PULLING AT THE THREADS OF WESTPHALIA: "IN VOL U NTARY SOVEREIGNTY WAIVER"—REVOLUTIONARY INTERNATIONAL LEGAL THEORY OR RETURN TO RULE BY THE GREAT POWERS?

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This paper explores the nature of sovereignty, its 17th century fusion with the state as a new political entity, its evolution over time, and challenges to its systemic primacy in the 21st century by thinkers such as Dr. Richard Haass, whose involuntary sovereignty waiver theory is deconstructed as a viable alternative to UN Security Council military intervention preventing human rights abuses, terrorism, and proliferation of weapons of mass destruction. The article also explores Haass’s recommendation that the world return to a Concert of Powers system modeled on that which developed from the 1815 Congress of Vienna, and evaluates use of the anticipatory self-defense doctrine as a method of executing involuntary sovereignty waiver theory. This paper also discusses the interplay between internationalist, realist, and neoconservative schools within the Bush

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All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of
any State . . . . Nothing contained in the present Charter shall authorize the
United Nations to intervene in matters which are essentially within the do-
mestic jurisdiction of any State . . . but this principle shall not prejudice the
application of enforcement measures under Chapter VII. ¹

—Charter of the United Nations

[O]n March 24, 1999, U.S. military forces, at my direction and in coali-
tion with our NATO allies, began a series of air strikes in the Federal Re-
public of Yugoslavia (FRY) in response to the FRY government's continued
campaign of violence and repression against the ethnic Albanian population
in Kosovo.²

—President William J. Clinton

Pursuant to my authority as Commander in Chief . . . I directed U.S.
Armed Forces, operating with other coalition forces, to commence combat

¹ UN Charter art. 2, paras. 4, 7.
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operations on March 19, 2003, against Iraq . . . to disarm Iraq in pursuit of peace, stability, and security. . . .

—President George W. Bush

INTRODUCTION

Since the 1990’s, American presidents have been willing to unleash the massive military arsenal of the world’s last superpower into the territories of other states without the formal agreed consensus of the international community. But if sovereignty means anything at all, it means freedom from outside interference. The baseline rule enshrined in the Charter of the United Nations holds that states cannot intervene in one another’s affairs by force without authorization from the Security Council. However, the United States led one intervention in Kosovo to stop crimes against humanity and then another in Iraq to stop the spread of weapons of mass destruction, both without Security Council authorization. Is America amending the UN Charter through action? Perhaps, if the Charter can be altered by subsequent customary practice.

So the question arises: whither sovereignty? At present, there is no clear answer. Perhaps the prerequisite question should be: what is sovereignty? Is it subject to change and, if so, is it changing fundamentally? What do countries such as Italy mean when they claim their sovereignty has been violated by the United States? This was Rome’s reaction in 2005 when an Italian court ordered the arrest of thirteen American intelligence agents responsible for the kidnapping of an Italian national of Arab descent in Milan and his subsequent illegal rendition to Egypt for interrogation. What did it mean when sovereignty was transferred from Britain to China in 1997 after the British left Hong Kong, or when it was handed back to Iraq by the

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5 UN Charter, supra note 1, at para. 4.
6 It is unlikely that this is possible, but the more extreme supporters of the prerogative of unauthorized humanitarian intervention (those who believe the prerogative has arisen to the level of obligation) necessarily must argue this position.
7 Berlusconi Demands U.S. ‘Respect’, BBC NEWS, World Edition, July 1, 2005, available at http://news.bbc.co.uk/2/hi/europe/4641821.stm. See ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 1 (1986) (“Any proposed diminution of a state’s political freedom or legal jurisdiction is likely to evoke a response which will be expressed, in part at least, as a defence of its sovereignty.”).
United States in 2004 after the War in Iraq? Is "sovereignty" some tangible thing? Can it be granted or withheld by others? When can it be violated?

Today, on the international plane, sovereignty resides in that political entity known as the state. Historically, however, sovereignty was not necessarily coterminous with the state. Tribes, clans and other groupings of people adhered to internal sovereign-like structures of social organization, but did not constitute states. As Grotius says, "That power is called sovereign whose actions are not subject to the legal control of another . . . . We exclude from consideration, therefore, the peoples who have passed under the sway of another people, such as the peoples of the Roman provinces." And many states did not enjoy complete sovereignty, vestigial remainders of which include San Marino and Liechtenstein, the foreign relations and defense of which are the responsibilities of Italy and Switzerland, respectively.

But the 17th century marriage of sovereignty and statehood at Westphalia continues to stand as unequivocal. Hannum reminds us that "[o]ne principle upon which there seems to be universal agreement is that sovereignty is an attribute of statehood, and that only states can be sovereign." Under classic Westphalian theory, the base maxim upon which foreign relations are built is the proposition that all states are equal and must reciprocally respect each other's sovereignty. As Brownlie notes, "the sovereignty and equality of states represent the basic constitutional doctrine of the law of nations." But it is apparent that, in both the literal and Orwellian sense, some states are more equal than others. It is also apparent that if all states operate as responsible actors on the world stage, those that are more equal

8 Stuart Hall, The State in Question, in THE IDEA OF THE MODERN STATE 1-2 (Gregor McLennan, David Held & Stuart Hall eds., 1984); HENKIN, supra note 4, at 8-9.
9 HUGO GROTIES, DE JURE BELLII AC PACIS, in 2 CLASSICS OF INTERNATIONAL LAW 102 (James Scott Brown ed., Francis W. Kelsey trans., 1925) ("For such peoples are not in themselves a state, . . . but the inferior members of a great state, just as slaves are members of a household.").
10 Hall, supra note 8, at 1-2; HENKIN, supra note 4, at 8-9.
13 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289 (5th ed. 1999).
should also be more responsible (at least in terms of political, economic and military power usage). Which states hold such status?

Those in the G-8 come to mind: Britain, France, Germany, Italy, Japan, Russia, Canada, and the United States. Aside from Canada and the US, such powerful states used to be simply referred to as the Great Powers. Not coincidentally, they are also the historic mischief-makers, wagers of world wars, and colonizers. So too are they the leading democracies, chief underwriters of public works in the developing world, and key distributors of foreign aid. But the club is not static.

Which states are considered Great Powers is a relative and geopolitical determination based heavily upon the perception of other states and measured by their willingness to yield to the influence of the Great Power in question. There is an ebb and flow to this status. Clearly, the United States was not considered a Great Power on its founding, but was so after the First World War.

Indeed, which states comprise the collection of states known as Great Powers inevitably changes after major military confrontations, and yet the same candidates continue to present themselves. In Europe, the "Concert of Powers" grew out of the 1815 Congress of Vienna, concluded at the end of the Napoleonic wars, as a more formalized assemblage of the victorious Quadruple Alliance (Britain, Russia, Prussia and Austria) which would seek to maintain the peace achieved at Vienna. France, restored under the Bourbons, joined the Concert of Powers in 1818. Leading up to World War I, Italy and the empires of Britain, France, Russia, Germany, Austria-Hungary, and the Ottomans comprised this group, but by 1919 only Britain, France, and Italy would remain as such, joined by the United States and Japan. Prior to World War II, Germany and the Soviet Union would have been considered Great Powers again, but by 1945 only the Soviet Union, the United States, Britain, and France retained that status, joined nominally by China, which would later grow into the role. After the Cold War, Japan and a reunited Germany reasserted themselves and are now regarded as such, but have been denied official status by permanent representation on the UN Security Council.14

Is the sovereignty of the Great Powers somehow different from that of less equal states? From an institutional perspective, certainly yes. In the economic realm, the Great Powers collectively drive globalization (from which they also disproportionately benefit). This is accomplished individually, through informal gatherings in Davos and G-8 summits, and through

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more formal structures like the WTO. The Great Powers also control decision-making and policymaking through their majority share voting rights at the World Bank and the IMF—which accords them more shares based on their larger economies. In the political/strategic realm, the Great Powers established global intergovernmental institutions whereby, again, they called the shots. This was done by enshrining the strongest of them in permanent decision-making and policymaking bodies on the League of Nations after World War I, and the United Nations after World War II, which also included China. However, neither formulation worked properly, as some Great Powers were invariably absent from each institutional manifestation.

Were Westphalian principles of state sovereignty and equality only meant to apply between and among the Great Powers? Initially yes—their purpose at the 1648 Peace Conference ending the Thirty Years’ War was to stabilize international relations and dampen the possibility of further warfare. Three hundred and fifty years later, the answer to that question was not so apparent. As self-determination movements gained momentum with the post World War I collapse of empires (and in the mid-20th century when colonialism crumbled), Westphalian sovereignty principles were claimed by the new states and not expressly denied by the Great Powers.

The ensuing Cold War allowed two of the Great Powers to become superpowers, relegating the rest to middle tier status. Afterward, Russia fell back to the middle tier—leaving the United States to assume various hegemonic roles (world’s policeman, benevolent economic dictator, chief promoter of democracy). This situation was tolerated throughout the 1990’s,

16 League of Nations Covenant art. 4, paras. 15-17.
17 UN Charter chs. 5-7.
18 The victors from World War I constituted the Council of the League (Britain, France, Italy and Japan), but the United States did not join. Those Great Powers which became fascist eventually withdrew from the League. Germany joined and was admitted to the Council 1926, but withdrew in 1933 after Hitler came to power; Japan withdrew in 1932, deeming the organization to be racist; Italy withdrew in 1937, and the Soviet Union was expelled in 1939 after invading Finland. The victors from World War II constituted the Security Council of the UN (Britain, France, China, the United States and USSR.), but Germany and Japan did not join the UN until 1973 and 1956 respectively, and have never been invited to join the Security Council as permanent members even though they are currently the second and third largest financial contributors to the UN after the United States.
Following the outrages committed in the Balkans and Rwanda, when the European Great Powers agreed with the Superpower that something must be done about sovereignty which effectively shielded states that engaged in genocide. Thus, vague rules of unauthorized "humanitarian intervention" came into play. That a policy circumventing the authority of the Security Council was actually endorsed by the UN's Secretary General brought to the fore certain inherent weaknesses in that body.

But America's insistence on invading Iraq after 9/11 pushed that tolerance to a breaking point. Because unauthorized humanitarian intervention would not legitimize the American invasion of Iraq, a new paradigm had to be devised. The policy that emerged from Dr. Richard Haass' desk, as the State Department's Director of Policy Planning, conveniently met this demand. Although it is unclear whether he meant for it to be applied to Iraq, his plan outlined three instances that would, if realized, constitute a constructive waiver by a state of its sovereignty claim, which traditionally shields states from outside interference. Simultaneously, the right of interference accruing to the acting state would not require prior UN authorization.

The first instance on Haass' list was humanitarian intervention to stop crimes against humanity and genocide. The second instance was fighting terrorism—allowing the attack of terrorists in states that harbor them. The third instance was stopping the spread of weapons of mass destruction—coincidentally the chief justification for invading Iraq. The Great Powers have split on accepting this new paradigm of intervention offered by the United States. Most of the Great Powers except Britain opposed the second and third prongs of this new sovereignty waiver paradigm. Because of res-
tive Muslim and separatist populations within their own borders, Russia and China were never on board with the first (humanitarian intervention). However, Russia has since endorsed the second two (fighting terrorism and non-proliferation).

While a system of international relations based outwardly upon the principle of paternalism is certainly workable, though not desirable, it can only succeed when the "parents" agree broadly on the rules. Here, they do not. When the Great Powers were largely controlled by monarchies or authoritarian regimes, this situation often led to conflict among them. However, with democracy established in most of the modern Great Powers, a similar outcome is not certain and probably less likely.

