarely place their human rights obligations above the "political benefits of avoiding international disagreements."⁵³ The Pinochet case fundamentally undermined the role of the sovereign state in two ways: immunity for official violations of human rights was revoked, and national courts exercised extraterritorial jurisdiction to punish human rights crimes in foreign countries, despite the diplomatic consequences.

The Pinochet precedent was not set overnight, and did not start or end in Great Britain. In 1996 Spanish and later non-Spanish citizens and their families filed suit in

⁵¹ Geoffrey Robertson, *Crimes Against Humanity* revised edition (New York: The New Press, 2002): 405.

⁵² Agence France Press, "A Chronology of the Pinochet Affair" 9 July 2001.

⁵³ Daniel Rothenberg, "'Let Justice Judge': An Interview with Judge Baltasar Garzon and Analysis of His Ideas," *Human Rights Quarterly* 24, 4 (2002): 928. See also Geoffrey Robertson, *Crimes Against Humanity* revised edition (New York: The New Press, 2002): ch. 10.

the offenders are 'common enemies of mankind and all nations have an equal interest in their apprehension and prosecution.'"⁵⁵ Universal jurisdiction was used in the 18th and 19th centuries to prosecute pirates and slave traders. It fell out of use until the Nuremberg war crimes trials at the end of World War II. There, the allies relied explicitly on universal jurisdiction to prosecute Nazi officials for acts that were not illegal under Nazi Germany's laws, but were deemed to be "crimes against humanity."⁵⁶

Using the argument that the alleged crimes committed were subject to universal jurisdiction, the Spanish investigating judge issued arrest warrants and an extradition request in late October 1998 while General Pinochet was on an unannounced visit to Great Britain for medical treatment. After his arrest, the Pinochet case went straight to Britain's highest court, the Law Lords. The first panel of Law Lords ruled 3-2 in favor of extraditing the former Chilean head of state to Spain to stand trial of charges of crimes against humanity, unless the Home Office interfered. Remarkably, Home Secretary Jack Straw refused to step in after the first trial, "finding," as Geoffrey Robertson puts it, "no reason not to let the law take its course."⁵⁷ Straw allowed Pinochet's extradition hearing to proceed. He explicitly rejected the notion that Pinochet enjoyed immunity for the alleged crimes, and held that Britain's obligations under international law overcame the usual deference to state sovereignty.⁵⁸ After the link between one of the Law Lords and

⁵⁵ Lord Browne-Wilkinson, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [Ex Parte Pinochet] (24 March 1999), citing the case *Demanjuk v. Petrovsky* (1985).

⁵⁶ For a discussion of Nuremberg and the notion of crimes against humanity, see Gary J. Bass, *Stay the Hand of Vengeance* (Princeton, NJ: Princeton University Press, 2000).

⁵⁷ Robertson: 397-398.

⁵⁸ It is usual for a foreign court to give deference to a home court if that court is undertaking proceedings on the same issue and has a stronger claim of jurisdiction. Chilean politicians argued that Pinochet should be tried in Chile; Straw rejected the argument that the possibility of this trial superseded Britain's requirement to obey its commitments under the European Convention on Extradition. BBC News World Service, "Straw sets out his reasons," December 9, 1998 Published at 17:57 GMT, available at http://news.bbc.co.uk/1/hi/uk_politics/231775.stm; accessed 23 August 2004.

committed in Argentina in the 1970s and 1980s.⁶³ Argentina itself has shifted its position and has detained 46 former military officials and repealed laws and edicts granting them and other officials' lifetime immunity in preparation for extradition to European countries. Its Supreme Court ruled in August 2004 that there is no statute of limitations for crimes against humanity.⁶⁴ In June 2004, the U.S. Supreme Court upheld the Alien Tort Statute of 1789 (ATS), which allows U.S. courts to assert jurisdiction for well-defined crimes committed outside the United States and against foreigners that are against the law of nations or self-executing treaties. The Court expressly rejected the claim that the ATS was meaningless, and affirmed the right of foreigners to use federal courts to seek damages for a limited set of acts. The Court also reaffirmed the judiciary's role in enforcing well-defined customary international law, such as the prohibition on state-sanctioned torture and genocide.⁶⁵ In March 2005 a US Appellate Court upheld the first judgment in the US against a Chilean military officer for acts committed in violation of the ATS and the Torture Victim Protection Act.⁶⁶ European courts continue to issue arrest warrants and extradition requests, in some cases even against current government

