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THE CASE OF *BOLIVIA v. CHILE* IN AN ERA OF TRANSFORMING SOVEREIGNTY

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On acount of the *Bolivia v. Chile* case before the International Court of Justice (ICJ), this Article examines the role of international judicial bodies in an era where the concept of sovereignty is under transformation in the context of the case of *Bolivia v. Chile* before the ICJ. This Article maps this transformation, examining how it is depicted in international jurisprudence in general and in the case of Bolivia's application in particular. Arguing that Bolivia's request should be

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adjudicated by the International Court on the basis of a sovereignty concept which results from a synthesis of the old doctrine with its new developments, this Article further argues how this new transformed sovereignty model can be useful also to other cases of international dispute resolution.

I. INTRODUCTION

The advent of the twenty-first century has brought with it a change in the classical notion of sovereignty. Claims of sovereignty in a number of cases have questioned traditional doctrines around sovereignty loss and declaration.

Sovereignty is in a stage of transformation. The present Article examines the role of judicial bodies in sovereignty's transformation and how international justice can contribute so that sovereignty patterns can more easily and smoothly transition to the new era. As such, the recently submitted application of Bolivia in the ICJ and the challenges it poses for Chilean sovereignty will be analyzed as an example.[1] The Article will further analyze how a possible ICJ ruling favoring a synthesis of old and new perceptions around the notion of sovereignty would be in tandem and would also essentially contribute to the settlement of other disputes.

This Article does not attempt to examine the traditional ways territory is lost and acquired, as these have been documented in classical international law.[2] On a similar, yet different note, this Article aspires to map how sovereignty, a broader notion which may or may not be associated with any changes in territorial status, is relinquished and acquired. As such, this Article will delineate sovereignty's transformation from passive and idealist to aggressive and pragmatic. Furthermore, it will explore how these opposing poles can actually be combined in a synthesis promoted by the ICJ on occasion of the Bolivia-Chile litigation.

1. Application Instituting Proceedings before the International Court of Justice (Bol. v. Chile), 2013 I.C.J. 1, (Apr. 24).

2. L. OPPENHEIM, INTERNATIONAL LAW Vol. 1- Peace 545, 545–58, 578 (H. Lauterpacht ed., 8th ed. 1955).

II. SOVEREIGNTY LOSS AND ACQUISITION: FROM PASSIVE/IDEALISTIC TO AGGRESSIVE/PRAGMATIC

A. *The Classical Sovereignty Pattern*

1. Sovereignty Loss—Passive

Traditionally, sovereignty titles changed in an outward-inward direction, mostly through conquest.[3] The second half of the twentieth century witnessed an inwards-outwards, a la carte sovereignty loss, where states wishing to remain independent transferred part of two main sovereignty facets—jurisdiction and legislative authority[4]—to exterior political constellations. This module, historically found in the case of vassal states,[5] resurged to the surface in the aftermath of World War II's scars. It found expression in the establishment of global and regional organizations which aspired not only to ensure the closer cooperation of state members, but also to introduce a new legal reality in the domestic realm.

The United Nations and the Security Council Resolutions under Chapter VII constitute one of the first attempts of the post-war global society to ensure that certain dicta will be respected and implemented by all state members. In modern international and constitutional law, the debate is not on whether such Resolutions bind state members above any of their domestic arrangements, but on whether they apply directly to or have to be incorporated in domestic law.[6]

This intermediate step in the sovereignty loss normative passivity concerning the adoption of rules not promulgated inside the state has been obliterated in the realms of the European Union model. The European Union has placed an emphasis on regional integration. As such it is logical that its mechanisms favor the retreat of national sovereignty.[7] De facto, this takes place through the embedding of

3. On this see the classical work of Thomas Hobbes "Leviathan" where Hobbes notes that dominion or sovereignty is acquired two ways, either by generation or by conquest. 2 Thomas Hobbes, Leviathan 306, 308–12 (Noel Malcolm ed. 2012) (1651).

4. Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen), 22 R.I.A.A. 209, 268 (Perm. Ct. Arb. 1998); Sovereignty over Pedra Branca/Pulau Batu Puteh, Judgment 2008 I.C.J. 12, ¶ 42 (May 23) (Dugard, J., dissenting); Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 1, ¶ 80 (Nov. 19).

5. ROBERT TREAT CRANE, THE STATE IN CONSTITUTIONAL AND INTERNATIONAL LAW 13–17 (J.M. Vincent et al. eds., 1907).

6. *Sanctions Regime Under Chapter 41 of the UN Charter, in* NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY 4 (Vera Gowland Debbas ed., 2004); *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci,* 20 EUR. J. INT'L L. 862, 864 (2009).

7. The examples of the German Empire and Italy in the nineteen century show that

sovereign powers to European organs. De jure, domestic laws are subordinate to European legislation.[8] European regulations are immediately incorporated in domestic jurisdictions without any further parliamentary act.[9] As expressed by the European Court of Justice: "As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the states have limited their sovereign rights. . ."[10] Such pronouncements, breaching in essence the inertia and resistance of member states,[11] render the European Union the most palpable example of passive sovereignty loss and at the same time also a paradigm for other regional organizations outside Europe.[12]

The imprint of passive sovereignty loss is so intense that it has not only been exemplified in the relations between states and international organizations but also in relations between states and territories. These territories, which in the past formed part of larger geopolitical constellations, are now following their own independent path or enjoy a loose connection with the bigger states with which they have been traditionally associated.

Thus, in the case of the Cook Islands or Niue and their relation with New Zealand, the islands were deemed one geopolitical entity even during the period before New Zealand acquired its independence from the United Kingdom.[13] After the proclamation of New Zealand independence, both the Cook Islands and Niue became de facto federal parts of New Zealand in the realms of their status as associated states.[14] New Zealand retained responsibility for these territories' defense, foreign policy and also for substantial domestic issues.[15] Thus, citizenship, one of the core examples of national sovereignty and

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regional economic integration can ultimately bring political integration. WALTER MATTLI, THE LOGIC OF REGIONAL INTEGRATION: EUROPE AND BEYOND 1 (1999).

8. Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 585, 594.

9. Jonathan Tomkin, *Implementing Community Legislation Into National Law: The Demands of a New Legal Order*, 4 JUD. STUD. INST. J. 130, 131 (2004).

10. Opinion 1/91, Draft Agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079, I-6102; Case 26/62, Van Gend en Loos v. Netherlands Inland Revenue Admin., 1963 E.C.R. 1, 5.

11. Ole Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10 EUR. J. INT'L L. 763, 766 (1999).

12. States continue to aspire to become E.U. members. Croatia became the latest E.U. member in July 2013. Edward Moxon-Browne, *MERCOSUR and the European Union: Polities in the Making?*, *in* COMPARATIVE REGIONAL INTEGRATION: EUROPE AND BEYOND 131, 134 (Finn Laursen ed., 2010).

13. W. John Hopkins, *New Zealand*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS 434–35 (Dinah Shelton ed., 2011).

14. *Id.*

15. ANTHONY H. ANGELO, CONSTITUTIONAL LAW IN NEW ZEALAND 131 (Roger Blanpain et al. eds., 2011).

discretion, cannot be conferred by the Cook Islands.[16] The latter can confer only permanent residency, while nationality is conferred by New Zealand.[17] In turn, this creates an expectation that the Cook Islands and New Zealand share a common standard of values.[18] Until 1980, New Zealand's Parliament could enact laws for the Cook Islands.[19]

From the various mini states, this relationship between the tiny state and its much bigger and influential neighbor state with which it has historically enjoyed ties, can be most palpably seen in the case of Monaco, whose sovereignty has been granted by a treaty with France.[20] Yet, Monaco has retained close connections with France. A customs union is in place[21] and French legislation is also the principality's legislation in many fields, such as banking and matters of alien residence.[22] On a public administrative sphere, based on treaty stipulation, French senior public servants have manned the principality's public services.[23] By their treaty in 1918, Monaco has entrusted to France its foreign relations and defense.[24]

Sovereignty loss through passivity is known in international law. Already in 1928, in the Island of Palmas arbitral award, it was held that sovereignty over a territory may pass as a result of the failure of the sovereign state to explicitly manifest against the acts of another state.[25] Accordingly, and in line with its jurisprudence,[26] the International Court

16. ALFRED M. BOLL, MULTIPLE NATIONALITY AND INTERNATIONAL LAW 151–52 (2007).

17. COOK ISLANDS CONST. Dec. 21, 2004, art. 76A, http://www.parliament.gov.ck/Constitution.pdf.

18. Joint Centenary Declaration of the Principles of the Relationship Between the Cook Islands and New Zealand, art. 2, para.1 (Apr. 6, 2001); Court of Appeal, Controller and Auditor-General v. Sir Ronald Davison, 2 NEW ZEALAND L. REV. 278, 319 (1996) (concurring opinion of Thomas, J.).