Part I of this article analyzes the evolutionary nature of sovereignty, from its fusion with the modern political institution of the state at Westphalia through colonialism, self-determination, and the post-colonial experience within the United Nations system. Part II explores the rise and acceptance of the humanitarian intervention doctrine, its durability and legitimacy, and whether it is properly now considered a right to be exercised by intervening states or a duty which must be carried out by them. Part III delves into the theory of involuntary sovereignty waiver, as proffered by Haass, challenges individual aspects of it as well as the whole, discusses Haass' call for a return to a "concert of powers" system, and appraises this theory against the backdrop of an ongoing foreign policy disagreement between realists and neoconservatives. Part IV analyzes the resurrection of pre-UN Charter use of force theory to effectuate sovereignty waiver-based policy, and considers the prospect for reciprocity between other states and the Great Powers.
I. EVOLVING SOVEREIGNTY THEORY

"Sovereignty" is a fluid concept.\textsuperscript{24} It is also an evolutionary concept, expanding and contracting over time, depending to a large extent on the meaning with which powerful states allow it to be infused.\textsuperscript{25} Because of its multiple facets and manifestations, "sovereignty" as such has been a difficult concept to pin down—perhaps revealing the subjective perspectives which must be brought to bear when discussing it.\textsuperscript{26} However, at base, it can be thought of as supreme power exercised over a definable territory.\textsuperscript{27}

Bodin first defines it in the 16th century this way: "Sovereignty is the absolute and perpetual power of a commonwealth, which the Latins call maiestas; the Greeks akra exousia, kurion arche, and kurion politeuma; and the Italians segnoria, . . . while the Hebrews call it tomek shëvet—that is, the highest power of command."\textsuperscript{28} Wheaton refers to it simply as "the supreme power by which any State is governed"\textsuperscript{29} and Woolsey calls it "the uncontrolled exclusive exercise of the powers of the state [that is] supreme within a certain territory, and supreme over its own subjects wherever no other sovereignty has jurisdiction."\textsuperscript{30} The Stanford Encyclopedia of Philosophy defines it thus:

\begin{quote}
The term "sovereignty" has a long and troubled history, and a variety of meanings. In its most common modern usage, sovereignty is the term for the "totality of international rights and duties recognized by international law" as residing in an independent territorial unit—the State. It is not itself a right nor is it a criterion for statehood. It is a somewhat unhelpful, but firmly established, description of statehood; a brief term for the State's attribute of more-or-less plenary competence.
\end{quote}

\textsuperscript{24} JAMES, supra note 7, at 15-17; HIDEAKI SHINODA, RE-EXAMINING SOVEREIGNTY: FROM CLASSICAL THEORY TO THE GLOBAL AGE 1 (2000).
\textsuperscript{25} HENKIN, supra note 4, at 8; JAMES, supra note 7, at 1-9.
\textsuperscript{26} JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 26-27 (1979):

\textsuperscript{27} The Restatement notes that ""Sovereignty" is a term used in many senses and is much abused. . . . [I]t implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there." RESTATEMENT, supra note 11, at § 206 cmt. b.
\textsuperscript{28} JEAN BODIN, ON SOVEREIGNTY 1 (Julian H. Franklin trans., Cambridge Univ. Press 1992) (1583).
\textsuperscript{29} HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 20 (3d ed. 1866).
\textsuperscript{30} THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW § 37 (5th ed. 1883).
Sovereignty, though its meanings have varied across history, also has a core meaning, supreme authority within a territory. It is a modern notion of political authority. Historical variants can be understood along three dimensions—the holder of sovereignty, the absoluteness of sovereignty, and the internal and external dimensions of sovereignty. The state is the political institution in which sovereignty is embodied. An assemblage of states forms a sovereign states system.\footnote{Dan Philpott, \textit{Sovereignty}, in \textsc{STANFORD ENCYCLOPEDIA OF PHILOSOPHY} (Edward N. Zalta ed., 2003), http://plato.stanford.edu/archives/sum2003/entries/sovereignty/.

\footnote{Id.; \textsc{JAMES}, supra note 7, at 13-14.}


\footnote{BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).}}

Historically, the holder of that power would be a person, as in a king, despot, or president, or an entity, as in a parliament or council. Whatever form the holder of sovereignty took, those who fell under that sovereign power within the defined territory regarded the sovereign's power over them as supreme. Typically, a layer of legitimacy derived from a body of law, a constitution, hereditary succession, or even divine mandate, underlie both this presumption of supremacy and the acceptance of it by those who were governed. The outward vessel within which this supreme sovereignty was contained was the state—defined territorially by fixed borders with other states or by natural features such as oceans.\footnote{Traditional sovereignty theory holds that within those borders, the state is master of its own affairs, exercising sovereign power through whichever model it can successfully govern, or as Black's notes, sovereignty means in part "the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation."\footnote{Phillip R. Trimble, \textit{International Law, World Order, and Critical Legal Studies}, 42 \textsc{STAN. L. REV.} 811, 833-34 (1990).}}

The simplest model to use, of course, is the model of the unitary state, where unchallenged power is collected in the central government and only dispersed to the provinces, if at all, through a rigidly enforced bureaucracy. A more complicated variation on this theme comes into play with democracy. Either of these can be further complicated with the element of federation, dispersing varying amounts of power vertically to sub-sovereign entities such as states, counties, or provinces. The American system contains the added wrinkle of dispersed sovereignty even at the supreme level hori-
zontally under our separation of powers doctrine, a concept not unknown in history. But to trace the idea of sovereignty, as embedded in that abstract political concept known as the “state,” one must inevitably turn to war-torn northern Germany in the early- to mid-17th century, as the Holy Roman Empire was about to be redefined in such a way that its constituent parts would become greater than the whole, laying the groundwork for its final collapse 150 years later as Napoleon marched through on his way to Russia.

32 United States Const. arts. I, II, III.
36 Grotius recognized the potential for division of sovereignty:

[W]hile sovereignty is a unity, in itself indivisible, . . . and including the highest degree of authority, which is “not accountable to any one”; nevertheless a division is sometimes made into parts designated as “potential” (partes potentials) and “subjective” (partes subjectivas). Thus, while the sovereignty of Rome was a unity, yet it often happened that one emperor administered the East, another the West, or even three emperors governed the whole empire in three divisions. . . . An ancient example of divided sovereignty is given by Plato in the third book of Laws. Since the Heraclids had founded Argos, Messene, and Sparta, the kings of these states were bound to govern within the provisions of the laws which had been laid down; so long as they should do so, the peoples were bound to leave the royal power in the hands of the kings themselves and their successors, and not to allow any one to take it away from them. To this end, then, not only did the peoples bind themselves to their kings, and the kings to their peoples, but also the kings bound themselves to one another, and peoples to one another. Further, the kings bound themselves to neighboring peoples, and the peoples to neighboring kings, and they promised to render aid, each to the other.

Grotius, supra note 9, at 123-24. The Romans also faced the challenge of wielding sovereignty within a system of shared power. During the early years of the Republic this struggle centered on division of power within the patrician class, between the Senate and Consuls. Ultimately, the Consuls came to exercise Rome’s sovereignty, but checks on their power kept them from wielding it in dramatic fashion. First, there were two Consuls who served simultaneously; second, each held a veto power to cancel actions by the other; third, each served one-year terms, after which they returned to the Senate (which meant they needed to remain on good terms with that body politically). Later, the struggle concerned division of power between the patrician class and the plebeians: the Consuls and Proconsuls on one hand, the Tribunes (representing the people) on the other. Such struggles were swept away, however, with the demise of Republican Rome and the rise of Imperial Rome and the age of Caesars. Bodin, supra note 28, at 2-5; Grotius, supra note 9, at 112, 129-30; see generally Anthony Everitt, Cicero: The Life and Times of Rome’s Greatest Politician (2003).
A. The Meaning of Westphalia

The road to Westphalia was a bloody one, marked by internecine warfare in Europe driven by claims and cross-claims to royalty, religious fealty, lands, and loyalty. The period leading up to the Thirty Years’ War was one characterized by a toxic combination of resurgent Protestantism, reassertion of Catholic authority, religious intolerance and state-sponsored prohibitions on free exercise of religion by the monarch’s subjects, if such religion was other than that of the ruler. Although these conditions existed in varying degrees throughout continental Europe, they were most pronounced within the religiously divided Holy Roman Empire, which was also the geopolitical center of Europe. It took roughly a century for this simmering violence eventually to explode into open warfare (from Martin Luther’s initiation of the Reformation in 1517 to the outbreak of hostilities in 1618). France, Spain, the Netherlands, and Sweden were among the foreign powers jumping into the fray and occasionally seizing territory for themselves. Ensuing battles engulfed the continent for a generation.\(^{37}\)

Prior to the Thirty Years’ War, European “statehood,” such as it was, had been characterized by medieval notions of sovereignty derived from religious authority as an extension of the Church. The monarchical “state,” along with the sovereignty that accompanied it, devolved along formal hereditary lines of descent. In his 1576 treatise République, Bodin took this to mean literally that the sovereign was above the law since secular sovereign power was a direct extension of divine power (the monarch was God’s lieutenant on earth and was above positive law because he acted in accordance with higher law).\(^{38}\) Moreover, Bodin posited that for an ordered society to function well, there must be a gravitational center of power that is absolute

\(^{37}\) See generally James Bryce, History of the Holy Roman Empire (photo. reprint 1978) (1904); Geoffrey Parker, The Thirty Years War (1997).

\(^{38}\) Bodin, supra note 28, at 7-15. Bodin’s reflection on the feudal state of affairs in 16th-century Europe is evident in the following analogy on this point:

For it is the law of God and of nature that we must obey the edicts and ordinances of him to whom God has given power over us, unless his edicts are directly contrary to the law of God, who is above all princes. Just as the subvassal owes an oath of fealty to his lord against all others, excepting his sovereign prince, so the subject owes obedience to his sovereign prince against all others, reserving the majesty of God, who is the absolute lord of all earthly princes.

Id. at 34-35. See also Shinoda, supra note 24, at 13.
and unchallengeable—both of which, of course, are characteristics of divine power.\(^{39}\)

Brierly identifies twin circumstances which had kept modern states from evolving during the Middle Ages: the dominance of feudalism and the Church. Those towering influences buckled at Westphalia, allowing the state to emerge.\(^{40}\) The peace settlement reached in 1648 was remarkable in that it defined a new era in state-to-state relations in Europe.\(^{41}\) Gross counts “individualism of territorial and heterogeneous states, balance of power, equality of states, and toleration” as among the legacies of the settlement that ended the Thirty Years’ War in subsequent treaties, known collectively as the Peace of Westphalia.\(^{42}\) And yet, a treaty-based right of intervention (as opposed to a generalized customary right that exists today) on the part of Sweden and France to enforce the peace, was another unique component,\(^{43}\)

\(^{39}\) Julian H. Franklin, Jean Bodin and the Rise of Absolutist Theory 23 (1973) (noting that Bodin’s absolutism was a later development that did not appear in his earlier works, such as his 1566 publication of *Methodus ad facilem historiarum cognitionem*).


[Feudal organization of society was a substitute for its organization in a state, and a perfectly feudal condition of society would be not merely a weak state, but a negation of the state altogether. . . . The other influence which retarded the growth of states in the Middle Ages was the Church. . . . Always government authority was divided; the Church claimed and received the obedience of the subjects of the state, and its claims were not always limited to the purely spiritual sphere. . . . But just as the state was gradually consolidating its power against the fissiparous tendencies of feudalism within, so it was more and more resisting the division of authority imposed upon it by the Church from without; and this latter process culminated in the Reformation, which in one of its more important aspects was a rebellion of the states against the Church. It declared the determination of the civil authority to be supreme in its own territory; and it resulted in the decisive defeat of the last rival to the emerging unified national state. . . . The Peace of Westphalia . . . marked the acceptance of the new political order in Europe.

\(^{41}\) Although two cities had to be used in what is now the German state of North Rhine-Westphalia because the Catholics and Protestants refused to meet one another (the Catholics were in Münster, the Protestants in Osnabrück), the outcome of the negotiations granted independence to the Netherlands from Spain, assured the recognition of Switzerland as an independent state, broke the power of the Holy Roman Emperor in favor of the German princes, legally recognized the Calvinists, and essentially recognized France and Sweden as new powers on the continent. \(^{42}\) Id.


\(^{43}\) Id. at 24 (citing Article CXXIII, Treaty of Münster, in 1 A General Collection of Treaties 36 (1710); David Jayne Hill, A History of Diplomacy in the International
indicating the acceptance of some state-centric external limits on sovereignty even within the framework of the foundation of the modern system.

The impact of Westphalia also became the basis for the growth of public international law. Westphalia created the political equilibrium that was "a necessary condition for the existence of the Law of Nations," and it allowed international law to be secularized by de-coupling states and sovereigns from religious backing so that natural law theories could be transformed.

Structurally, Westphalia began the process of pulling the concept of sovereignty out of the person of the ruler. Prior to Westphalia, kings could, and often did, claim the legitimacy for their rule as divine right. Because the European states of the 17th century were monarchies, the king was the supreme sovereign within his realm. Even with the influence of the Church on the wane leading up to the Thirty Years' War, kings filled the void with claims to divine right of governance, in some cases setting themselves up as substitute Popes. This was most evident in England, where Henry VIII had successfully jettisoned Papal influence two hundred years earlier and installed the Protestant Church of England with the king as head of the church.