⁶³ Gretchen Peters, "Mexico Gives Boost to Universal Jurisdiction," *Christian Science Monitor* 13 June 2003.

⁶⁴ Larry Rohter, "Argentines Face Human Rights Trials in Europe," *New York Times* 28 July 2003 and Stacie Jonas, "The Ripple Effect of the Pinochet Case" *Human Rights Brief*, Volume 11, Issue 3, pgs. 36-38; and BBC News World Service, "Vital rights ruling in Argentina," 24 August, 2004, 23:45 GMT 00:45 UK, available at <http://news.bbc.co.uk/1/hi/world/americas/3596316.stm> (accessed 25 August 2004).

⁶⁵ 542 U.S. *Sosa v. Alvarez-Machain* (2004). The Court in this ruling gave federal courts the ability to decide which acts violate customary international law, but made very clear that only very specifically defined acts that were clearly accepted as prohibited were permissible grounds for taking jurisdiction. They specifically referenced state-sanctioned torture and state- or privately-sanctioned genocide as passing this threshold. They reaffirmed the role of US courts in enforcing customary international law in the *Paquete Habana* (1900) and *Filartiga v. Pena-Irala* (1980) cases. *Filartiga* turned solely on whether torture was prohibited under customary international law, while the *Paquete Habana* set the precedent that US courts would apply the customary law of nations. Official torture is widely understood to be against the law of nations, as codified in the Convention on Torture (ratified by the US in 1994). To bolster the prohibition on torture, the US enacted the Torture Victims Protection Act in 1991 after the *Filartiga* case.

⁶⁶ *International Law in Brief*, April 12 2005, American Society of International Law. <http://www.asil.org/ilib/2005/04/ilib050412.htm#j3>, (accessed August 28, 2005).

territory, convicting two Rwandans of genocide in July 2005.⁶⁸ Spain's highest court has also limited the Audencia Nacional's jurisdiction to cases involving Spanish nationals. Several European states have declined to exercise jurisdiction over current foreign officials. German courts went beyond the ICJ ruling to hold that a *former* Chinese head of State was entitled to immunity from German criminal jurisdiction. European countries have also taken steps to limit the right of individuals to bring suit against foreign officials and have enacted legislation shifting this authority to state prosecutors.⁶⁹

Yet at the same time, the number of cases prosecuted in Western Europe under universal jurisdiction has steadily risen since 2000. Several European countries have developed dedicated police and investigatory units to handle international crimes including human rights abuses. The European Union has set up a "Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes" to facilitate EU-wide cooperation in investigation and prosecution of international crimes and emphasized the need for EU members to prosecute such cases.⁷⁰ In 2004 Interpol began organizing Expert Meetings on these crimes in response to the increasing number of universal jurisdiction prosecutions.⁷¹ Latin American countries have participated in a "justice cascade," stripping former officials of immunity and trying them for human rights violations.⁷² African countries may be embarking on one, with the 2000 indictment of the former President of Chad for torture and crimes against humanity

⁶⁸ *International Law in Brief*, July 19 2005, American Society of International Law. <http://www.asil.org/ilib/2005/07/ilib050719.htm#b1>, (accessed August 27, 2005).

⁶⁹ Bhuta and Schurr, "Universal Jurisdiction in Europe," 8-13 25-27.

⁷⁰ Bhuta and Schurr, "Universal Jurisdiction in Europe," 3, 10-13 and 21.