19. COOK ISLANDS CONST. Dec. 21, 2004, art. 76A, http://www.parliament.gov.ck/Constitution.pdf.

20. Bengt Broms, *Entitlement in the International Legal System*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 391 (R. St. J. MacDonald et al. eds., 1986).

21. Bengt Broms, *States*, *in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 65 (Mohammed Bedjaoui ed., 1991).

22. Jorri Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood 287–88 (1996); IMF, *Staff Country Reports, Monaco: Assessment of the Supervision and Regulation of the Financial Sector* (Aug. 2003), at 12, Int'l Monetary Fund Country Report, No. 03/262 (Aug, 2003).

23. Treaty on the Admission of Monegasque Nationals to Certain Public Positions in France and on the Recruitment of Certain Civil Servants of the Principality, Fr.-Monaco, July 28, 1930, 981 U.N.T.S. 371.

24. Convention on the Rights of the Child, Committee on the Rights of the Child, Consideration of Reports Submitted by State Parties Under Article 8, paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Monaco, Mar. 1, 2006, CRC/C/OPAC/MCO/1.

25. Island of Palmas Case (Neth. v. United States), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928).

26. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United

of Justice has explicitly pronounced in the *Pedra Branca* case that silence may speak if the conduct of the other state calls for a response.[27]

Yet, the new type of sovereignty loss differs from its predecessors. It does not refer to the passivity of the side relinquishing sovereignty but to the passivity of the side to which these sovereign powers are transferred.

In this drama of sovereignty loss, emphasis is put on the side absorbing the rattles of the new status quo rather than on the side instigating these rattles. While the state relinquishing its sovereignty takes concrete steps, promulgating relevant laws or changing its constitution, the international organization or state to which sovereignty is transferred just accepts the relinquishing of these powers to its favor.

This type of sovereignty loss is not holistic, demanding the total demolition of the previously exercised state authority, but rather voluntary and passive. As such, it calls to question the state's sovereignty entrenched, inviolable character, which has been shaped in the Westphalian system.[28]

2. Sovereignty Acquisition-Idealism

While sovereignty was lost in a passive way, it was gained through humanistic ideals. Most sovereign states that were created, especially during the second half of the twentieth century were the result of liberation wars conducted in an anti-colonialist spirit. People fought for their freedom and independence. Quite characteristically, U.N. Resolutions from the 1970s associate sovereignty with an inalienable right to self-determination,[29] a notion that would accompany the decolonization process[30] and would be cardinal in sovereignty acquisition as demonstrated in the ICJ's jurisprudence. At the same time, and faithful to a passive stance other than in cases of decolonization, this sovereignty proclamation in the name of self-determination was not to be pronounced to the detriment of territorial integrity.[31] Sovereignty proclamation was not endorsed in order to bring

States), Judgment, I.C.J. Rep. 1984, at 305, ¶ 130.

27. Pedra Branca/Pulau Batu Puteh, Judgment, I.C.J. Rep. 2003, ¶ 121.

28. EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 97 (2002); LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 23 (M. Cherif Bassiouni ed., Int'l & Comparative Criminal Law Ser., 2002); Yu Keping, *Globalization and State Sovereignty*, *in* CHINESE PERSPECTIVES ON GLOBALIZATION AND AUTONOMY 86 (Cai Tuo ed., 2012).

29. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/25/28, at 121 (Oct. 24, 1970).

30. Gentian Zyberi, *Self-Determination Through the Lens of the International Court of Justice*, 56 NETH. INT'L L. REV. 429, 432 (2009).

31. KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 77

turmoil to the existing territorial status quo, but to lead to the restitution of territorial rights to their original holders according to the ideals of freedom and justice.

Nevertheless, there were also cases, most conspicuously that of the Kurds, where the international community refused to acknowledge independence, even though the Kurds formed a distinct people living in a definable territory.[32] Such approach is the prelude of a general attitude which would opt to view sovereignty acquisition on pragmatic grounds. This attitude would become rampant toward the end of the twentieth century as will be analyzed in the next Part.

B. *Sovereignty Transformed*

1. Sovereignty Loss-Aggressive

The first decade of the twenty-first century has witnessed the passivity of sovereignty loss emerging wounded. Classical inter-state and supranational structures have come under doubt and ultimately revision. The eurozone crisis has bolstered skepticism about the future of the European Union and countries, such as the United Kingdom, have pondered whether they should continue being part of the Union if they cannot influence its decisions as much as they want.[33] Even toward the end of the previous century, traditional structures were questioned.

In 1988, New Zealand lodged a declaration with the U.N. Secretary General, notifying it that New Zealand treaty action would not engage the Cook Islands or Niue, unless expressly stipulated.[34] Thus, the Cook Islands began to form their own foreign policy by signing, independently from New Zealand, bilateral treaties and agreements with countries like the United States, France, and China.[35] In 2001, through their joint declaration, New Zealand and the Cook Islands agreed that

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(Cambridge Studies in Int'l & Comparative Law Ser., 2002).

32. Ronald Thomas, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of Independence on the Merits and International Law*, 32 FORDHAM INT'L L.J. 1990, 2004 (2009).

33. *EU Leaders Warn Cameron over Membership Referendum*, BBC NEWS (Jan. 23, 2013), http://www.bbc.co.uk/news/world-europe-21159368; *EU Referendum: Tory MP Will Take Forward the Bill*, BBC NEWS (May 16, 2013), http://www.bbc.co.uk/news/uk-politics-22542207.

34. Alex Frame, *Fundamental Rights in the Realm of New Zealand: Theory and Practice*, 22 VICTORIA U. WELLINGTON L. REV. 85, 90–91 n.16 (1992).

35. Treaty Between the United States of America and the Cook Islands on Friendship and Delimitation of the Maritime Boundary Between the United States of America and the Cook Islands, U.S.-Cook Is., June 11, 1980, PITSE 6; Agreement on Maritime Delimitation Between the Government of the Cook Islands and the Government of the French Republic, Cook Is.-Fr., Aug. 3, 1990, PITSE 4; Trade Agreement Between the Government of the Cook Islands and the Government of the People's Republic of China, Cook Is.-China, Nov. 16, 1998, PITSE 12.

the latter would be viewed as a sovereign state in their interaction with international bodies and other states.[36] New Zealand would accordingly only assist the Cook Islands in foreign policy matters.[37] Moreover, through constitutional amendment, New Zealand no longer has the power to legislate for the Cook Islands.[38]

Also in the case of Monaco, in the first decade of the twenty-first century, the principality took substantial measures to separate from France. Thus, it voted on laws of its own in fields relating to substantial economic activities such as the operation of mutual funds and their supervision.[39] Following a constitutional amendment in 2002, Monaco's minister of state can be either French or Monegasque and is no longer appointed from a list of French nationals proposed by the French government.[40]

A more aggressive form of sovereignty loss has emerged with the advent of the new century and the demise of the sovereignty loss passivity model. Sovereignty loss has undergone a dynamic, Hobbesian, and predatory transformation. International or supranational bodies aspiring to either nullify or substantially limit a state's sovereignty, do not wait for the state to submit to their demands or wishes, but actively take step to shape this state's sovereignty status. In this transformed notion of sovereignty, the notion of viability plays an important role. Sovereignty is actively intruded upon or nullified only on the basis of compelling grounds because a different scenario would create a situation which would not be viable for the international community, a scenario with which the international community could by no means compromise. These compelling grounds can be either humanitarian or more pragmatic. Thus, in the case of Kosovo, the U.N. militarily intervened in order to stop the massacre of the Albanian minority from the Milosevic regime.[41] Yet, even after the massacre was averted, Kosovo became an autonomous area in the Federal Republic of Yugoslavia through a U.N. Security Council Resolution.[42] Gradually, the international community fostered the creation of a new state. In 2008, Kosovo declared its independence.[43] A considerable number of

36. Joint Centenary Declaration of the Principles of the Relationship Between the Cook Islands and New Zealand, Cook Is.-N.Z., art. 4, Apr. 6, 2011.