Once Westphalia took the religion out of the rule, sovereignty was essentially secularized. Writing during the peace negotiations at Westphalia, Hobbes developed his famous social contract theory in *Leviathan* (1651) to explain the autonomous self-sufficient commonwealth (state) which no longer required divine authority for legitimacy. Although he acknowledged God's continued relevance, Hobbes severed the dependency relationship between what he termed the immortal God (divine) and the mortal God (state), describing the mortal god as an "artificial man" constructed from the collec-

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44 *Id.* at 27 (citing 1 OPPENHEIM'S INTERNATIONAL LAW 99 (Arnold McNair ed., 4th ed. 1928)). Winfield argues that Grotius adapted the religiously-based law of nature to "fill the vacuum" created by the withdrawal of Papal "supreme authority" while others credit him with merely beginning the process of transferring "the accent" from natural law to "that branch of human law which 'has received its obligatory force from the will of nations.'" *Id.* at 35 (quoting HUGO GROTIIUS, DE JURE BELLI AC PACIS, in 2 CLASSICS OF INTERNATIONAL LAW 44 (James Scott Brown ed., Francis W. Kelsey trans., 1925)). However, Gross observes that the subsequent eclipse of Grotius by Vattel, who emphasized the consensual nature of international law "between" equally sovereign states over the concept of international law as "governing" states from above, meant that "[i]nstead of creating a society of states, the Peace of Westphalia, . . . merely ushers in the era of sovereign absolutist states which recognized no superior authority" who were "jealous of their territorial sovereignty to the point where the idea of an international community became an almost empty phrase. . . ." *Id.* at 36-39.

tivity of men adhering to the same social contract within which "sovereignty is an artificial soul, as giving life and motion to the whole body."\textsuperscript{46}

Sovereignty's secularization had little drastic immediate effect, as many kings continued to rule their states with self-described divine inspiration, but it did make room for republics on the world stage and gave them the right to deal with other states on an equal basis.\textsuperscript{47} The ripple effect of this development cannot be understated. Over time, republics became a more common form of government and, through democracies, began to lodge the sovereignty of the state in the people.\textsuperscript{48}

Most scholars generally fix the Peace of Westphalia as the point of marriage between sovereignty and state, simultaneously birthing the modern system of states in international law.\textsuperscript{49} As Henkin notes, "The move from prince-nations to states, from a club of princes with club rules to a developed political system with international law rules, is commonly dated from the Peace of Westphalia (1648) and the emergence of the secular state."\textsuperscript{50}

Thus, after Westphalia, a generalized "sovereignty package" can be said to have emerged, that each state enjoyed and which operated to form an in-

\textsuperscript{46} Id. at 9.
\textsuperscript{47} Gross, supra note 42, at 26.
\textsuperscript{48} HENKIN, supra note 4, at 9. Franck, among others, believes that popular sovereignty, the right to democratic self-government, has in fact become an emerging international norm. Thomas M. Franck, The Emerging Right to Democratic Self-Governance, 86 AM. J. INT'L L. 46 (1992). This notion was abhorrent to Grotius, who stated "the opinion of those must be rejected who hold that everywhere and without exception sovereignty resides in the people . . . How many evils this opinion . . . can even now give rise to if it sinks deep into men's minds, no wise person fails to see." GROTIUS, supra note 9, at 103.
\textsuperscript{49} See, e.g., CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 7 (P.E. Corbett trans., 1968) ("The treaties of 1648 confirmed the plural and secular system of a society of independent states, replacing thenceforth the providential and hierarchic order of the Middle Ages."); MALCOLM M. SHAW, INTERNATIONAL LAW 25 (5th ed. 2003); MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW 2 (2d. ed. 2001); Gross, supra note 42, at 28-29 (citing Sir Paul Vinogradoff, Historical Types of International Law, in 1 BIBLIOTHECA VISSERIANA 45 (1923)) ("[Westphalia] marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority.").
\textsuperscript{50} HENKIN, supra note 4, at 9. Although many acknowledge the oversimplification of this assertion (the treaties nowhere specifically mentioned creation of such a system) it has become an agreed-upon handy reference tool for purposes of discussing the constituent pieces of logic that together create what we today call the Westphalian system of states. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 2 (2001). Cf. Stephen Krasner, Pitfalls of International Idealism, 8 UCLA J. INT'L L. & FOREIGN AFF. 61, 61-62 (2003) (arguing that the principle of non-intervention came much later).
terconnecting network of collectively shared expectations and presumptions. Notions of state sovereignty commonly include the following:

- Equality of states within the international community;
- General prohibition on foreign interference with internal affairs;
- Territorial integrity of the nation-state;
- Inviolability of international borders;
- Sovereign immunity of the state engaged in state action.\(^{51}\);
- Sovereign immunity of the head of state or government\(^{52}\)

The first of these, equality of states, is the linchpin to the rest, for if states are not bound to respect one another, then the corollary aspects of independence are not guaranteed. Westphalia was the formal, though not necessarily explicit, recognition of this concept: "Westphalia symbolizes, for international law, a transition from strict hierarchy to equality or from a vertical ordering, with the Pope and Emperor at the pinnacle, to a horizontal order composed of independent, freely negotiating states."\(^{53}\) Philpott describes the significance of Westphalia, including its assertion of sovereign state equality, in sweeping terms:

What arose at Westphalia was foundational - a new "constitution of international relations", defining the basic legitimate political entities and their fundamental prerogatives. The sovereign state which it prescribed was Janus-faced, its government staring both inward at its subjects, over which it had supreme authority, and outward beyond

\(^{51}\) State immunity is not a critical component of this paper's analysis. For a discussion of state immunity, see BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 595–603 (3d ed. 1999).

\(^{52}\) Head of state immunity is also not discussed in depth here. For a discussion of head of state immunity, see generally Dapo Akande, International Law Immunities and the International Criminal Court, 98 AM. J. INT’L L. 407 (2004).

the state's borders, where no rival authority was entitled to force a change in the governance of its inhabitants.54

Another dynamic to consider is what may be termed a sliding scale of sovereign equality. Writing in the mid-19th century, Wheaton, while confirming state equality doctrine, linked the degree of sovereignty a state has to the degree of equality it enjoys on the international stage.55 Citing the examples of the Free City of Cracow (sic.), the United States of the Ionian Islands, and the Principalities of Moldava, Wallachia, Servia (sic.), and Monaco,56 Wheaton asserts:

All sovereign States are equal in the eye of international law, whatever may be their relative power. The sovereignty of a particular State is not impaired by its occasional obedience to the commands of other States, or even the habitual influence exercised by them over its councils. It is only when this obedience, or this influence, assumes the form of express compact, that the sovereignty of the State, inferior in power, is legally affected by its connection with the other. Treaties of equal alliance, freely contracted between independent States, do not impair their sovereignty. Treaties of unequal alliance, guarantee, mediation, and protection, may have the effect of limiting and qualifying the sovereignty according to the stipulations of the treaties.57

Although international law scholars such as Wheaton, Dickinson, Wilson, and even Grotius describe the internal/external aspect which Philpott correctly references above,58 and Dickinson goes on to divide the equality of states doctrine into two manifestations (equal protection before the law and equality of capacity for rights),59 it is the external aspect of sovereignty and the equal protection prong with which "sovereignty waiver" is concerned.60

55 WHEATON, supra note 29, at § 33.
56 Id. at §§ 34-36.
57 Id. at § 33. Accord WOOLSEY, supra note 30, at § 37.
58 EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW 3-4 (1920); GEORGE GRAFTON WILSON, INTERNATIONAL LAW § 8 (1910); GROTIUS, supra note 9; WHEATON, supra note 29, at § 20.
59 DICKINSON, supra note 58.
The external legal equality of states doctrine is the foundational theory effectuated by policies ensuring states' territorial integrity and inviolability of borders. Although prior to the UN Charter, the Great Powers rode roughshod over both these concepts with regard to smaller states in some instances, and ignored them when assembling their colonies (which were not regarded as states to begin with), territorial integrity and border inviolability were regularly respected on a reciprocal basis—especially in Europe. Before the Second World War, even Hitler went out of his way to gain the consent, coerced as it was, of Austria before the Anschluss and of Britain and France before annexing the Sudetenland from Czechoslovakia. Once the war was underway, however, such respect was not accorded to the states his armies invaded.

Supreme Court Justice Robert Jackson specifically recognized the parameters of these doctrines in 1945 when he was heading the American

[Equality] indicates commonly either of two important legal principles. In the first place, it may mean what is perhaps best described as the equal protection of the law or as equality before the law. International persons (states) are equal before the law when they are equally protected in the enjoyment of their rights and equally compelled to fulfill their obligations. This would seem to have been the significance of the remark, made by the first French delegate at the Second Hague Conference of 1907, that “each nation is a sovereign person, equal to others in moral dignity, and having, whether small or great, weak or powerful, an equal claim to respect for its rights, an equal obligation in the performance of its duties.” . . . In the second place, the word “equality” may be used to mean an equal capacity for rights. This is commonly described in the law of nations as equality of rights and obligations, or more often simply as equality of rights. . . The equality of states in this sense means, not that all have the same rights, but that all are equally capable of acquiring rights, entering into transactions, and performing acts.

Id. Dickinson then goes on to postulate whether varying degrees of status exist in either form of equality and draws comparisons with municipal law to demonstrate that the development of these two aspects of equality appear to be artificially reversed with respect to international law. Id. at 3-5. Modern scholars, such as Simpson, have offered even more detailed taxonomies of equality: “Sovereign equality as a background principle of international law contains three separate ideas. I call these formal equality, legislative equality and existential equality. [W]hile states are formally equal within the system, their legislative and existential equality has traditionally been compromised by the presence of, respectively, hegemony and antipluralism.” SIMPSON, supra note 53, at 6-7.

For a discussion of the tension between naturalism and positivism in theories of state equality, see SIMPSON, supra note 53, at 31-33.

delegation to establish an international military tribunal to try Germany's leading Nazi figures:

It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.  

The principle of non-intervention has been affirmed time and again in numerous multilateral organizational treaties such as those founding the Organization of American States (OAS), the Organization of African Unity (OAU), the Arab League, and of course the United Nations. Indeed, Wilson's 14th Point, calling for establishment of the League of Nations rested on this very premise: "A general association of nations must be formed under specific covenants for the purposes of affording mutual guarantees of political independence and territorial integrity to great and small

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62 Minutes of Conference Session of July 23, 1945, in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 331 (1949).

63 Organization of American States Charter art. 21: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."

64 Organization of African Union Charter art. 3: "The Member States . . . solemnly affirm and declare their adherence to the following principles: The sovereign equality of all Member States. Non-interference in the internal affairs of States. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence."

65 League of Arab States Charter arts. 5, 8: "Each member-state shall respect the systems of government established in the other member-states and regard them as exclusive concerns of those states."

66 UN Charter arts. 4, 7.
states alike." The principle of non-intervention likewise established itself within re-affirming resolutions that occasionally issue from these organizations such as UN General Assembly resolutions 2131 (1965) and 2625 (1970). The Monroe Doctrine, promulgated by the United States (a young prospective Great Power in the 1820’s) limiting further colonization or interference by European Powers in the Western Hemisphere, was yet another articulation of the principle.

More recently, the International Court of Justice has re-endorsed non-intervention as an indispensable component of international legal order. In its 2005 Congo v. Uganda opinion, concerning Uganda’s invasion of the Democratic Republic of Congo (DRC) in support of anti-Kabila Congolese rebels and its occupation of the Ituri region, the Court cited with approval its previous decision in Nicaragua “[making] it clear that the principle of non-intervention prohibits a State ‘to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State’” and held that Uganda’s actions:

[V]iolated the sovereignty and also the territorial integrity of the DRC. Uganda’s actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.

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68 G.A. Res. 2131 (XX) UN GAOR, 20th Sess. (1965): “No State has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State.”


70 For an in-depth background discussion of the Monroe Doctrine’s genesis, first articulation by Secretary of State John Quincy Adams, second articulation by President Monroe, rejection by Britain and Russia, and interpretation by other states in the Western Hemisphere, see Wheaton, supra note 29, at § 68 n.36. Of course, the Monroe Doctrine ironically did not keep the United States itself from interfering in the affairs of Latin American countries.