⁷¹ Bhuta and Schurr, "Universal Jurisdiction in Europe," 21-23.

⁷² Ellen L. Lutz and Kathryn Sikkink "International Human Rights Law and Practice in Latin America," *International Organization* 54 (2000): 633, 654-57 and Ellen L. Lutz and Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America," *Chicago Journal of International Law* 2, 1 (2001).

considered public or officials acts. While not the full scale victory for universal jurisdiction that human rights activists hoped for, this smaller shift still carries important political implications, as states increasingly accept that their sovereign rights are circumscribed by human rights.

Crimes against Humanity and the International Criminal Court

The challenge to the boundary of absolute sovereign immunity started not with a frontal assault on sovereign immunity but with an innovation in the boundaries of the institution known as the law of armed conflict or international humanitarian law. The law of armed conflict arose to limit the discretion of military officers and their political commanders in the conduct of an activity that is legally recognized as being the right only of states: war.⁷⁵ This institution sought to constrain the authority of war makers by stipulating the humanitarian boundaries beyond which they could not go—in effect bounding the jurisdiction of war within the institutional boundary of humanity.⁷⁶

This boundary change was formalized in recent times in the Nuremberg Charter adopted by the Allies on August 8, 1945. Through the Nuremberg Charter, foreign states,

⁷⁵ The 1899 and 1907 Hague and 1949 Geneva Conventions codifying the laws of war expressly recognize authorized state agents as the only legal combatants in conflict. Other combatants are illegal as they do not have legal authority to act.

⁷⁶ This is expressly laid out in the Martens clause, included in the preambles to the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerent remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from *the laws of humanity*, and the dictates of the public conscience. [Emphasis added.]

Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex Regulations, 18 October 1907. See also Diane Orentlicher, “The Law of Universal Conscience: Genocide and Crimes Against Humanity,” paper was presented at the Committee on Conscience conference *Genocide and Crimes Against Humanity: Early Warning and Prevention* on December 9, 1998, at the United States Holocaust Memorial Museum, p. 8.

wartime activities.⁸² This effectively removed a temporal limitation on when a crime against humanity could occur (only within wartime), as well as a geographic limitation (only in regions where there was interstate conflict).

This expansion of the territorial jurisdiction over crimes against humanity was codified in the UN Security Council's adoption of the Statute establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY). The ICTY Statute gave the Tribunal authority to prosecute crimes conducted in either inter-state or internal armed conflicts.⁸³ The temporal expansion was institutionalized in the Statute of the International Tribunal for Rwanda (ICTR) and the International Criminal Court. The ICTR and ICC statutes do not require that the acts be conducted in times of armed conflict, only that they be "part of a widespread or systematic attack on any civilian population."⁸⁴ All three stipulate that no state can conduct either genocide or crimes against humanity.⁸⁵ Regardless of whether a state of armed conflict is in existence, these crimes are justiciable, and starting with Nuremberg, there is no statute of limitations on when individuals can be prosecuted for crimes against humanity. Another incursion on the traditional boundaries of sovereignty and sovereign immunity that Nuremberg began was that of individual responsibility for state-sanctioned crimes. The Nuremberg

⁸² Orentlicher (1998), p. 13-14.

⁸³ ICTY Statute, Article 5, adopted May 25, 1993.

⁸⁴ Rome Statute of the ICC, Art. 7, adopted July 17, 1998. See also ICTR Statute, Article 3, adopted November 8, 1994.