37. *Id.*

38. COOK ISLANDS CONST. Aug. 4, 1965, art.46.

39. Int'l Monetary Fund [IMF], *Monaco: Assessment of the Supervision and Regulation of the Financial Sector*, at 12, IMF Country Rep., No. 03/262 (May 2003).

40. *Monaco/Monte Carlo*, JCI EUROPEAN CONFERENCE (last visited Oct. 10, 2013), http://www.jci-ec2013.com/en/about/monaco-monte-carlo/general-presentation.html.

41. Daniel Fierstein, *Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 B.U. INT'L L. J. 417, 422 (2008).

42. *Id.* at 419.

43. *Id.* at 418.

states acknowledged Kosovo as a sovereign state.[44] In the case of the Second Iraq War, the U.S. decision to militarily intervene was based not out of humanitarian concerns, but out of fears that Saddam Hussein possessed weapons of mass destruction.[45]

Viability arguments leading to an aggressive sovereignty loss or restraint cannot only be geo-strategic but also economic. Thus, during the eurozone crisis and with the threat of bankruptcy, countries in Europe's South saw their fiscal sovereignty restrained through adherence to the demands of the European Union as the International Monetary Fund memoranda aimed to restrict their budget deficits.[46] While officially these memoranda meet legislative approval, their volume and character is so overwhelming and imposing that in essence they constitute the monolithic approach of their drafters, whose authority is not questioned.[47] In some cases, their demands are openly aggressive. For example, in Cyprus, bank accounts became subject to a levy as part of a deal which Cyprus reluctantly accepted even though its Parliament refused initially.[48]

Nevertheless, the tendency is for international practice to gradually distance itself from such aggressive interventions in the notion of sovereignty. This has been noted in accounts of all of the aforementioned situations. In the aftermath of Kosovo and the war in Iraq, the international community did not lend a sympathetic ear to the secession of South Ossetia and Abkhazia from Georgia.[49] This is the case despite the fact that these territories hold many features similar to Kosovo; an ethnic Russian minority seceding from a sovereign state and declaring independence after the culmination of an armed conflict and the presence of the Russian army in these territories. Not surprisingly, in international legal theory South Ossetia and Abkhazia were also deemed to be closely associated with Kosovo.[50] Yet, at the same time, it was

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44. Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 779 (2009).

45. David Fidler, *International Law and Weapons of Mass Destruction: End of the Arms Control Approach?*, 14 DUKE J. COMP. & INT'L L. 39, 72–73 (2004).

46. Vassilis Monastiriotis, Forum, *A Very Greek Crisis*, 48 INTERECONOMICS REVIEW OF EUROPEAN ECONOMIC POLICY 4, 5 (2013); Spyros Kosmidis, *Government Constraints and Economic Voting in Greece*, 70 GREESE: HELLENIC OBSERVATORY PAPERS ON GREECE AND SOUTHEAST EUROPE, May 2013, at 2.

47. *Greek Parliament Passes New Austerity Package with Tiny Majority*, EKATHIMERINI.COM (Nov. 8, 2012), http://www.ekathimerini.com/4dcgi/_w_articles_wsite1_1_08/11/2012_468997.

48. *What Has Been Agreed in Cyprus*, CNN, Mar. 27, 2013, http://edition.cnn.com/2013/03/18/business/cyprus-bank-levy-explainer; Helena Smith, *Cyprus Parliament Votes to Accept Controversial €10bn EU-IMF Bailout*, THE GUARDIAN (Apr. 30, 2013), http://www.guardian.co.uk/world/2013/apr/30/cyprus-parliament-bailout-deal-passed.

49. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 403 (2d ed. 2006).

50. Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or*

equally stressed that there should be no comparison between the two cases and that each one is unique.[51] As such, the presence of the Russian army in these regions has not been viewed as part of a transitory period toward independence, but as occupation of Georgia's territory.[52]

The fact that the second war in Iraq was met with skepticism in parts of the international community, as well as between legal publicists,[53] created a trauma in the collective international consciousness to the extent that the international community has appeared reluctant to intervene even in conflicts where war crimes are committed, like in Syria.[54] Moreover, all the cases hence in which international military intervention has taken place, involve relevant Security Council Resolutions authorizing such action.[55] Finally, in the case of the actual formulation of state fiscal policy by international organizations, the fact that the IMF admitted that in the case of Greece the wrong measures had been implemented,[56] demonstrates that these bodies do not want to appear faultless, bereft of any revision and change in their aggressive interventions in the notion of sovereignty. This recoil of sovereignty loss' aggressiveness will be further examined in the case involving Bolivia and Chile before the ICJ.

2. Sovereignty Acquisition—Pragmatism

The parameter of viability and the notion that things have to be done

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Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia and Abkhazia, 24 LEIDEN J. INT'L L. 467, 475 (2011).

51. Rein Mullerson, *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia*, 8 CHINESE J. INT'L L. 1, 4 (2009); Ronald Thomas, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of Independence on the Merits and International Law*, 32 FORDHAM INT'L L.J. 1990, 2032 (2009).

52. Hanna Jamar & Mary Katherine Vigness, *Applying Kosovo: Looking to Russia, China, Spain and Beyond After the International Court of Justice Opinion on Unilateral Declarations of Independence*, 11 GERMAN L.J. 913, 918 (2010).

53. HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 199 (2005); Janne Nijman, *After 'Iraq':Back to the International Rule of Law? An Introduction to the NYIL 2011 Agora*, 42 NETH.Y.B. OF INT'L L. 71, 71, 79 (2011); Philippe Sands, *Operationalizing the UN Charter Rules on the Use of Force*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 343, 350 (Antonio Cassese ed., 2012).

54. Solon Solomon, *The Quest for Self-Determination: Defining International Law's Inherent Interstate Limits*, 11 SANTA CLARA J. INT'L L. 397, 404–06 (2013).

55. *See, e.g.*, the cases of Libya and Mali. On this see Solon Solomon, *The Quest for Self-Determination: Defining International Law's Inherent Interstate Limits*, 11 SANTA CLARA J. INT'L L. 397, 403 (2013); Theodore Christakis & Karine Bannelier, *French Military Intervention in Mali: It's Legal But . . . Why? Part II: Consent and UNSC Authorization*, EJIL!TALK (Jan. 25, 2013), http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-part-2-consent-and-unsc-authorisation/.

56. *'Notable Failures': IMF Admits Major Mistakes on Greek Bailout*, DER SPIEGEL ONLINE (June 6, 2013), http://www.spiegel.de/international/europe/the-imf-admits-serious-mistakes-on-greek-bailout-a-904093.html.

in a certain way is to a large extent also responsible for sovereignty's veering away from humanism and embracing necessity. This does not mean that idealistic reasons behind sovereignty quests are totally obscured, but they are overshadowed by more pragmatic considerations.

Sovereignty aspirations were deeply attached to Kosovo's Albanian minority's self-determination quests and pleas for freedom. Yet, the necessity to forge a viable solution, urged the international community to view these aspirations satisfied only through a sovereign state. It is interesting that states who recognized Kosovo's independence did so out of the belief that Kosovo's independence would contribute to international peace, democratic and economic development and the strengthening of human rights standards.[57] Quite similarly, the international community opted to back the unilateral Palestinian statehood bid in the United Nations.[58] Equally, South Sudan's independence was viewed as the appropriate solution in order to end a decades-long civil strife in Sudan.[59]

In the era of transforming sovereignty, the question is not in which cases sovereignty can be recognized but in which cases it must be recognized. Thus, the international community has persistently refused to recognize the independence of Somaliland and its consequent secession from Somalia, largely because recognition of Somaliland's sovereignty would deprive Somalia of an important part of its country, necessary for Somalia's state ability restoration efforts.[60]

Gradually, sovereignty has been transformed from an ideal to a pragmatic reality, veering away from the traditional Montevideo criteria and being based on state interests.[61] Accordingly, sovereignty's pragmatic transformation has led to the awarding of state characteristics to non-state actors simply because the latter exercise state functions on a particular territory. In tandem with this perception, non-state actors have been plausibly given the impression that they can either pursue

57. Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 782 (2009).