While the principle has long been considered a bedrock rule of international law, today, *just cause* has emerged as an excuse for Great Powers to cross theoretically unbreachable frontiers either individually or collectively. Such incursions range from stealthy special operations missions to broad-based intervention. The object may be to capture dangerous and despotic sovereigns, as in the case of Manuel Noriega in Panama or Saddam Hussein in Iraq (the former requiring a special operation; the latter, a broad-based invasion followed by occupation). In other cases, the object may be to stop tragedy, as with the 1992–93 famine in Somalia, or to stop implementation of genocidal government policy, as with ethnic cleansing in Serbia.

As in all justifications for state intervention, *just cause* is a result of a valuation calculation. Something must outweigh the countervailing sovereignty interest of the object state and stability interest of the state system to justify another state’s intrusion. But in some cases, the countervailing interest can actually become the *just cause* rationale for intervention, as in the case of NATO’s bombing of Serbia to stop ethnic cleansing in Bosnia and Kosovo—NATO’s credibility and Europe’s collective stability were arguably at stake. Nevertheless, in the above examples of United States intervention, America gave more weight to protecting its national security interests (capturing Noriega and Hussein) than to respecting international borders. With regard to the interventions in Somalia and Serbia, *just cause* derived from giving more weight to avoiding tragedy than to respecting frontiers.

UN Secretary-General Kofi Annan, while not endorsing the former, has blessed the latter types of frontier breach and termed them “humanitarian interventions.” He cites the unchecked genocide in Rwanda as an example of what can happen when there is no humanitarian intervention and suggests that such interventions are proper even without prior UN Security Council approval. The African Union, successor to the OAU, even recognizes the possibility of humanitarian intervention in its constitutive act, which the previous organization’s charter did not allow. And Henkin admits the fundamental change in circumstances with regard to sovereignty that recognition of humanitarian intervention has wrought: “While impermeability is still a

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73 A.U. CONSTITUTIVE ACT art. 4: “The Union shall function in accordance with the following principles: (a) sovereign equality and interdependence among Member States of the Union; (b) respect of borders existing on achievement of independence; . . . (f) prohibition of the use of force or threat to use force among Member States of the Union; (g) non-interference by any Member State in the internal affairs of another; (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity. . . .”
general characteristic of statehood, it is no longer absolute . . . . By state consent, by the growth of systematic 'customary' (non-conventional) norms, international law developed a comprehensive law of individual human rights holding states responsible for how they treated persons subject to their jurisdiction.  

American presidents from George H.W. Bush onward have readily engaged in both types of intervention (narrowly defined special operations and broad-based interventions), even though humanitarian intervention is the only widely accepted form of just cause. Dr. Haass' theory of involuntary sovereignty waiver seeks to stretch the acceptance of just cause for intervention in humanitarian disasters to that for intervention in cases of terrorism support and WMD proliferation. Given the debacle the United States currently faces in Iraq, however, it is unlikely that this expansion will be widely accepted.

Nevertheless, to enjoy any of the aspects of the Westphalian sovereignty package, an entity must first be considered a state. The Restatement describes the commonly accepted elements of statehood this way: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Recognition by other states was once considered an element of statehood, but competing theories on criteria for recognition, the trebling of the number of states during the 20th century, and Cold War politics have eroded this criterion. While international recognition is no longer widely considered to be a required element of statehood, in practice the ability to exercise the benefits bestowed on sovereign states contained in the Westphalian sovereignty package requires respect of those doctrines and application of them to the state in question by other states in the interstate system.

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74 HENKIN, supra note 4, at 12.
75 See, e.g., Dana Milbank, Piling on the Defenders of U.S. Policy in Iraq, WASH. POST, Aug. 24, 2005, at A3 (chronicling the quickly eroding support for the president's Iraq policy as casualties and costs continue to mount); Richard A. Clarke, Battlefields Fighting Terrorists in Iraq Did Not, and Will Not, Immunize Us from Attacks at Home, N.Y. TIMES (Magazine), July 17, 2005, at 18 (noting that Iraq has become a terrorist training camp with live US and Iraqi military targets and live ammunition just as Afghanistan was 20 years ago with live Soviet targets).
76 Humanitarian intervention is discussed in Parts II and III, infra.
77 RESTATEMENT, supra note 11, at § 201 cmt. a.
78 HENKIN, supra note 4, at 13-15.
79 Id. at 15-16. The criteria for recognition will typically vary with the recognizing states. For example, at the end of the Cold War, as the Soviet Union was splintering into new repub-
During the period of expanding colonization by the European Powers, the acquired territories in the Americas, Africa, and Asia were not considered to be states and were not treated as such, thus recognition was not an issue. The colonies were collections of subject peoples and territories existing under the extended sovereignty of whichever of the European states claimed them. However, there was movement from the early days of regarding such colonial possessions as having no sovereignty whatsoever, to the later period where guardianship principles came into play much more forcefully, implying a native sovereignty held in trust by the colonial power.

B. Colonialism and Sovereignty

As the term colonial "possession" implies, the colonies of the European powers were not considered to be sovereign, even though some of them, or parts of them, may have exercised considerable internal autonomy, such as Britain's indirect rule of its Indian Raj in some parts through local maharajahs. Inherent in the idea of colonialism is the relationship of a superior to an inferior. The underlying basis for this notion rested in a variety of justifications, including racial and religious inferiority of the natives, economic expansion opportunities, as well as geostrategic interests vis-à-vis other Great Powers. The twin aims of colonization were usually economic and social or civilizational, involving the Christianizing and civilizing of native populations. The British, French, Dutch, Danish, Russian, Portuguese, and Spanish colonizers of the Americas during the 16th to 18th centuries discovered land that was already occupied. However, since the occupiers were not Christian peoples grouped into political entities known as states, the natives...
were considered incapable of expressing sovereignty on par with the European powers. 82

Consequently, when those powers took hold of the Western Hemisphere, they did not consider themselves to be impinging on the sovereignty of other states. Instead, they established rules whereby the sovereignty of the other European states colonizing in the area would be protected from intrusion by fellow European states. John Marshall notes in Johnston v. McIntosh, the landmark Indian title case, that European powers respected each other's sovereignty reciprocally so as to avoid conflicting claims, and used the doctrine of discovery to vest title in the European state whose subject made the discovery to effectuate this system. 83 The Indians, of course, having only a right of occupancy, held no title to the land, and, thus deprived of territoriality, were not sovereign states. However, they remained sovereign in the governance of themselves internally, and so were treated as sovereign entities, especially by the English (and later the Americans) for purposes of treaty-making to relinquish occupancy of land to the European states. 84

83 Johnson v. McIntosh, 21 U.S. 543, 572-74 (1823):

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence . . . . But, as they [European powers] were all in pursuit of nearly the same object [“to appropriate as much of (this immense continent) to themselves” as possible], it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it . . . . The rights thus acquired being exclusive, no other power could interpose between them.

Not all scholars of the colonizing period adhered to this view, however. Franciscus de Victoria, a professor at the University of Salamanca, denied the utility of the discovery doctrine for divesting natives in the Americas of their lands. In his 1557 work, *De Indis et de Jure Belli Relictiones*, he noted that "the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view." He led a group of like-minded Spanish scholars in this opinion and Lindley has classified Victoria in the first of his three categories of publicists having divergent views on the sovereignty of what he terms "infidels" in his 1926 treatise on legal justifications for colonial expansion, *The Acquisition and Government of Backward Territory in International Law*:

Those who regarded backward races as possessing a title to the sovereignty over the territory they inhabited which was good as against more highly civilized peoples;

Those who admitted such a title in the natives, but only with restrictions or under conditions;

Those who did not consider that the natives possessed rights of such a nature as to be a bar to the assumption of sovereignty over them by more highly civilized peoples.

For those denying sovereignty inherent in native peoples, this principle turned on the civilized/non-civilized dichotomy. Civilized states had sovereignty, non-civilized states did not. It followed that when non-civilized states were brought into a colonial empire, the question of respecting the non-civilized states' sovereignty did not arise, because they were not legally

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85 *Franciscus de Victoria, De Indis et de Jure Belli Relictiones* 128 (J. Bate trans., 1917) (1557).

86 *Lindley, supra* note 82, at 11. Others represented in the first category include Gentilis, Grotius, Günther, Klüber, Blackstone, and Woolsey. Those adhering to the second category, with their varying conditions, include Vattel (acquiring state must be in need of more territory), Martens (excepts districts held only by nomads), and Pinheiro-Ferreira and Bluntschli (the encroachment is valid so long as not resisted by force by the natives). In the third category, Lindley includes Westlake, Hall, Oppenheim, Lawrence, Field, and Heimburger (who denies that the treaties effectuated with such peoples are really in fact treaties as that term is used amongst civilized states). *Id.* at 12-19.

87 *Anghie, supra* note 81, at 56-65.
considered to have sovereignty worth respecting; the sovereignty they did have derived from their civilized colonizer.\textsuperscript{88}

As colonization progressed through the Thirty Years War and into the post-Westphalian era, alternative theories began to emerge with regard to the sovereign status of native peoples, leading in the 19th century to recognition of basic trusteeship principles.\textsuperscript{89} The guardianship philosophy was officially endorsed by the Great Powers at the Berlin Conference of 1885, which sought the opening of Africa’s interior to European commerce and civilization.\textsuperscript{90} The trusteeship ideology found expression in the League of Nations mandate system which sprung up after the defeat of Germany, Austria-Hungary, and the Ottoman Empire following the First World War to handle the administration of colonies and other territories stripped away from the vanquished Great Powers, while not specifically applying to existing colonies of the victorious Great Powers. Article 22 of the Covenant of the League states:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.\textsuperscript{91}

Thus, the League established a system of mandates, pairing up territories that were on the road to independence with “mandatory powers” such as France, Britain, Japan, and even the United States. Nor were mandatory arrangements identical in nature: “The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.”\textsuperscript{92} Consequently, while some territories of the former Ottoman Empire in the Near East could be provisionally recognized as independent, other territories such as those in central Africa were more closely controlled and

\textsuperscript{88} Id. at 82-87.
\textsuperscript{89} LINDELEY, supra note 82, at 329-35.
\textsuperscript{90} Id. at 332-33.
\textsuperscript{91} League of Nations Covenant art. 22, para. 1.
\textsuperscript{92} Id.
militarized. Still other territories with sparse populations, such as in southwest Africa and the south Pacific, were administered directly under the laws of the mandatory power, subject to safeguarding the interests of indigenous populations.\textsuperscript{93}

Moving into the 20th century, the spreading notion of democracy, and the accompanying notion that sovereignty inhered in the people, together with a general decline in racist thinking (though not enough to be sure), meant that guardianship principles could be interpreted not primarily as the superior watching out for the inferior, but instead the strong watching out for the weak. This shift, in turn, provided room for the notion that people in the colonies, as people, had sovereignty too—even though their colonial masters were acting as temporary guardians, in effect holding it for them until they could exercise it on their own.

Thus, the entire colonial paradigm eventually moved from one of the Great Powers extending their metropolitan sovereignty over their colonial possessions to one of the Great Powers exercising the sovereignty of their colonial territories on behalf of those people in the territories.\textsuperscript{94} This set the stage for a radical new line of thinking which would be introduced after the First World War and which would hasten the end of the European empires as such and lead to a massive realignment of states on the world stage.

C. Self-Determination and Self-Awareness

From 1918 to 1920, as new states began to form from the collapsed empires of Austria-Hungary, Germany, and the Ottomans, President Wilson propounded the view that national peoples should be able to self-determine their own state of affairs as far as possible.\textsuperscript{95} The new Soviet leader, Vladimir Lenin, also propounded a philosophy of self-determination, but one

\textsuperscript{93} Id. at paras. 2-9.
\textsuperscript{94} This change in thought is reflected in such mundane documents as an 1899 legal opinion from the Crown attorneys as to feasibility of land ownership in Kenya: “Sovereignty, if it can be said to exist at all in regard to territory, is held by small chiefs, or elders, who are practically savages, and who exercise a precarious rule over tribes which have not as yet developed either an administrative or a legislative system, even the idea of tribal ownership in land is unknown.” G. Nasiiku Taraya, The Legal Perspectives of the Maasai Culture, Customs, and Traditions, 21 ARIZ. J. INT’L & COMP. L. 183, 210 (2004).
based on violent secession to liberate people from bourgeois governments in furtherance of socialist realization. Conversely, Wilson's view, which held sway at the Paris Peace Conference in 1919, was one based on the expressed will of the people through democratic processes (ascertaining the consent of the governed to the form of their state and government), thereby adding a domestic democratic element to the process. Wilson's Secretary of State, Robert Lansing, however, had clear misgivings about putting such grand theory into practice:

The more I think about the President's declaration as to the right of "self-determination," the more convinced I am of the danger of . . . . such ideas . . . . What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder, and rebellion? Will not the Mohammedans of Syria and Palestine and possibly Morocco and Tripoli rely on it? How can it be harmonized with Zionism, to which the President is practically committed? The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives . . . . What a calamity that phrase was ever uttered! What misery it will cause!