⁸⁵ Crimes against humanity are defined in the ICC Statute as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

humanity, the ICC makes no distinction between former (such as Pinochet) and current officials. As is well-known, ICTY Prosecutor Carla del Ponte indicted a sitting head of state, Slobodan Milosevic. The ICC explicitly rejects sovereign immunity for current or former state officials. ICC Statute Article 27.2 states, “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

Political Implications of Shifts in the Boundaries of Sovereignty

What are the political consequences of this shift in the institutional boundaries of sovereignty? Aside from promoting greater accountability for human rights and reducing the impunity of dictators, this shift has altered the legitimate realms of authoritative action of states and individuals. On the one hand, states appear to be increasingly subjecting themselves to a reduced sphere of exclusive sovereign authority and to greater international accountability. On the other, states have expanded their claims to domestically adjudicate cases that have traditionally been off limits, protected by the boundary of state sovereignty. Individuals have much greater ability to access national and international courts to seek redress for acts committed by state officials. In the theoretical terms we adopt here, the institutional boundaries of state sovereignty are now more permeable. While sovereignty may never have been as institutionalized as domestic institutions, this change in its boundaries has real political consequences, not all of which have been welcomed.

What makes these shifts possible is the establishment of other institutions, in particular the Convention against Torture (CAT) and the Genocide Convention. These

contained provisions that prevented politically-motivated prosecutions and limited ICC jurisdiction to only those cases where a state refused or failed to prosecute the alleged crimes at home. It failed however in gaining blanket immunity for US military personnel in the Statute.⁹⁰ The U.S. Congress stepped into the act in 2000 when Senator Jesse Helms introduced the American Servicemembers' Protection Act (ASPA), which President Bush signed into law on August 2, 2002. The APSA prohibits U.S. cooperation with the ICC and seeks to regulate U.S. cooperation with the United Nations and foreign countries to guarantee U.S. protection from ICC actions. It also bars any U.S. military assistance to states that have ratified the ICC treaty unless the President waives this requirement. The ASPA was quickly dubbed the "Hague Invasion Act" because it authorizes the President to "use all means necessary and appropriate to bring about the release of any person ... detained or imprisoned by, on behalf of, or at the request of the International Criminal Court."⁹¹

The Bush Administration has gone much farther in its efforts to restore the traditional boundaries of sovereign immunity; it has sought to reverse the bounding of state sovereignty within human rights and humanitarian law. It revoked the U.S. signature on the ICC Statute. It has also exerted a tremendous amount of time, pressure and threats to force countries, especially parties to the Statute, to sign bilateral immunity agreements (BIAs) covering U.S. officials and military personnel, claiming the right to do so under Article 98 of the ICC Statute. The EU Council subsequently pronounced that such BIAs are illegal, and counseled member states not to sign them as they would violate their legal

⁹⁰ Jonathan Tepperman, "Contempt of Court," *Washington Monthly* (November 2000).

⁹¹ "American Servicemembers' Protection Act," *The American Journal of International Law* 96, 4 (Oct. 2002): 975-977.

actors—states or individual human beings—have the authority to act both domestically and internationally. These struggles arise precisely because of the important ways in which changes in the boundaries of one institution, the law of armed conflict, can have ripple effects that change the boundary of another institution, sovereign immunity.

Conclusion

The nature of and change in the boundaries of discrete institutions have important consequences for broader social organization and order. Institutional boundaries deserve attention because they are what structure -- in very different ways -- the amount and ease of access between institutional domains. In defining that access, they can serve to reproduce or alter institutions. The nature of boundaries determines whether and which actors are able or unable to operate legitimately within and across institutional jurisdictions. Boundaries transmit social and institutional rules internally, as relationship between sovereign governments and their citizens regarding who has the right to bring suit for human rights abuses attest. But boundaries also transmit social rules between and among institutions, as the discussion of sovereign immunity highlights. In these ways, boundaries can protect institutions and contribute to institutional survival and continuity. They also organize and stabilize social orders, fostering collective action in some realms and regulating conflict in others.

The creation of boundaries or their change can reverberate throughout other institutions in society, shaping their relations and the overall degree of institutionalization of the values that a society is founded on. Boundaries transmit social values and roles to institutional and societal actors and individuals. For these reasons, more attention needs to be paid to the boundaries of institutions. Without understanding how these borders