58. General Assembly Votes Overwhelmingly to Accord Palestine 'Non Member Observer State' Status in United Nations, General Assembly GA/11317, 67th Pln., 44th and 45th Mtgs, Nov. 29, 2012, *available at* http://www.un.org/News/Press/docs/2012/ga11317.doc.htm.

59. Jure Vidmar, *South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States*, 47 TEX. INT'L L.J. 541, 551–53 (2012).

60. Aaron Kreuter, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, 19 MINN. J. INT'L L. 363, 384–85 (2010); Benjamin R. Farley, *Calling a State a State: Somaliland and International Recognition*, 24 EMORY INT'L L. REV. 777, 812 (2010).

61. This stress of necessity over idealism is rampant also in other branches of contemporary international law such as international humanitarian law, national security law and human rights law. The international discourse on the use of drones and civilian casualties, the use of surveillance systems, and the right to privacy highlight this point.

independence once they control a particular territory or undertake state functions and initiatives pertaining even to foreign policy issues, under the umbrella of their mother state.

The case of Hezbollah is indicative of this. Being far more than a mere political party, but rather a part of the Lebanese state structure itself,[62] Hezbollah has recently been actively involved in the Syrian civil war.[63] In 2006, it abducted two Israeli soldiers, triggering the Second Lebanon War. Israel held Lebanon accountable for Hezbollah's actions.[64] Since 9/11, harboring triggers attribution,[65] with states being held accountable for actions that non-state actors perform inside national territory even with no prior state agreement or participation. The fact that the state has tolerated the use of its territory by non-state groups is enough for the state to be held accountable for these groups' actions.[66]

In Europe, both Scottish and Catalan ethnic groups have sought independence. Moreover, Scotland and Catalonia deem that once independent, they should automatically be perceived as European Union members.[67] This state activism as far as sovereignty is concerned, has correctly been repelled both by European Union organs as well as noted publicists.[68] Yet, it is part of a perception according to which the international community has a duty to accept every sovereignty assertion, regardless of the state's viable future or the other states' political will and with no further deliberations or evaluation procedures. Moreover, this duty is justiciable and its satisfaction can be pursued in international courts and tribunals.

This diluted perception of sovereignty, to the extent that it can be pursued in international judicial bodies, is a direct result of sovereignty's transformation and the way it has come to be perceived by international dispute settlement bodies.

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62. Stefan Kirchner, *Third Party Liability for Hezbollah Attacks Against Israel*, 7 GERMAN L.J. 777, 780 (2006).

63. Jeffrey Fleishman, *Hezbollah's Role in Syria Fighting Threatens to Spread Holy War*, L.A. TIMES (June 22, 2013), *available at* http://articles.latimes.com/2013/jun/22/world/la-fg-syria-sectarian-20130623.

64. THERESA REINOLD, SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT 110 (2013).

65. KIMBERLEY TRAPP, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 51 (2011); Reinold, *supra* note 65, at 99–101. For the fact that it is dubious whether harbouring has also become a legal customary norm, see *id.* at 111; HELEN DUFFY, THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW 55 (2005).

66. Kirchner, *supra* note 63 at 781–82.

67. Simon Johnson, *European Leaders Refuse to Discuss Independent Scotland's EU Membership with Alex Salmond*, TELEGRAPH (Jan. 23, 2013), http://www.telegraph.co.uk/news/worldnews/europe/eu/9821431/European-leaders-refuse-to-discuss-independent-Scotlands-EU-membership-with-Alex-Salmond.html.

68. Joseph Weiler, *Slouching Towards the Cool War; Catalonian Independence and the European Union; Roll of Honour; In this Issue; A Personal Statement*, 23 EUR. J. INT'L L. 909, 910–12 (2012).

III. THE ROLE OF INTERNATIONAL JUDICIAL BODIES IN SOVEREIGNTY'S TRANSFORMATION

The role of international adjudicating bodies has been critical in transforming sovereignty. While judicial bodies have followed sovereignty's passive/idealistic patterns, during the last decade they have turned to a more activist, dynamic stance. First and foremost, this is discerned in the jurisprudence of the International Court, as the international community's main judicial organ, but it is equally mirrored in the jurisprudence of other regional courts. For methodological reasons, the role of the ICJ and the other judicial bodies will be examined in two different Parts.

A. *Sovereignty Transformation in the Realms of the ICJ*

The passive elements in sovereignty loss were embalmed in the Court's jurisprudence even from its first decades. In the *Expenses* case, the Court ruled that international organizations can have implied powers. The state was voluntarily relinquishing powers in favor of international constellations.

As for sovereignty acquisition, through resort to the right of self-determination,[69] the Court linked sovereignty acquisition with ideals. In the Namibia case this was the emancipation from the apartheid regime and the end of racism.[70] In the Western Sahara advisory opinion, the notion of freedom was highlighted as well as the liberation from any foreign-imposed sovereignty constraints that opposed the people's inner national aspirations. Thus, the Court declared that the population of Western Sahara did not belong to the neighboring countries and as such it could freely define its political future by its freely expressed will.[71] In *East Timor*, sovereignty was asserted as the right of people to have the freedom to dispose of their territory's natural resources the way they desire. Thus, the Court, proclaiming self-determination's *erga omnes* character, invalidated an agreement between Indonesia and Australia for the exploitation of the continental shelf of the Timor gap.[72] Accordingly, in its advisory opinion in the case of Israel, the Court linked self-determination with the various initiatives that have been historically undertaken toward the establishment of Palestinian state

69. Gentian Zyberi, *Self-Determination Through the Lens of the International Court of Justice*, 56 NETH. INT'L L. REV. 429, 431 (2009).

70. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1970 I.C.J. Rep. 1971, ¶ 131.

71. Western Sahara Advisory Opinion, 1975 I.C.J. Rep. 12, ¶¶ 55, 70 (Oct. 16).

72. East Timor (Port. v. Austl.), 1995 I.C.J. Rep. 90, ¶ 29 (June 30).

sovereignty.[73]

Yet, in the Kosovo advisory opinion, adherence to sovereignty's active and pragmatic character, noted a turn in the Court's jurisprudence. The Court, albeit with a strong minority opinion signaling the judges' ideological hurdles in acknowledging sovereignty's transformation, ruled in favor of Kosovo's secession. No legal importance was rendered to how this secession had become feasible or to Serbia's historic links with the territory. Hence, it is the people and their pragmatic needs and wishes, and not the international status quo, expressed in certain borders or any ideology, that define when sovereignty can be relinquished.

As far as sovereignty over a particular area is concerned, the notion of historic title from a decisive factor toward the end of the previous century is accordingly transformed to a secondary element in the first decade of the new century.[74] Judge *ad hoc* Franck palpably expresses this transformation when he notes in his separate opinion in the *Pulau Ligitan* and *Pulau Sipadan* case that historic title cannot prevail over the right of non-self-governing people to associate with other peoples in the region with which they feel they share ethnic or cultural ties.[75]

B. *Sovereignty Transformation in the Realms of Other Judicial Bodies*

The transformational route that the concept of sovereignty followed both on doctrinal grounds as well as in ICJ jurisprudence is also discerned in relation to other international judicial bodies. For example, in the realms of the European Union, the passive sovereignty loss model has been questioned in the last few years. In *Kadi*, the European Court of Justice struck down a European Union Regulation which came to incorporate in European law the arrangements of a U.N. Security Council Resolution.[76]

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73. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 118 (July 9).