Self-determination also meant self-awareness. This malleable principle eventually "provided colonial peoples with the foundation for their claims to freedom from foreign rule." The colonies did not fare well during the First World War. Their men were sent off to fight and die in Europe, their resources were commandeered to the motherland or fatherland's war effort, and they received little in return. Moreover, as they watched new countries emerge from the ashes of the defeated Great Powers, their fate remained unchanged—no states, no sovereignty, continued servitude. Yet, they heard the call of self-determination and began to apply that terminology to themselves; perhaps no one more so than Mahatma Gandhi, a young lawyer in

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97 See generally MARGARET MACMILLAN, PARIS 1919 (2002).
98 ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 21-22 (1995)).
South Africa who began agitating for Indian independence. This self-realization, or self-awareness, that stemmed from the philosophy of self-determination was the beginning of a sometimes bloody end to the colonial system. Robert Lansing's fears were realized.

After the Second World War, and more unrequited extraction of men, material, and wealth from the colonies by the European Powers, resentment grew to a boiling point. Following the war, it became apparent that the militarily and economically depleted European Powers could no longer resist the call for decolonization in any real sense. Consequently, Britain, France, Belgium, Holland, and Portugal began the long, cumbersome, and poorly planned process of disengagement. This is the point at which self-determination returned to its original roots—that of colonial separation. After all, the notion of self-determination was originally linked to the notion of colonial secession, first borne out successfully during the separation of the American colonies from the British Empire. The principle's formal articulation by Wilson a century and a half later was not meant to operate in the dynamic of colonial separation, but rather to justify democratizing the process of constructing new states.

The history of self-determination is also the history of Great Powers attempting to put Wilson's genie back in the bottle, or at least limit its effects. After the First World War, the principle was limited to European peoples. During the Second World War, Roosevelt and Churchill tried to extend this containment by agreeing in the Atlantic Charter to limit the principle to those "nations of Europe under the Nazi yoke," not the colonies. When this effort failed and decolonization spread inexorably, the Great Powers sought again to limit the principle's use as available only to former colonies emerging as new states, not a "right," as some had asserted, that was available to people within existing states. In fact, the emergence of Bangladesh from Pakistani rule was the only instance during the Cold War that the inter-

102 HALPERIN ET AL., supra note 100, at 16.
103 HANNUM, supra note 12, at 30.
105 HENKIN, supra note 4, at 198; Hurst Hannum, Rethinking Self-Determination, 34 VA. J. INT'L L. 1, 12 (1993).
national community recognized a "full-fledged secessionist claim" based on the right to self-determination.  

But to say that decolonization was the end of self-determination would be inaccurate. Self-determination as a political impetus survives very much intact, and is used in exactly the way the Great Powers sought to avoid. Today, secessionist groups within many multiethnic states are directly challenging the sovereign power of their national governments under the banner of self-determination. They clamour for either increased autonomy or outright independence. Both violent and non-violent examples abound, from Chechens in Russia to Tibetans and Muslims in China, Corsicans in France, Aceh in Indonesia, and Basques and Catalans in Spain. Indigenous peoples have also joined the chorus for self-determination in countries including Mexico, Canada, Brazil, and even the United States. Perhaps the most insistent group currently asserting self-determination principles are the Kurds of northern Iraq, Iran, Syria, and southern Turkey.

Although they uniformly deny the asserted right to self-determination as justification for secession, national governments have responded in a variety of ways. In some cases, brutal military suppression has tamped down such movements; in other cases, a power-sharing offer has sufficed. The most successful efforts are those that seek the political accommodation necessary for continued peaceful cohabitation, such as Canada’s creation of a separate province for native peoples and Britain’s devolution of limited legislative power to new regional parliaments in Scotland and Wales. Of course, complete separation is often the only solution after military repression has failed—as was the case with East Timor breaking off from Indonesia in 1999.

Thus, self-determination has served remarkably well as the conceptual vehicle delivering sovereignty to the people. From the 19th century recognition on the part of the Great Powers that a sovereignty element did in fact exist in the colonies, to the 20th century realization of the colonies that this was undeniable, self-determination was successfully pulled into service as

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106 HALPERIN ET AL., supra note 100, at 13.
107 Id. at 2.
108 Id. at 123-60. See also Dean E. Murphy, Bill Giving Native Hawaiians Sovereignty Is Too Much for Some, Too Little for Others, N.Y. TIMES, July 17, 2005, at A14.
110 HENKIN, supra note 4, at 198.
the handmaid of sovereignty realization even though that was not the original intention for its use. Nevertheless, so successful was the principle at driving decolonization, that modern secessionist groups within states hope to replicate that success—however misplaced that hope might be.

D. Post-Colonialism and the United Nations Experiment

As decolonization took hold, statehood itself was bequeathed on the colonies of the European powers as the preferred incorporation of political self-realization for colonial peoples. They were, in effect, made in the image of their creators. As the creator of state sovereignty, Europe was also, in fact, the chief exporter of the notion of state sovereignty to the rest of the world. But as the states of Africa and Asia began to emerge during the period of decolonization, it became clear that the receding colonial powers had often botched the job.

Some missteps were benign, such as the British squandering £36 million attempting to cultivate peanuts in unsuitable terrain in Tanzania (which they inherited from Germany after World War I), but others led to bloodshed, as in the case of Britain’s hasty pullout from Palestine and India—which both erupted in warfare. Receding from Africa, the British were deemed to have done little “to balance colonial economies or to diversify crop production, and those colonies that were not thought to have anything worth developing, ultimately used their share of funds merely to cancel overdrafts.” Hastily departing from East Timor, the Dutch left the territory open to invasion and occupation by Indonesia. The Great Powers incorrectly assumed that all colonies they had controlled were viable independent entities.

111 HALPERIN ET AL., supra note 100, at 20-25.
113 SHINODA, supra note 24, at 11.
115 Id. at 116-19, 253.
116 Id. at 116.

The inhabitants of East Timor in 1975 were not capable of either internal or external self-determination. Internally, the Portuguese authorities departed the territory, and the ensuing internecine strife destroyed whatever civic structure re-
The vast majority of colonies, largely located in Africa, were in fact artificial creations which split nations of people arbitrarily and were formed to suit the economic or strategic interests of their erstwhile colonial masters. Yet when the African colonies became states, those new states were automatically locked into their colonial frontiers by independence leaders in the interests of border stability.\footnote{HANNUM, supra note 12, at 23 n.65 (citing and quoting O.A.U. Res. 16(1) (July 1964) (Afr. Union) (declaring that “all Member States pledge themselves to respect the frontiers [sic] existing on their achievement of national independence.”).}

One by-product of the preference for border stability during decolonization was the production of artificially multi-ethnic states.\footnote{Kelly, Political Downsizing, supra note 95, at 217.} Disregard for local alliances when these colonies were established, in turn, would have profound consequences down the road as inter-ethnic conflict within and between states in Africa formed the majority of armed insurrections and warfare.\footnote{ANGHIE, supra note 81, at 205. See also Robert McCorquodale & Raul Pangalangan, Pushing Back the Limitations of Territorial Boundaries, 12 EUR. J. INT’L L. 867 (2001) (As Lord Salisbury noted in the 19th Century, “We have been engaged . . . in drawing lines upon maps where no white man’s feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.”).}

Thus, when many of these newly-independent former colonies walked onto the world stage as states, they did so with high expectations of sovereign equality, but latent in many of these new states were the weaknesses and errors left over from colonialism, such as divided peoples (leading to ethnic conflict), incongruent economies, heavy dependency on one resource or another, and inadequately-trained governing classes and bureaucracies.

\footnote{Gerald B. Helman & Steven R. Ratner, Saving Failed States, 89 FOREIGN POL’Y 3, 4 (1992-93): “The idea . . . that states could fail . . . was anathema to the raison d’etre of de-colonization and offensive to the notion of self-determination. New states might be poor, it was thought, but they would hold their own by virtue of being independent.”}
So many states born dysfunctional, and so widely unequal in fact to Western states, immediately mocked the doctrine of state equality in law. Indeed, multiple institutions from Trusteeships to the International Monetary Fund, World Bank, and other development organizations were created to help shepherd along states emerging from colonialism, implicitly admitting the bungled decolonization process. However, the state equality doctrine remained useful for Cold War purposes, where each superpower attempted to use it to the disadvantage of the other—most notably in the United Nations.

The General Assembly of the United Nations was the main institutional manifestation of state equality, with “one state, one vote” serving as the fundamental operating principle. US secretary of State Cordell Hull noted in the memorandum on US foreign policy that later became the official commentary on the Moscow Declaration: “Every State, large and small, is equal before the law and the rule of law. The principle of sovereign equality of all peace-loving states, irrespective of their size and strength, as participants in a system of general security, will be the foundation upon which the future international organization shall rest.”

No sooner had that principle been agreed upon during negotiations at Dumbarton Oaks, than the Soviets asserted that each of the USSR’s sixteen constituent republics was entitled to a seat in the General Assembly, immediately resulting in a huge voting bloc for the Soviet Union. The other negotiators were left “breathless” at this assertion, but the more the British pondered it, the more they appreciated the Russian position, as they had earlier asserted separate seats for their dominions within the Commonwealth and India. Eventually, the Soviets were allowed to enter Byelorussia and Ukraine as individual states within the General Assembly.

Nevertheless, the Great Powers succeeded in blunting this embodiment of state equality by securing their decision-making priority within the Charter in several important respects:

125 Id. at 119-20.
Only Security Council decisions are binding, not General Assembly decisions.\footnote{126}{UN Charter art. 25.}

Only the Permanent Security Council members have a veto power; non-permanent members do not.\footnote{127}{Id. at art. 27.}

The General Assembly cannot consider issues currently pending before the Security Council (a Charter-based gag order).\footnote{128}{Id. at art. 12.}

Only the Security Council can deploy troops and authorize use of force or economic embargoes, not the General Assembly.\footnote{129}{Id. at chs. 4, 5, 7.}

Every member of the UN acknowledges that the Security Council acts on their behalf (coerced legitimacy?).\footnote{130}{Id. at art. 24.}

The Charter's supremacy clause allows Security Council decisions to override other treaty obligations a UN member may have.\footnote{131}{Id. at art. 103.}

Amendments to the Charter have to overcome Security Council vetoes of the Permanent Members.\footnote{132}{Id. at art. 108.}

Although the smaller states hedged at so much institutional power being reserved for the Great Powers, they ultimately did sign on, bringing the number of states originally adhering to the Charter to 50. The member states of the United Nations now number 191,\footnote{133}{United Nations, List of Member States (2005), available at http://www.un.org/Overview/unmember.html.} and they uniformly cherish their individual and equal votes in the General Assembly. This structure ensures that, as with any deliberative body, coalitions of states within the Assembly alternately form and evaporate. Nevertheless, the resulting resolutions remain only morally binding, not legally.
II. POST-COLD WAR HUMANITARIAN INTERVENTION

The term humanitarian intervention implies the breach of a state’s sovereign borders through force by another state or collective of states to protect people within those borders from being killed, abused, starved, or otherwise egregiously maltreated. In the 19th century, Woolsey identified two instances in which a state’s sovereignty could be violated: intervention justified “by the extreme circumstances of the case,” and for self-preservation. An example cited by Woolsey is the “interference” in 1827 of Great Britain, France, and Russia, on behalf of the Greeks “avowedly dictated by motives of humanity.” At the time, the Greeks were being brutally repressed by their Turkish masters within the Ottoman Empire and sought the aid of other Christian European Great Powers.

Stowell described humanitarian intervention in the 1930’s as “use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.” Modern scholars, like Yoo, define the principle simply as “use of force in the internal affairs of a country to prevent massive deprivation of human rights,” citing India’s 1971 intervention in Bangladesh and France’s 1979 intervention in the Central African Empire as examples of humanitarian intervention during the Cold War.

Still, with few exceptions, it was the world’s emergence from the Cold War that marked a dividing line, prior to which state mastery over internal affairs and border inviolability remained strong, and after which it began to erode more persistently. Just before the Cold War ended in 1988, as Gorbachev was unleashing reforms that would lead to the Soviet Union’s collapse and as Reagan was increasing US military and economic pressure to speed that process along, two genocides unfolded, one in northern Iraq and another in Burundi. In both cases, the principle of border inviolability, stemming from Westphalian sovereignty concerns, kept the international community from intervening—or at least such was the excuse posited—but the reality of Cold War politics stymieing collective action was in play as well.