74. *See, e.g.*, Arbitral Award between Eritrea and Yemen stating inter alia that "there can be no doubt that the concept of historic title has special resonance in situations that may exist even in the contemporary world, such as determining the sovereignty over nomadic lands occupied during time immemorial by given tribes who owed their allegiance to the ruler who extended his socio-political power over that geographic area." A different situation exists with regard to uninhabited islands which are not claimed to be falling within the limits of historic waters. Award of the Arbitral Tribunal in the First Stage of the Proceedings, Eri. v. Yemen, Territorial Sovereignty and Scope of the Dispute, Oct. 9, 1998, ¶ 123.

75. Sovereignty over Pulau Ligitan & Pulau Sipadan (Indon. v. Malay.), 2001 I.C.J. Rep. 575, 652 (Oct. 23) (separate opinion of Judge ad hoc Franck).Application by the Philippines for Permission to Intervene (Indon. v. Malay.), 2001 I.C.J. 575, 652 (Oct. 23) (separate opinion of Judge ad hoc Franck).

76. Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi & Al Barakaat International Found. v. Council of the European Union & Comm'n of the European Cmtys., Judgment.

Although acting inside the realms of its competence by striking down a European Union Resolution and not the Security Council Resolution itself,[77] through its judgment, the European Court of Justice rendered clear that the passive relinquishment of powers to the U.N. Security Council could not lead to the acceptance of any measures and pronouncements once these negated the relinquishing party's core values.[78]

Sovereignty has also taken an aggressive, pragmatic course in the European Court of Human Rights' jurisprudence. The Court's jurisprudence in the issue of Northern Cyprus is characteristic, because of its repeating character and its consistent view that the Turkish invasion and Northern Cyprus' subsequent occupation have not created a new legal or factual reality.[79] Accordingly, the Court has heard cases of Greek Cypriots demanding compensation for their properties in the northern part of the island, without requiring that the cases first be heard by a Northern Cypriot Claims Committee which has created by the non-internationally recognized Turkish Cypriot state. The Claims Committee is deemed as a local remedy that has to be exhausted in order for Court's jurisdiction to be asserted.[80]

In 2010, the Court opined otherwise. In the *Demopoulos* case, the Court held that prior to any judicial appeal, Greek Cypriots should first raise their claims before this committee. The Court went on to pronounce that:

> [I]t cannot be within this Court's task in interpreting and applying the provisions of the Convention to impose an unconditional obligation on a Government to embark on the forcible eviction and rehousing of potentially large numbers of men, women and children even with the aim of vindicating the rights of victims of violations of the Convention.[81]

The Court thus seemed ready to sanction a status-quo, leading

77. *Id.* ¶ 317.

78. *Id.* ¶¶ 285, 299. For a similar active stance toward U.N. Security Council Resolutions by the U.K. Supreme Court, see Her Majesty's Treasury (Respondent) v. Ahmed (FC), Her Majesty's Treasury v al-Ghabra (FC), R (on the application of Hani El Sayed Sabaei Youssef) v. Her Majesty's Treasury, Judgment [2010] UKSC 2. For a similar stance by Canadian courts see Antonios Tzanakopoulos, U.N. Sanctions in Domestic Courts: From Interpretation to Defiance in Abdelrazik v. Canada, 8 J. INT'L CRIM. JUST. 249 (2010).

79. *See, e.g.*, Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1996); Cyprus v. Turkey, App. No. 25781/94 Eur. Ct. H.R. (2001); Xenides-Arestis v. Turkey, App. No. 46347/99 Eur. Ct. H.R. (2005).

80. Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1996); Demades v. Turkey, App. No. 16219/90 Eur. Ct. H.R, ¶ 20 (2008).

81. Demopoulos v. Turkey, App. No. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 Eur. Ct. H.R., ¶ 116 (2010).

potentially in the future also to an alteration of the sovereignty status, not on reasons of legality, but on a pragmatic need that renders such an approach essential.[82] In these realms, legality and humanity cease to play the prominent role.

Bereft of its humanistic content, sovereignty acquires mechanistic characteristics. It becomes something dry, easily attestable only through the question of whether it exists or not. The answer to this question sometimes lies in formal papers and declarations. In these cases, it leads to states being deemed to have jurisdiction over parts of their territory which they do not effectively control. Thus, in the case of Catan, the ECHR, echoing its previous jurisprudence,[83] held that although the region of Transdniestria was not under Moldovan, but Russian, effective control, Moldova still had an obligation to ensure rights and freedoms of the local population because internationally the region is recognized as part of Moldova's territory.[84]

In the realms of the law of the sea and the International Tribunal for the Law of the Sea (ITLOS) jurisprudence this mechanical sovereignty acquisition has been expressed through the fact that a state can exert sovereignty over a ship simply due to the latter flying the particular state's flag and with no further requirements for a genuine link between that state and the vessel.[85]

IV. THE CASE OF *BOLIVIA V. CHILE*: THE ROLE OF THE ICJ BETWEEN CROSSROADS

Caught in the crossroads between a notion of sovereignty which aspires to return to its more traditional, non aggressive tone, without losing its current dynamic features, the role of the ICJ and the opportunity of international justice to decisively view the way sovereignty is perceived in contemporary international law, is particularly stressed in *Bolivia v. Chile.*

In April 2013, Bolivia filed a lawsuit with the ICJ against Chile.[86] In its application, Bolivia requested the Court oblige Chile to enter negotiations so that Bolivia is ultimately granted sovereignty over

82. Solon Solomon, *The Dynamic Law of Occupation: Inaugurating International Thematic Constitutionalism*, 54 HARV. INT'L L.J. 59, 64 (2012).

83. Ilascu and Others v. Moldova & Russia, App. No. 48787/99, 40 Eur. Ct. H.R. Rep. 46 (2004).

84. Catan and Others v. Moldova & Russia, App. No. 43370/04, Judgment, Oct. 19, 2012, ¶¶ 109-10.

85. For opinions requiring such genuine link, see M/V "Louisa" Case (No. 18) (St. Vincent v. Spain), Case No. 18, May 28, 2013, Individual Opinion of Judge Ndiaye, ¶ 124.

86. *See* Application Instituting Proceedings before the International Court of Justice (Bol. v. Chile), 2013 I.C.J. 1 (Apr. 24).

Chilean territory and access to the Pacific Ocean.

The nature of the plea is highly problematic. Bolivia requests that the Court pronounce on a duty to negotiate. The duty to negotiate indeed exists in international law but as a means to settle the dispute by identifying its object.[87] Thus the question that has always tormented the international community was how the duty to negotiate was to be exercised.[88] In that sense, the specific duty followed automatically as an appendix to the assertion of a dispute. Once a dispute was asserted, states had a duty to negotiate in order to resolve it.[89] International jurisprudence has palpably expressed this when in its Advisory Opinion on the Railway Traffic between Lithuania and Poland, quoted also by the ICJ in the Pulp Mills judgment,[90] the Permanent Court of International Justice held that an obligation to negotiate does not imply an obligation to reach an agreement.[91]

In *Bolivia v. Chile*, the Bolivian application asks the Court to order Chile to negotiate in order for sovereignty to be transferred to Bolivia.[92] In other words, it asks the Court to indirectly impose the applicant's views on the respondent, by ordering Chile to enter a negotiation process, the result of which is predetermined. On account of this, the case should be striken from the Court's docket on non justiciability *stricto sensu* grounds.[93] The Court cannot predetermine with its judgment the outcome of the negotiations nor can it order Chile to open negotiations which are bound to culminate in a particular solution.

This clear-cut legal conclusion loses part of its crystal character once the case is perceived through the notion of transforming sovereignty. The Bolivian aspirations for sea access can be interpreted and understood on economic grounds. Bolivia is basically a mountainous state. Access to the sea would give it an opportunity not only to reroute its commercial roads, but also to restructure its economic activities, by maybe developing a fishing sector, thus boosting thus its economy. The

87. Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 EUR. J. INT'L L. 1, 4–5 (2003); M/V "Louisa" Case (St. Vincent v. Spain), Case No. 18, May 28, 2013, Individual Opinion of Judge Ndiaye, ¶ 30.

88. For the fact that the duty to negotiate has to be exercised in good faith, see Cameron Hutchison, *The Duty to Negotiate International Environmental Disputes in Good Faith*, 2 MCGILL J. SUSTAINABLE DEV. L. & POL'Y 117 (2006).

89. Peters, *supra* note 88, at 11.

90. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, *available at* http://www.icjcij.org/docket/files/135/15895.pdf, ¶ 150 (2010).

91. Railway Traffic Between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J. (ser. A/B) No. 42, at 116 (Oct. 1931).

92. Application Instituting Proceedings Before the International Court of Justice (Bol. v. Chile), 2013 I.C.J. 1, ¶¶ 1, 30 (Apr. 24, 2013).

93. For the notion of justiciability *stricto sensu* and its distinction from justiciability *lato sensu*, see SOLON SOLOMON, THE JUSTICIABILITY OF INTERNATIONAL DISPUTES: THE ADVISORY OPINION ON ISRAEL'S SECURITY FENCE AS A CASE STUDY 15 (2009).

question is how these economic aspirations, utterly tied to the country's economic viability, can find expression in the realms of international law without breaching sovereignty.

The law of the sea already offers one approach to the dilemma. The U.N. Convention on the Law of the Sea provides that landlocked states with no sea access are to be granted such access under certain conditions. This pattern provides solutions for the financial hardship of landlocked states, some of which are among the world's poorest states.[94] It is characteristic in Africa that states have extensively relied on such sea access to boost their economies.[95] As far as the question of how sovereignty rights interact with such sea access, the answer is that they do not. Landlocked states are provided access to the sea without taxation of traffic through transit states.[96] The sovereignty issue is not opened at all and accordingly not addressed. Thus, this approach proves impotent in cases sea access is pursued coupled with sovereignty demands. Bolivia did not base its pleas on the law of the sea provisions.

In these cases the conjunction of vital interests and sovereignty rights is indispensable and totally consistent with the fact that courts prefer to balance between various interests.[97] Creative patterns need to be examined. Thus for example, Laos, the only landlocked state in Southeast Asia tried to neutralize any disadvantages stemming from non sea access by transforming its roads in major transportation corridors for its neighbor states.[98] Moreover, the Mekong River is an international waterway so that Laos can have secure access to the South China Sea.[99]

Similarly, in *Bolivia*, the Court can rule that once a state's survival, encompassing also economic and ethnological parameters, can be assured only through access over territory belonging to another state's sovereignty, the second state is obliged to grant such access. This solution offers more than what the law of the sea envisions and less than full sovereignty as *Bolivia* requests; it goes further than relaxing any

94. R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 316 (2d ed. 1988); Michael Faye et al., *The Challenges Facing Landlocked Developing Countries*, 5 J. HUM. DEV., 31, 33 (2004).

95. TAYO AKINTOBA, AFRICAN STATES AND CONTEMPORARY INTERNATIONAL LAW: A CASE STUDY OF THE 1982 LAW OF THE SEA CONVENTION AND THE EXCLUSIVE ECONOMIC ZONE 65 (1996).

96. Convention on Transit Trade of Landlocked States, 8641 U.N.T.S. 1967.

97. Nollkaemper, *supra* note 6, at 863; JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 200 (2009).

98. Gretchen Kunze & V. Bruce Tolentino, In Laos: Land-linked not Land-locked, Asia Foundation, Aug. 27, 2008, *available at* http://asiafoundation.org/in-asia/2008/08/27/in-laos-land-linked-not-land-locked/.

99. Somphone Louanglath, Development of Ports and Cruise in Mekong River, Lao PDR, Japan, Sept. 10, 2010, *available at* http://www.jterc.or.jp/koku/koku_semina/pdf/100910_seminer_Somphone.pdf.

financial and trade obstacles for the landlocked country. In essence, it provides the right of usage for the landlocked country over its neighbors' land in order for sea access to be achieved.

International jurisprudence has hinted at such an approach. In the first phase of the *Eritrea v. Yemen* arbitral award, the arbitral tribunal awarded sovereignty to Yemen over critical island groups, yet at the same time held that "in the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men."[100]

Thus, according to the arbitral award, the poor economic condition of people is a factor weighing on sovereignty not being asserted on absolute grounds. Yet, at the same time, these vital interests do not come to sovereignty's expense. They are not meant to lead to the questioning of traditional sovereignty rights or to a new status quo of shared sovereignty. Quite interestingly, once Eritrea brought such sovereignty claims based on the previous cited paragraph of the arbitral award, the arbitral tribunal clarified in the second phase of its award that "[t]he traditional fishing regime is not an entitlement in common to resources nor is it a shared right in them. Rather, it entities both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands which, in its Award on Sovereignty, the Tribunal attributed to Yemen."[101]

Thus, the Court clarified that any rights held over Yemen sovereign territory were not reserved for the state of Eritrea but for the benefit of its people. Stress is put on the humanistic aspect of providing better standard livings for human beings rather than on state sovereignty dispute formalities.

Accordingly, in *Bolivia*, the Court based on the fact that living standards of Bolivians will be elevated once Bolivia is granted access to the sea, can oblige Chile to provide such access. Yet, this access should not be tied to any sovereignty rights as Bolivia demands.

Developing further international law, beyond its existing positivist realms, the Court can set as a precondition for any concessions in territory use, sovereignty's undisputable character. On a similar basis, in essence the "legitimate interests" in paragraph 3 of article 125 of UNCLOS[102] could be interpreted in a broad sense in order to include

100. Award of the Arbitral Tribunal in the First Stage of the Proceedings ¶ 526 (Perm. Ct. Arb. 1998), http://pca-cpa.org/show page.asp?pag_id=1160.

101. Award of the Arbitral Tribunal in the Second Stage of the Proceedings ¶ 103 (Perm. Ct. Arb. 1999), http://pca-cpa.org/showpage.asp?pag_id=1160.

102. The clause states that "[t]ransit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and

issues attached to sovereignty. In the realms of the European Union such an approach seems to be condoned. Strictly interpreted,[103] European law does provide for the suspension of common market policies in those cases when a member state's national security is threatened.[104] Accordingly, U.S. law grants the President the right to impose trade embargoes and economic sanctions in cases where U.S. national security is jeopardized.[105]

Under this lens, once the transit state, in this case Chile, feels that its sovereignty is verbally or actually threatened by the state using its territory, any conferred rights can be revoked without any penalties. Thus, Chile could hinder Bolivia from reaching the sea over Chilean territory once Bolivia expressed sovereignty claims over the particular piece of land.

This precondition is very important on a practical level, since it can relate also to other major disputes which will be analyzed in the next Part. Moreover, doctrinally, it renders clear that it is not sovereignty that is being compromised in such cases, but the powers and competencies deriving from it. This is a direct application in dispute resolution of sovereignty's passive element. At the same time, this passive element also embeds elements of sovereignty's transforming phase. It is based on pragmatism and is imposed on states rather than decided voluntarily by the states themselves. Blending elements of both phases of its transformation route, sovereignty acquires a new character. It becomes relevant to the solution of complex territorial disputes. It matures, consolidates. From transforming, sovereignty becomes transformed. Its implications for international dispute resolution are sketched in the next Part.

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facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests." U.N. Convention on the Law of the Sea, art. 125, Dec. 10, 1982, 516 U.N.T.S. 205.

103. Case 13/68 SpA Salgoil v. Italian Ministry of Foreign Trade, 1968 EUR-LEX CELEX Lexis 453, 463 (Dec. 19, 1968).

104. Thus article 224 of the E.C. Treaty provided that "Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security." Treaty Establishing the European Community, HR-Net, art. 224, http:// www.hri.org/docs/ Rome57/Part6.html#Art224 (Mar. 25 1957); Case 367/89, Criminal Proceedings against Aimé Richart & Les Accessoires Scientifiques, 1991 EUR-Lex CELEX Lexis 4621, 4645 ¶ 22 (Oct. 4, 1991).

105. Roger Alford, *The Self-Judging WTO Security Exception*, 3 UTAH L. REV. 697, 700 (2011).

V. SOVEREIGNTY: FROM TRANSFORMING TO TRANSFORMED

The role of international justice has been considered minor in contemporary international developments.[106] Force, pragmatism and state interests rather than laws and values are seen as more important factors to the consolidation of the international landscape.[107] To an extent this is true; law has inherent limits, further of which it cannot reach.[108] Yet, this does not mean that its role cannot be augmented, in particular on an authoritative tone through decisions of international courts and tribunals.