134 Woolsey, supra note 30, at § 51 and § 43.
136 Yoo, supra note 14, at 743.
137 Id.
In a September 1988 editorial about the genocide against the Hutus in Burundi and President Saddam Hussein's use of chemical weapons against Kurdish people in Iraq, the New York Times placed the "sovereignty shield" problem squarely on the international agenda, stating that "Burundi is indeed sovereign, and so is Iraq. In a world in which states jealously guard their sovereignty, no international police can be summoned if a country slaughters within its own frontiers." The editorial went on to say that the United Nations' unanimous approval of the Genocide Convention in 1948 "was a moral as well as a legal act, a recognition of the world's sins of silence as entire peoples perished," and that "[t]hose who commit such acts should know the world watches, that sovereignty cannot legitimize genocide." While acknowledging that "Burundi is indeed sovereign, and so is Iraq," the editorial claimed that "[o]utside attention to human rights in Burundi violates sovereignty no more than black Africa's just demand for sanctions against white South Africa." In the face of the grave human rights violations in Burundi and Iraq, the New York Times urged, "Enough silence.'

That silence changed after the Cold War. In 1991, after the first Gulf War with Iraq, President George H.W. Bush ordered cessation of Iraqi military activity north of the 36th parallel to stop Hussein's renewed brutalization of the Kurdish minority there, thus placing a large portion of President Hussein's country beyond his direct control. Similar action had been called for previously to stop Hussein's use of poison gas against the Kurds in 1988, but none had then materialized. The difference between no action in 1988 and action in 1991 after similar events track the continuance and cessation of the Cold War. A sea change in attitudes toward sovereignty was occurring.

In fact, the Gulf War may be seen as the seminal event encompassing the diverging concepts. No intervention occurred in 1988 because of sovereignty, and yet one of the reasons articulated for the American-led coalition to enter the Gulf War was the restoration of Kuwaiti sovereignty. Moreover,

139 Id.
140 Id.
141 Id.
142 Yoo, supra note 14, at 743; Kelly, Political Downsizing, supra note 95, at 277 (noting that the creation of safe zones for the Kurdish people limited Iraq's sovereignty in northern Iraq); Orrin G. Hatch, Safe Havens Aren't Enough, N.Y. TIMES, Apr. 13, 1991, at A23 (discussing US control of Iraq and its occupation of one fifth of Iraq's territory); William Safire, Editorial, Duty to Intervene, N.Y. TIMES, Apr. 15, 1991, at A17 (discussing George H.W. Bush's designation of Kurdistan as off-limits to Hussein and his direction of the military to take actions to aid refugees).
the decision was made not to eliminate Iraq’s sovereignty. The war itself, however, is book-ended by two events immediately before and after which cast doubt on the inviolability of sovereignty: America’s trampling of Panama’s sovereignty in 1989 when it invaded the country to capture Manuel Noriega, and America’s designation prohibiting Iraqi military activity after the Gulf War in the northern “no-fly zone” in 1991.

The evolving operation of sovereignty theory played out dramatically in war-torn southeastern Europe. Sovereignty was not implicated in the 1995 Bosnian intervention because NATO was invited to become involved by Bosnian president Alija Izetbegovic with the blessing of the UN Security Council. However, sovereignty was clearly implicated in the 1999 Kosovo intervention four years later when NATO conducted punitive air strikes against Yugoslav positions and cities—definitely not at the invitation of President Milosevic.

The Kosovo operation was a military intervention by an international alliance against a sovereign state conducting internal “ethnic cleansing.” This intervention occurred without prior authorization from the UN Security Council, due to objections from China and Russia, both concerned with containing their own increasingly restive ethnic minorities—deemed “internal matters.”\(^{143}\) NATO’s intervention led to the occupation of an internationally acknowledged internal province of Serbia. The decision to go forward, clearly a violation of traditional sovereign prerogative and border inviolability, was a defining moment for NATO, and a politically courageous one.

Thus, it is the Kosovo intervention that many consider reflective of the seismic paradigm shift in the once sacrosanct notion of state sovereignty, as Westbrook notes:

Kosovo appears to teach two lessons . . . . First, genocide is barbarism, and the civilized world need not respect the sovereignty of barbarians, even when they pose no threat to security. Warfare against barbarians is permissible . . . . Warfare may even . . . . be required—hence the “new interventionism.” If barbarian (at least genocidal) states are not sovereign, they cease to be states. The second lesson is the converse of the first: statehood is defined in terms of participation in the civilized order . . . . [T]he state itself has

\(^{143}\) Michael J. Kelly, Traveling the Road to Rambouillet: Is the Imposition of Federalism in Kosovo Pragmatic Foreign Policy or Unwise Meddling? 40 S. TEX. L. REV. 789, 789-99 (1999); GENOCIDE IN TIBET: A STUDY IN COMMUNIST AGGRESSION (Rodney Gilbert ed., 1959) (discussing the political history of Tibet); MARY CRAIG, TEARS OF BLOOD: A CRY FOR TIBET (1992).
come to be defined by its conformity to the basic requirements of international law. Failure to conform to such requirements, for example, by slaughtering one's minorities, results in the forfeiture of sovereignty and so loss of statehood.144

Supporting the growing impetus for humanitarian intervention, the Appellate Chamber of the International Criminal Tribunal for the Former Yugoslavia recognized the importance of penetrating borders to apprehend war criminals in the Tadic case, noting:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.145

It is the human rights movement that properly deserves credit for pushing states into the realm of beginning to consider violating sovereignty principles in favor of protecting individuals. Since the 1648 Treaty of Westphalia, international law had catered to the interests of nation-states. But based upon the core principle that the freedom and dignity of the individual should be paramount, the international human rights movement demanded that those states be held accountable for their treatment of individuals, including their own citizens.146

144 David A. Westbrook, Law Through War, 48 BUFF. L. REV. 299, 328–29 (2000) (quoting Michael Glennon, Glennon Replies, FOREIGN AFF., July/August 1999, at 120, 122: “At some fundamental level, international law scholars appear to have subordinated the doctrine of state sovereignty to international law’s prohibition on genocide, a position which has been explicitly taken by Michael Glennon: ‘Intrastate genocide is no longer entitled to the protection of sovereignty.’”). President Milosevic attempted to litigate this breach of sovereignty in the International Court of Justice against NATO states in their individual capacity, claiming an illegal use of force against Yugoslavia, but the Court dismissed his claims for lack of jurisdiction because the remainder state of Serbia and Montenegro did not automatically succeed to the United Nations seat formerly occupied by Yugoslavia and was not a party to the Statute of the International Court of Justice. See Case Concerning the Legality of the Use of Force (Serbia and Montenegro v. Belgium) 2004 I.C.J. 105 (Dec. 19) ¶¶ 46-129.
While some still cling desperately to the hard line of Westphalian thought, placing states’ sovereignty rights above that of persons, others point to a fundamental shift away from selective state-to-state relations as the foundation of international law to a communitarian perspective. Nations are viewed as being members of an international community grounded in a set of “universal values.” Within the community, nations fall along a spectrum “from the most ‘advanced’ liberal democracies to barely coherent nations always about the slip into the abyss of an ultimate savage alterity that still remains.” Since members of the international community are expected universally to acknowledge and adhere to the “universal values,” any egregious failure to do so could ground the justification for an intervention.

Another question concerning humanitarian intervention is whether it has made the transition from a right of intervention to a duty of intervention. The implications of such a transition are far-reaching, and key questions, such as to whom the duty would attach, remain unresolved. Consequently, the debate on this point is a lively one. The most progressive proponents urge that after years of developing humanitarian law significantly limiting how harshly governments can treat their people, humanitarian intervention has evolved from a right to a duty, which is morally required even in the absence of Security Council approval.

The rapporteurs of the International Commission on Intervention and Sovereignty agree only to a limited extent. Relying on a high bar for responding militarily only in extreme cases based on principles of just cause, the commission called for humanitarian intervention to become an obligation in their 2001 report The Responsibility to Protect, which served as a springboard for a draft agreement among states at the United Nations.

The draft agreement at Article 118 puts the duty in the first instance on the individual state concerned to stop genocide, war crimes, ethnic cleansing, and crimes against humanity. It then shifts that duty to the international community, within the context of the UN system if the individual state fails to meet its obligation:

147 Pahuja, supra note 122, at 465
148 Id.
[W]e recognize our shared responsibility to take collective action, in a timely and decisive manner, through the Security Council under Chapter VII of the UN Charter and in co-operation with relevant regional organizations, should peaceful means be inadequate and national authorities be unwilling or unable to protect their populations.  

This is followed by Article 119, discouraging the Security Council permanent members from using their veto power in cases of genocide, war crimes, ethnic cleansing, and crimes against humanity.  

While the agreement remains in the drafting stage, it is worthwhile to note the objects of the proposed duty: the individual state concerned and the collective within the context of the UN, not individual neighboring states or individual Great Powers. Consequently, if the state in question fails to act or is unable to act, and the Security Council is politically locked, then atrocities can go forward and it is up to each individual state to intervene on its own.  

States acting on their own, outside the UN context, raises the equally vexing dilemma of conflicting duties—to the extent that the norm can evolve from a right to a duty. In fact, an evolution from a right to a duty may not be possible, as they are considered different creatures. An affirmative transference from one to the other would likely be necessary, which in turn means substituting one norm for another. The authors of the draft agreement are attempting just that, substituting an obligation to intervene for a right of intervention. Failing such an effort, which is probably likely without US or Russian support, the new norm must come along in customary fashion, which in turn means proving state practice, opinio juris (the belief on the part of states that they are required to engage in the practice), and jus cogens status—required to derogate from the general prohibition on intervention contained in the Charter.  

If the above occurred, which again is unlikely, then the only thing to have been proven would be a conflict between a jus cogens customary law obligation to use force for humanitarian intervention and the Charter’s obligation not to use force without Security Council authorization. Would that make it easier for individual states to choose which obligation to comply

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152 Id. at art. 119.
with? Probably not. Thus, attaching an obligation to intervene to the international community within the UN system as a collective obligation is perhaps the only viable method of attaching such a duty.

III. INVOLUNTARY SOVEREIGNTY WAIVER THEORY

How can sovereignty be waived? Certainly, it can be waived voluntarily. Consent, after all, is the basis of international law. States are only bound by international law to the extent that they consent to be bound, and it is their sovereign decision either to withhold or grant such consent. States manifest this consent when they sign and ratify treaties or decide not to object to the attachment of customary practice which, over time, can become binding. Often the benefits of voluntary sovereignty waiver, like joining the World Trade Organization (WTO) to take advantage of liberalized international trading guarantees, are clearly outweighed by the sovereignty that is given up, as in submitting to the jurisdiction of WTO’s stringent regulations and dispute resolution procedures.

But can sovereignty be waived involuntarily? Can it be taken away from a state without that state’s consent? Traditional international law, based on the Westphalian system, says no. To do so would destabilize the entire system of independently sovereign states, which operate horizontally with legal equality on the world stage subject to no higher authority. However, some believe that the time has come to put conditions on that sovereignty. Whether they follow the broader developing concept of “earned sovereignty”153 or the narrower concept of justified humanitarian intervention,

153 Paul R. Williams, Michael P. Scharf & James R. Hooper, Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty, 31 DENV. J. INT’L L. & POL’Y 349, 349-50 (2003). The authors of this approach envision sovereignty, and the promise of more of it, as a useful carrot to quell secessionist movements within states. Their useful, versatile and readily employable definition is the following:

[T]he approach of earned sovereignty is designed to create an opportunity for resolving sovereignty-based conflicts by providing for the managed devolution of sovereign authority and functions from a state to a sub-state entity. The authority and functions may include the power to collect taxes, control the development of natural resources, conduct local policing operations, maintain a local army or defense force, enter into international treaties on certain matters, maintain representative offices abroad, and participate in some form in international bodies. In some instances the sub-state entity may acquire sufficient sovereign authority and functions which will then enable it to seek international recogni-
they agree that sovereignty is not absolute. One such scholar is Dr. Richard Haass, who has developed a theory of conditional sovereignty, which I term involuntary sovereignty waiver.