The notion of sovereignty is undergoing a transitory period of transformation. It is thus vulnerable to all the factors stated above that in essence configure international doctrinal notions and the relations between international actors. By rendering a clear, firm judgment that will capture sovereignty's molding and will incorporate elements of the notion's development throughout all its phases, the ICJ can demonstrate that international judicial bodies do not utter doctrinal positions, but they are able to follow the way certain notions are developed. These developments do not render international law obsolete, leaving a lacuna to be filled by real politik, but instigate courts and tribunals to respond with more creative, synthetic legal models. Through the Court's pronouncement, sovereignty can solidify, from transforming be rendered transformed.

Such a judicial sealing of sovereignty's transformation can have far-reaching implications for the way dispute settlement is viewed. Sovereignty is liberated from the dualistic, zero sum game dilemma of its totality excluding other sides from any rights on the relevant territory. A state keeps its sovereignty over a territory and these claims are not put in doubt. At the same time, this state is obliged on a passive, semi-voluntary basis, to relinquish rights of use and possession to another state. This is particularly important in cases of land disputes or prolonged occupations that have created links that cannot be disregarded.

A. *The Sakhalin and Kuril Islands' Dispute*

In 1945, shortly before the final Japanese surrender and in violation of a bilateral neutrality pact, the Soviet Union attacked Japan and

106. D.P. Forsythe, *The International Court of Justice at 50, in* ITS FUTURE ROLE AFTER FIFTY YEARS 402 (A.S. Muller et al. eds., 1997).

107. Janne Nijman, *After 'Iraq':Back to the International Rule of Law? An Introduction to the NYIL 2011 Agora*, 42 NETH. Y.B. INT'L L. 2011, at 79–80.

108. Solon Solomon, *The Quest for Self-Determination: Defining International Law's Inherent Interstate Limits*, 11 SANTA CLARA J. INT'L L. 397 (2013).

conquered Sakhalin and the Kuril Islands.[109] The Islands' Japanese residents were expelled to Japan and the islands underwent a long period of "sovietization." Japan never ceased to view these territories as an integral part of the Japanese state. In 1981, a day was instituted in Japan for these "northern territories."

Japan and Russia have established diplomatic relations through a joint declaration, but they have not signed a peace treaty.[110] Accordingly, these territories remain disputed and efforts have been made for the two countries to settle the issue. Thus, during one of the last trips of the Japanese prime minister to Moscow, it was announced that both sides would establish a bilateral committee that would examine the final status of the islands. One of the proposals being discussed is for the islands to pass under Japanese sovereignty, yet to be leased to Russia for a long period of time.[111]

Such a solution clearly bears the marks of transformed sovereignty. Similar to domestic law, sovereignty is bracketed to sovereignty title and use. As such, it becomes possible for both rights to be exercised over a territory, with both sides getting what in essence they want from the notion of sovereignty. In the case of Japan and Russia, the first is interested in the symbolic historic, national connotations that escort sovereignty, while for the latter sovereignty is translated to more practical issues of territory use and the factual landscape for the residents as well as for the Russian state and economy in general, that have been created as a result of Russian presence over the past decades.

B. *The Case of* Cyprus

In the case of *Cyprus*, the Kofi Anan plan was an attempt to achieve a dispute settlement between the island's two communities through resort to a partially transformed sovereignty model. Since the Turkish invasion in 1974, the island has been divided between its southern part where the state of Cyprus lies, and its northern occupied part where the Turkish Cypriot Republic has been declared.[112] The international

109. Ernesto de la Guardia, "La Question des iles Kouriles," 37 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 407 (1991).

110. Joint Compendium of Documents on the History of Territorial Issue Between Japan and Russia cited in Hiroshi Kimura, *The Kurillian Knot: A History of Japanese-Russian Border Negotiations* 168 (2008).

111. Masahiro Matsumura, *Might Does Not Make Right with Kuril Islands*, MOSCOW TIMES (May 31, 2013), http://www.themoscowtimes.com/opinion/article/might-does-not-make-right-with-kuril-islands/480859.html. For the fact that the idea of a lease traditionally existed as a way of bridging contesting claims see Guy-Pierre Chomette, *Kuril Islands: Sea Road to the Deep North*, LE MONDE DIPLOMATIQUE ENGLISH EDITION (Sept. 2001) (clarifying though that the proposal at the time referred to a lease by Russia to Japan and thus was rejected by the latter).

112. Solon Solomon, *The Dynamic Law of Occupation: Inaugurating International*

community holds that the island's northern part is under occupation. As such, no sovereignty claims are recognized for the Turkish Cypriot Republic and the territory it occupies.[113]

According to the Anan plan, this absolutism in the portraying of sovereignty claims is diluted. The prolonged military occupation of the island's northern part is not terminated together with the annulment of its consequences, but it is legally consolidated through the creation of a Turkish Cypriot state as part of a United Cypriot federation.[114] While the administrative privileges are exercised in the island's northern part by the Turkish Cypriots, sovereignty titles are not returned to the state of Cyprus as it existed at the time of the Turkish occupation, but to a new state, the United Cyprus Republic.[115] The case of Cyprus presents thus an example of an attempt to apply transformed sovereignty models. The reason it failed is largely due to the fact that contrary to other cases, competing sovereignty quests would be exercised on the same piece of land even after any settlement. The slicing sovereignty model, exemplified in other cases such as that of Japan and Russia or even between Israel and the Palestinians, proved harder to find its place in the case of Cyprus.

C. *The Israeli-Palestinian Conflict*

In 1967 and as a direct consequence of the Six Day War, Israel captured the West Bank and Gaza, deemed by Israeli governments as well as by Israel's Supreme Court to be under belligerent occupation.[116] Palestinians aspire to exercise on these territories their right to self-determination. As such, talks between Israel and the Palestinians have been waging, for the eventual creation of a Palestinian state.

These talks were given a decisive impetus through the Oslo accords. Moreover, in 1999, Israel and the Palestinian Authority signed a protocol for the creation of a safe passage between the West Bank and Gaza.[117]

This is of paramount significance for the viability of the future Palestinian state and the necessity for the West Bank not to remain a

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Thematic Constitutionalism, 54 HARV. INT'L L.J. ONLINE 59, 62–63 (2012).

113. *Id.*

114. Nicola Solomonides, *One State or Two? The Search for a Solution to the Cyprus Problem*, 4 INT'L PUB. POL'Y REV. 61, 72 (2008).

115. Yael Ronen, *Status of Settlers Implanted by Illegal Territorial Regimes*, 79 BRIT. Y.B. OF INT'L L. 195, 222 (2008).

116. David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. RED CROSS 207, 210 (2012).

117. Protocol Concerning Safe Passage Between the West Bank and the Gaza Strip, Jerusalem (Oct. 5, 1999), *available at* http://www.knesset.gov.il/process/docs/safe_passage_eng.htm.

landlocked area between Israel and the Hashemite Kingdom of Jordan. While there are examples of states which are not contiguous and yet their viability is not put in question,[118] still no sea access for the West Bank might put the Palestinian state's future in question.[119] As such, the question of the passage's granting is transformed from a point of discretion to an international obligation for Israel. Under this lens, the ICJ's pronouncement in *Bolivia* can also contribute to the consolidation of this obligation.

The Court has already ruled that safe passage should be granted between two non-contiguous territorial parts controlled by the same sovereign, subject though to full recognition and exercise of the other state's sovereignty over the intervening territory.[120] Through its *Bolivia* ruling the Court can extend this line of thought to apply not only to the safeguarding of such passage but also to its *ab initio* creation. Secondly, in *Bolivia* the ICJ has the opportunity to broadly interpret situations that permit the granting of such passage in order to determine as cases where a state's viability is at stake not only for incidents of violence and unrest, but also due to a dire economic position.