A. Conditional Application

Richard Haass is formerly the undersecretary of state for policy planning in the G.W. Bush administration and currently chairman of the Council on Foreign Relations. One of the most creative notions to emerge from the G.W. Bush administration’s foreign policy apparatus was his involuntary sovereignty waiver theory, which essentially holds that countries constructively waive their traditional sovereignty shield and invite international intervention when they undertake to massacre their own people, harbor terrorists, or pursue weapons of mass destruction.154

In his earlier works, Haass duly recognized the widening acceptance of unauthorized humanitarian intervention as marking the “emergence of a new perspective about the inviolability of state sovereignty.”155 Noting the widely-cited 1993 Conference of Catholic Bishops statement that “principles of sovereignty and non-intervention may be overridden by forceful means in exceptional circumstances”156 to prevent genocide and mass atrocities, Haass noted the general sentiment that “the international community was wrong in

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154 Haass began discussing this theory in relation to states that commit atrocities against their people or harbor terrorists in 2002:

Sovereignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone inside your own territory. Other governments, including the United States, gain the right to intervene. In the case of terrorism, this can even lead to a right of preventive, or preemptory, self-defense.


156 Id. at 13.
not doing more to thwart the efforts of Hitler in Germany or Pol Pot in Cambodia, who by their behaviour, forfeited the normal benefits and protections of sovereignty. Likewise, Haass stated that it was generally believed that it was right to intervene in Iraq on behalf of the Kurds and in Somalia.

It is Haass’ notion of sovereignty forfeiture that germinates later into the theory of sovereignty waiver. He uses the widening acceptance of unauthorized humanitarian intervention as a vehicle to push for acceptance of intervention to stop terrorists and the spread of WMD. In a forthright policy speech delivered at Georgetown University entitled Sovereignty: Existing Rights, Evolving Responsibilities, Haass described his general view of sovereignty. He acknowledged that sovereignty had been an important source of international stability and had served as a foundation for peace, democracy, and prosperity. But Haass argued that changed conditions in the world like globalization and the problem of “weak states” demand that we adjust our thinking and actions. Specifically, he stated that we must adjust to the new reality of “outlaw regimes jeopardiz[ing] their sovereign status by pursuing reckless policies fraught with danger for their citizens and the international community.”

Haass then discussed three classes of sovereignty loss: (1) weakened states teetering toward failure as suffering from a sovereignty deficit, stressing, as any realist would, the danger they represent; (2) challenges of globalization, again mentioning “foreign threats;” and (3) sovereignty delegation—voluntary sovereignty waiver in exchange for mutual benefit, as in the case of states joining the European Union. Noting an “emerging global consensus” that “sovereignty is not a blank check,” Haass considered appropriate measures available to Great Powers concerning rogue regimes:

The final challenge to sovereignty . . . arises not when states cede it voluntarily but when it is taken away. [S]overeign status is contingent on the fulfillment by each state of certain fundamental obligations, both to its own citizens and to the international community. When a regime fails to live up to these responsibilities or abuses its prerogatives, it risks forfeiting its sovereign privileges—including, in extreme cases, its immunity from armed intervention.
Haass identified three circumstances which he believed justified violation of the norm of non-intervention. His first exception is the case of a state that commits or fails to prevent genocide or crimes against humanity on its territory. "The international community," Haass stated, "has the right—and, indeed, in some cases, the obligation—to act to safeguard the lives of innocents."\(^{162}\) His second exception, is the right of countries to "take action to protect their citizens against those states that abet, support or harbor international terrorists, or are incapable of controlling terrorists operating from their territory."\(^{163}\) In this situation, Haass pledged that, "The United States stands prepared to assist governments in meeting this solemn responsibility. And when states are reluctant or unwilling to meet this baseline obligation, we will act—ideally with partners, but alone if necessary—to hold them accountable."\(^{164}\) Haass’ third exception in which states risk forfeiting their sovereignty is when they pursue weapons of mass destruction:

When certain regimes with a history of aggression and support for terrorism pursue weapons of mass destruction, thereby endangering the international community, they jeopardize their sovereign immunity from intervention—including anticipatory action to destroy this developing capability.\(^{165}\)

Noting the long history under international law of a recognized right to self-defense, including the right to take pre-emptive action against a clear and imminent threat, Haass stated that:

The challenge today is to adapt the principle of self-defense to the unique dangers posed by the proliferation of weapons of mass destruction. Traditionally, international lawyers have distinguished between pre-emption against an imminent threat, which they consider legitimate, and "preventive action" taken against a developing capability, which they regard as problematic. This conventional distinction has begun to break down, however. The deception practiced by rogue regimes has made it harder to discern either the capability or imminence of attack. It is also often difficult to interpret the intentions of certain states, forcing us to judge them against a backdrop of past aggressive behavior. Most fundamentally, the rise of catastro-
phic weapons means that the cost of underestimating these dangers is potentially enormous. In the face of such new threats and uncertainties, we must be more prepared than previously to contemplate what, a century and a half ago, Secretary of State Daniel Webster labeled "anticipatory self-defense." 166

Haass then turned to the responsibilities of sovereignty:

In all three of the situations I have just outlined—stopping genocide, fighting terrorism, and preventing the spread of weapons of mass destruction—the principle remains the same: with rights come obligations. Sovereignty is not absolute. It is conditional. When states violate minimum standards by committing, permitting, or threatening intolerable acts against their own people or other nations, then some of the privileges of sovereignty are forfeited.167

Although sovereignty “has been for the past three and a half centuries, a central pillar—and arguably the central pillar—of world order,” Haass argued, it has become “less absolute and more contingent than in the past.” Still, Haass asserted, “In all cases, the bar to armed intervention must be set high.”168

We do not want to return to a world in which governments routinely intervene in one another’s affairs. In an age of advanced conventional weapons and new instruments of mass destruction, this would be a recipe for catastrophe. Accordingly, there should be a general presumption in favor of respecting sovereignty. But . . . we need to strike a new balance between the rights and responsibilities of states. This new conception of sovereignty must adjust to the needs of weak states, adapt to the forces of globalization, accommodate the need for cooperation, and address the problem of outlaw regimes . . . .

166 Id.
167 Id.
168 Id.
169 Id. Haass is unwilling to expand the causes for intervention beyond the three that he proposed. For example, he has stated that “promoting political or economic reform is an inappropriate use of armed intervention. The use of military force needs to be reserved for extreme situations.” Richard N. Haass, Pondering Primacy, 4 GEO. J. INT’L AFF. 91 (2003), available at http://journal.georgetown.edu/Issues/sf03/Haasslocked.pdf [hereinafter Pondering Primacy]. See also Richard N. Haass, Freedom Is Not a Doctrine, WASH. POST, Jan. 24,
Thus, there is in Haass' formulation a presumption that sovereignty exists as a shield against outside intervention, but it is a rebuttable presumption. And although Haass sets out general guidelines, the precise formula for rebuttal of sovereignty presumption remains in doubt. For instance, it appears that sovereignty waiver theory proceeds on the basis of individualized threat or condemnation instead of universal threat or condemnation, although it could certainly proceed on the latter with much more international legitimacy. For example, while India considers Pakistan a dire threat (both nuclear and conventional), the Great Powers treat it benignly at worst and as an ally at best. Can India invoke sovereignty waiver theory against Pakistan because it brutalizes its own people, harbors terrorists in its northwest provinces, threatens Kashmir, and operates as a clearinghouse for proliferation of nuclear weapons? Or can only the Great Powers undertake the decision of which state’s sovereignty is to be waived?

The case of Iraq presents both sides of this coin. After Saddam’s instigation of the Iran-Iraq War in 1980-88 and invasion of Kuwait in 1990, the entire Middle East considered Iraq a threat, and the world condemned the actions of Saddam’s regime. The First Gulf War, fought under the UN banner, restored the status quo ante: restoring Kuwait’s sovereignty, leaving Saddam in power, and leaving Iraq’s own sovereignty intact. However, according to the customary acceptance of humanitarian intervention, three of the Great Powers—the United States, Britain, and France—subsequently created and enforced “no-fly zones” in northern and southern Iraq to keep Saddam from further repressing the Kurdish and Shi’ite people in those areas. This action was not authorized by the UN. According to the Haass model, Iraq waived its sovereignty protecting the country from outside intervention by persecuting the Kurds and Shi’ites.

A decade later, when Iraq was suspected of reengaging its pursuit of WMD, including nuclear capabilities, the international community forced

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2005, at A15 (“[I]t is neither desirable nor practical to make democracy promotion the dominant feature of American foreign policy.”).


172 Id.

Iraq once again to accept weapons inspectors under the aegis of the UN. Fearful that this process was ineffective and to wait would invite disaster, the United States, and a smaller group of states invaded and occupied Iraq without the backing of the UN. Had Iraq waived its sovereignty by pursuing WMD? Under the Haass model, yes—even though only two of the Great Powers, the United States, and Britain, considered that to be the case. The interveners turned out to be mistaken, resulting in a colossal failure of the doctrine on its first outing.

This inherent flaw in the model, allowing individual states (or some of the Great Powers) to determine when a state’s sovereignty should be waived, is clearly an impediment to the theory’s operation. For if enough Great Powers felt strongly the other way and deployed militarily to guarantee the sovereignty of the state in question, then the conflict would be between the Great Powers themselves, as was the case during the Korean War when Chinese troops swarmed across the border to defend North Korea. That Great Power conflict resulted in a stalemate that exists to this day.

Consequently, if the sovereignty waiver doctrine is to survive intact as a package, it is likely to do so only in the context of collective organic action such as that offered by acting through the UN Security Council. The Council already can supersede state sovereignty under Chapter VII, and all member states of the UN have expressly agreed to this by signing the Charter. This, of course, is the Charter-based sovereignty waiver mechanism. As unrepresentative as the Council is, given its current structure, it still bestows an irreplaceable degree of legitimacy on military actions undertaken in its name. UN blessings, though sometimes difficult to obtain, also provide political cover for other states to contribute troops, logistics, or money.

174 The Korean War serves as an example both of Great Power conflict and multilateral Great Power intervention within the UN framework. Disagreement about which China should occupy the Chinese permanent Security Council seat (Mao’s communist government in Beijing or Chiang Kai Shek’s government in Taiwan) left that seat empty. Opposition to seating Mao’s government by the United States, Britain, and France was strong. In protest, the Soviets walked out of the Security Council. With both the Chinese and Soviet vetoes neutralized, the remaining three permanent members passed a resolution to defend South Korea from North Korean aggression. Consequently, the three remaining Great Powers worked together within the UN system, while another Great Power, China, responded militarily to throw the war ultimately into a stalemate.

175 There was also some worry during the conflict over Kosovo that Russia would intervene to defend its Slavic cousin Serbia from Western aggression.


177 Comparing the UN backed First Gulf War in 1991 against the non-UN backed War in Iraq in 2003 bears out this point. The 1991 Gulf War was backed by 34 states, many of them ma-
However, Haass is probably unwilling to endorse that, even to ensure the continued viability of his theory. His mistrust of the UN collective security apparatus remains strong, based largely on his disagreement with the notion of the UN’s ability to bestow external legitimacy. Responding in an interview to the question of “who decides when a country is committing (or omitting) actions that justify intervention,” Haass responded:

[T]here is no single source of authority or legitimacy . . . . [T]he United Nations is not yet at the point where it alone can decide what is legitimate and what is not. Well then, who decides? Is it the United States or some other government? The answer is that you have to look at the case at hand and you have to try to make a case in the court of international public opinion . . . . [Y]ou have to base your actions on norms.\(^{178}\)

And norms are what he is trying to help create although Haass does not discount the value of multilateralism. Indeed, he explicitly endorses it as preferable to the unilateralist tendencies of the neconservatives, which he dismisses as “not a serious or sustainable foreign policy choice for the United States”\(^ {179}\)


\(^{178}\) Haass, *Pondering Primacy*, supra note 169, at 92-93.


\(^{180}\) *Id.* (“The real question is, which form of multilateralism will emerge? . . . . U.S. leadership remains essential . . . [b]ut leadership requires followership, something that can only be engendered by a foreign policy that strives to get others to agree on the principles and rules of international relations and how they are to be enforced when they are violated.”).
United States happened to be undertaking, Haass is primarily concerned with multilateralism among the Great Powers. In fact, he has proposed nothing less than an effective return to rule by the Great Powers. In a 2004 speech before the National Committee on American Foreign Policy, Haass suggested that a resurrection of the 19th century concert of powers model, that flowed from the Congress of Vienna, could work in the 21st century to stabilize international relations, protect basic human rights in other states, and protect the Great Powers from the harm envisioned by spreading terrorism and WMD:

I speak of a "concert" in the sense derived from experience some two centuries ago, in the aftermath of the Napoleonic wars. . . . The goal of Castlereagh, Metternich, Talleyrand, and their counterparts was to avoid the sort of major power war that had characterized European affairs; the key principle was a common understanding to avoid interfering in each other's internal affairs. The result was the Concert of Europe and decades of relative peace on the continent . . . The purpose of a 21st century concert would not be to resist calls for self-determination but to manage the challenges intrinsic to globalization and to deal with the most pressing threats to the common security and prosperity.