Under this perspective, the Court's potential contribution to the settlement of the safe passage Gaza-West Bank issue would be essential. First, the ICJ Bolivia judgment, basing its reasons on the revival of Bolivia's economy through access to the sea, would clarify that state survival can include also economic survival.[121] This is important for the Palestinian Authority, whose financial situation still remains dismal.[122] Moreover, similar to Bolivia, the West Bank does not have access to the sea. While officially the Gaza Strip would also form part of the Palestinian state, the future Palestinian state's viability would be in question if the West Bank, which provides sea access, is not seen as one unit with the Gaza Strip.[123]

The ICJ Bolivia ruling can also be helpful for Israel. By establishing that such sea access can not infringe on other states' sovereign rights

118. Justus Reid Weiner & Diane Morrison, *Linking the Gaza Strip with the West Bank: Implications of a Palestinian Corridor Across Israel*, JERUSALEM CENTER FOR PUBLIC AFFAIRS (2007), *available at* http://jcpa.org/text/TheSafePassage.pdf.

119. Mel Levine, *Palestinian Economic Progress Under the Oslo Agreements*, 19 FORDHAM INT'L L.J. 1393, 1406 (1995) (noting that the absence of a safe passage between the West Bank and Gaza restricts even non-export oriented Palestinian producers to a fraction of their potential markets).

120. Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 41, 43 (Nov. 26).

121. This is similar to the debate whether the "threat" in article 2 of the U.N. Charter includes only military threat or other forms of threat.

122. Niv Elis, *Israel, PA Agree to Restart Economic Cooperation*, JERUSALEM POST, June 16, 2013, http://www.jpost.com/Diplomacy-and-Politics/Israel-PA-agree-to-restart-economic-cooperation-316715.

123. *See* Levine, *supra* note 119. The Oslo accords stipulated that the West Bank and Gaza were to be seen as one unit.

and that the granting state can unilaterally block it, once it feels verbally or substantially threatened from the other side, the ruling can provide redress to Israeli fears that such access can be used for the transfer of terrorists or weapons from the Gaza Strip to the West Bank. Already the protocol signed between Israel and the Palestinian Authority stipulates that Israel can temporarily halt the passage's operation on security or safety grounds.[124] Yet, the Protocol does not elaborate further on the nature of these security or safety fears and whether they include also a threat to Israel's sovereignty or a general Palestinian hostile attitude. In that aspect and by including these parameters in any policy regarding access routes, a future ICJ pronouncement can render important services to international jurisprudence and practice alike. This is underlined also through the fact that the ICJ never viewed the right to safe passage as encompassing also the transfer of armed forces or ammunition.[125]

Moreover, the establishment by ICJ jurisprudence of any threats to sovereignty as an independent factor can be critical also for the more efficient settlement of the dispute between the Former Yugoslav Republic of Macedonia (FYROM) and Greece.

D. *The Case of* FYROM *and* Greece

In 1991 and following Yugoslavia's dissolution, Greece's northern neighbor proclaimed its independence under the name "Republic of Macedonia." Greece was immediately concerned with the new state's name and flag, depicting an ancient Macedonian symbol.[126] Coupled with facts such as maps depicting the new state to encompass also Greek territory as well as school books that made reference to a unified Macedonian identity, Greece expressed fears that its northern neighbor nurtured an expansionist and aggressive agenda that posed a threat for Greece's territorial integrity.[127] In response, Greece engaged in politics that had wider political and economic implications for the unstable nascent country.[128] Thus, Greece objected to its neighbor joining the United Nations under the name of "Macedonia."[129] In light of these objections the United Nations decided to refer to the new state as "Former Yugoslav Republic of Macedonia" (FYROM), pending a

124. Protocol Concerning Safe Passage Between the West Bank and the Gaza Strip, *supra* note 117, § 2, ¶ G.

125. Right of Passage over Indian Territory (Port. v. India), I.C.J. Rep. 41 (1960).

126. Michael Ioannidis, *Naming a State-Disputing Over Symbols of Statehood at the Example of "Macedonia,"* 14 MAX PLANCK Y.B. U.N. L. 507, 518 (2010).

127. Case C-120/94, Comm'n v. Greece, 1994 E.C.R. I-3040, ¶ 8; Michael Froomkin, *When We Say Us, We Mean It!*, 41 HOUS. L. REV. 839, 852–54 (2004).

128. Ioannidis, *supra* note 126, at 517.

129. Froomkin, *supra* note 127, at 852.

solution to the issue.[130] Equally, the European Union and NATO clarified that the dispute over the name should be solved before the new country can be admitted in their realms.[131] On an economic scale, and utterly relevant for our analysis, is the embargo Greece imposed to its northern neighbor in 1994.

FYROM is a landlocked state and its access to the sea is through Greek ports.[132] Following the Greek embargo, the European Community referred Greece to the European Court of Justice on the grounds that the embargo had been imposed in violation of article 224 of the EC Treaty.[133] Greece argued that its northern neighbor's attitude constituted a threat to its sovereignty and national security and thus justified invocation of article 224.[134]

The Court dismissed the application of interim measures. It noted that in absence of detailed consideration of the matter, it could not establish that Greece had relied improperly on article 224 of the Treaty. Ultimately, the case was discontinued due to the fact that an agreement was reached between Greece and FYROM and the embargo was lifted.[135] Nevertheless, it is important for the relations between sovereignty and the challenges posed to it, that the Court did not rule out that threats to territorial sovereignty, no matter how difficult to be proved, can indeed justify the imposition of an embargo and the barring of sea access.[136] As Advocate General Jacobs put it, "[I]t would be wrong to rule that Greece could not invoke article 224 of the Treaty on the ground that there was no serious international tension constituting a threat of war."[137]

Yet, it would be helpful and constructive should international jurisprudence take steps to elaborate more on the security concerns that are able to annul any restrictions on state sovereignty. This jurisprudential clarification takes an imperative note, once the invocation of security concerns is considered as part of the legal system itself it desires to suspend. Thus, it is equally subject to judicial review and should not be pronounced as self-judging.[138] Judicial decisions such

130. Michael Wood, *Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties*, 1 MAX PLANCK Y.B. U.N. L. 231, 236–38 (1994).

131. Froomkin, *supra* note 126, at 855–56.

132. L. Savadogo, *Sur le Contentiex Entre la Grece et la Macedonie*, 74 REVUE DE DROIT INT'L ET DE DROIT COMPARE 248, 266–69 (1997) (Fr.).

133. Case C-120/94, Comm'n v. Greece, 1996 E.C.R. I-010513, ¶ 46.

134. *Id.* ¶ 31.

135. *Id.* ¶ 5 (opinion of the President of the Court); Nikos Zaikos, *The Interim Accord: Prospects and Developments in Accordance with International Law*, *in* ATHENS-SKOPJE: AN UNEASY SYMBIOSIS, 1995–2002, at 21, 24 (Evangelos Kofos ed., 2003).

136. *Case C-120/94*, E.C.R. I-010513, ¶ 92.

137. *Id.* ¶¶ 56, 60 (opinion of Advocate General Jacobs).

138. Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 383 (2003). *Contra* Peter Lindsay, *The*

as that in the case of the Bolivian application can contribute the most to the clarification of the security element in sovereignty's transformation. Consequently, such clarifications regarding the right to sea access on condition of no sovereignty threats or territorial aspirations would address Greek fears and would enhance regional stability in the Balkans.

VI. CONCLUSION

Sovereignty loss and acquisition has undergone a transformation in the last decade from passive and idealistic to aggressive and pragmatic. This has led to an impoverishment of the weight the notion of sovereignty carries in the international law, to the extent that non-state actors have stepped in to fill the gap created by recoil of state sovereignty. Under this prism, the notion has been installed to the international community that sovereignty is so flexible that it can be infringed upon with no adherence to the prescribed international procedures or alternatively it can constitute a justiciable notion, bound to be awarded or annulled by international judicial bodies.

By reference to the Bolivian application to ICJ, where sovereign access is asked for over Chilean territory, the present Article made an attempt to stress the Court's pivotal role in restoring respect for the concept of sovereignty. In particular, it was argued that the Court should adjudicate the issue by providing for a synthesis of sovereignty's opposing poles and not by unilaterally siding with one of the parties at the expense of the other. After all, in a highly fragmented international law and jurisprudence, the challenge for international courts and tribunals lies in creative synthesis and not in doctrinal exclusion.

Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure, 52 DUKE L.J. 1277, 1296–1300 (2003).