[T]here is an important parallel between the concert of the early 19th century and the potential concert of today, namely, the notion of the principal powers of the era agreeing to restrain their competition, take one another's interests into account, and, where possible, work together on behalf of common purposes.\footnote{\textit{\textsuperscript{181}}} The primary aims of the 21st century concert of Great Powers, according to Haass, should be stopping genocide, terrorists, and WMD—the three foci of his involuntary sovereignty waiver theory. Thus, the application of this theory would fall to the Great Powers acting multilaterally, not necessarily within the confines of the UN collective security apparatus. This is essentially the creation of a group acting as the world's policemen, as opposed to the United States taking on that role alone.\footnote{\textit{\textsuperscript{182}}} As such, would the Great

\footnote{\textit{\textsuperscript{181}}} Haass, \textit{Toward a 21st Century Concert, supra} note 22 ("The purpose of a 21st century concert [between the Great Powers] would not be to resist calls for self-determination but to manage the challenges intrinsic to globalization and to deal with the most pressing threats to the common security and prosperity.").

Powers then be subject to the same involuntary sovereignty rules? That is where the application of this model breaks down. The Security Council is already outfitted for that role, but, of course, this institutional manifestation of collective Great Power consensus does not always provide the consensus the United States desires. A more informalized concert of powers approach would naturally provide greater flexibility.

If involuntary sovereignty waiver theory can find support in the old texts of international law publicists, then it may do so only in a cautionary way. For example, after propounding the universally accepted principle of non-interference in the internal affairs of states, Woolsey identifies only two exceptions in his 19th century treatise: “Whatever be the interference, it can be justified only as an extreme measure, and on one of the two following grounds: (1) that it is demanded by self-preservation; (2) that some extraordinary state of things is brought about by the crime of a government against its subjects.” On the surface, Woolsey’s statement may be taken to support Haass’ theory; stopping terrorists and WMD proliferation fits nicely into point 1, and humanitarian intervention fits nicely into point 2.

However, Woolsey continues on to say that the self-preservation justification cannot be based on “mere suspicion, or calculation of remote probabilities” and that “good evidence” showing a real danger, while difficult to quantify, should be obtained before taking action to prevent it. Likewise, Woolsey states that extraordinary crimes committed by a government against its subjects are problematic to define. Moreover, he points out that “the danger of erring is less than in the other instance, because interference here is more disinterested; and the evil that results of a mistake are less, because such cases are comparatively rare.”

For that very reason, this author is more sanguine with regard to states bypassing the Charter to stop another state from committing genocide against its own people, than with regard to states bypassing the Charter to attack WMD-seeking or terrorist-supporting states using an antiquated, unilateralist anticipatory self-defense doctrine and relying on flimsy evidence, as in the case of the War in Iraq. Considering Haass’ original three scenarios for justified intervention, the humanitarian intervention prong could feasibly survive a collapse of the theory, although this would not be necessary since it has a well-developed underpinning of its own based on human rights.

183 WOOLSEY, supra note 30, at § 43.
184 Id.
185 Discussed in Part IV infra.
Haass acknowledges that a key difference between humanitarian intervention and intervention to stop WMD or terrorists is that the underlying basis of the rights concerned belongs to individuals in the case of humanitarian intervention and to states in the case of stopping WMD or terrorists. While Haass does not appear to believe that distinction to weaken his theory, states exercise unauthorized humanitarian intervention on behalf of people who are starving or being killed to effectuate universal values. They exercise the rights of individuals on their behalf, perhaps even altruistically. But states exercise unauthorized intervention to stop WMD or terrorism on their own behalf, not on behalf of individuals and only in the rare instance on behalf of other states.

In both instances of unauthorized intervention, the case may be that they must do so because they could not achieve the permission of the Security Council and so could not act within the legal UN collective security apparatus. But in the case of humanitarian intervention, the politics of an inability to achieve authorization are usually apparent, helping make the action excusable. In the case of interventions to stop WMD or terrorists, the suspicion may be, and has been, that the threat asserted is not dire enough or credible enough to warrant intervention. Consequently, those interventions to protect a state's national security interests are deemed less legitimate, and less excusable.

With regard to terrorism, under Haass' theory, the fact that terrorists exist within a state is enough to trigger the involuntary waiver of that state's sovereignty, regardless of whether the terrorists are there by invitation or not. Clearly, Afghanistan was tolerating, if not supporting the Al Qaeda presence in that state in the late 1990's. But what about states which, while not actively supporting terrorists, do nothing to quash the terrorist presence within their borders? Saudi Arabia, for example? Or Ireland? Motive matters more than scope of threat as a determinative sub-unit of the involuntary sovereignty waiver calculation. The terrorists in Afghanistan hit a major power, and Afghanistan paid the price. Saudi Arabia is the breeding ground of many anti-Western terrorists. Fifteen of the nineteen hijackers on 9/11 were Saudi, and yet the United States did not attack Saudi Arabia. Irish terrorists attacked Great Britain for years, some from within Northern Ireland, some from Ireland, yet Britain did not invade Ireland. Spain's ter-

186 Haass, Georgetown Speech, supra note 20.
rorism problems with Basque separatists are wholly contained within Spain. Does another state have the right to go in and attack the Basque separatists?

In the examples of Saudi Arabia, Ireland, and Spain, the governments publicly condemn the terrorist acts and attest to their efforts, ineffectual as they may be, to root them out. Moreover, although Saudi Arabia’s terrorists leave that country to wreak havoc abroad on an international scale, Ireland’s terrorists only target Britain and Spain’s terrorists only target Spain. In the case of these three states, it is more difficult to attribute the action of the terrorists to the conduct of the state, whereas in the case of Afghanistan, that link was easily made. The Restatement offers some insight into how an agency relationship in this regard can work:

§207 Attribution of Conduct to States

A State is responsible for any violation of its obligations under international law resulting from action or inaction by

(a) the government of the state, . . . .

cmt. a. [A] state is responsible for the conduct of its effective government, whether or not that government was recognized by other states. It is responsible for the conduct of any revolutionary regime that becomes the effective government . . . .

rep. n. 4. In [the] Case Concerning United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. Rep. 3, 29, the Court held that the conduct of militants who had seized the embassy and staff “might be considered as itself directly imputable to the Iranian State only if it were established that, in fact . . . the militants acted on behalf of the state . . . .” The Court held that the government had given its “seal of approval” to the militants’ actions and thus bore responsibility for those actions.189

Informally applying these precepts in the case of Afghanistan, the state of Afghanistan bore responsibility for the conduct of the revolutionary Taliban regime and the acts of Al Qaeda were approved by that government, just as those of the Iranian militants were approved by the revolutionary government in Iran. Consequently, the state sovereignty of Afghanistan was involuntarily waived. According to the Haass model, Afghanistan’s sovereignty was involuntarily waived not only because Al Qaeda’s acts were

189 RESTATEMENT, supra note 11, at § 207, cmt. a, d, rep. n. 4.
imputable to that state, but also because the United States could respond in the traditional self-defense mode via Article 51 of the UN Charter and, to the extent it still exists, could respond proportionally according to the parameters of the customary law doctrine of reprisal.\textsuperscript{90} Of course, realpolitik cynics might simply say that the friends of Great Powers do not suffer involuntary sovereignty waiver so long as they make good faith efforts to control their terrorism problems.

A more encompassing question concerns the theory as a whole. Does involuntary sovereignty waiver theory rest on a \textit{just cause} foundation? If so, does pursuit of national security interests or avoidance of human tragedy really provide \textit{just cause} sufficient to outweigh an object state's sovereignty interests? Had Panama in 1989, Somalia in 1993, Serbia in 1999, and Iraq in 2003 jeopardized their own sovereignty through government policies or inability to act that weakened their sovereignty shield (as Haass posits) against American military intervention? Perhaps the resulting justification for violating any state's border is only as broad as the underlying act or omission and thereby limits the intervention's scope to that of the sovereignty-weakening act or omission.

Either way, the result in practice is that sovereignty as a shield against outside intervention, an already eroding principle, is meant to erode much faster such that borders considered previously inviolable are increasingly violable—but only when the Great Powers say so. American policies such as this one attempt to expand \textit{just cause} for intervention in a broader sense, more so than even the rest of the Great Powers are comfortable with. However, realpolitik dictates that this rule is not applied to states that can physically withstand the intervention (China and Russia—which are abusing minority ethnic groups within their borders, or North Korea—pursuing WMD) or those states that are on otherwise friendly terms with the proposed interveners (Pakistan—pursuing WMD, or, although not rising to the level of genocide, Mexico—abusing indigenous nationals in Chiapas, and Turkey—repressing its Kurdish population). Consequently, the policy only operates against countries such as Serbia, Afghanistan, and Iraq that cannot resist American power.

The last three wars the United States has fought against other states track Haass' conditions. The 1999 war against Serbia was a humanitarian intervention to protect Kosovar Albanians from ethnic cleansing. The 2002 war against Afghanistan was to root out terrorists and depose the Taliban.

government that harbored them. The 2003 war against Iraq was primarily to stop the spread of WMD. Levels of international support varied with each intervention, but the interventions did not turn on Security Council approval. The Kosovo operation was undertaken by NATO and widely supported; the Afghanistan operation was also undertaken collectively by NATO and was deemed self-defense after the 9/11 attacks on the United States; and the Iraq operation received the least support and was, in fact, widely condemned.\textsuperscript{191}

Another question encompassing the theory as a whole is whether Haass is properly discussing rights or duties. There is disagreement on whether the generalized right of humanitarian intervention has evolved into a generalized duty to intervene.\textsuperscript{192} But even advocates of the premise that a duty of humanitarian intervention now exists refuse to extend such a right to other interventions, let alone a duty.\textsuperscript{193} Others, however, support the view that duties exist in all three instances (humanitarian intervention, stopping terrorism, and stopping proliferation of WMD), proposing that in the field of global security, there should be a “collective ‘duty to prevent’ nations run by rulers without internal checks on their power” from acquiring WMD or sponsoring terrorism.\textsuperscript{194}

Haass seems not to want to see his conditions considered triggers for obligatory action. Instead, he prefers maximum flexibility for policymakers, and although he condemns the inaction of the international community in the face of the Rwandan genocide, he seems to want to preserve states’ abilities to walk away from those very calamities: “There should be no absolutes in this area. A definitive set of rules would unnecessarily tie the hands of policymakers. A government should not be compelled to act if all its criteria are met, anymore than it should be prevented from acting even if some of its criteria are not met.”\textsuperscript{195} Yet when challenging the international community to act in response to genocide unfolding in Darfur, Sudan throughout 2004-05, Haass termed the necessary humanitarian intervention a duty:

\textsuperscript{191} Yoo, supra note 14, at 729-30.
\textsuperscript{192} See Part II supra.
\textsuperscript{193} Rivkin et al., supra note 5, at 495 n.75 (“While the UN has in the past extolled the legal permissibility of humanitarian interventions, only a few proponents of the legality of humanitarian intervention espouse the view that the Charter is similarly permissive when it comes to national security-driven interventions.”) (citing United Nations, International Commission on Intervention and State Sovereignty, \textit{The Responsibility to Protect} (Dec. 2001), available at http://www.dfait-maeci.gc.ca/iciss-ciae/pdf/Commission-Report.pdf); Lee Feinstein and Ann-Marie Slaughter, \textit{A Duty to Prevent}, 83 FOREIGN AFF. 136 (2004)) (internal citation omitted).
\textsuperscript{194} Feinstein and Slaughter, supra note 190.
\textsuperscript{195} HAASS, INTERVENTION, supra note 151, at 68.
We need to embrace a contractual approach to sovereignty, one that recognizes the obligations and responsibilities as well as the rights of those who enjoy it. Such an approach would essentially communicate to governments and their leaders that the rights and protections they associate with statehood are, in fact, conditional, and that governments and leaders would forfeit some or— in extreme cases—all of these rights and protections if they failed to meet their obligations. This idea will only have an impact if the international community is prepared to go beyond voicing this principle and accept the necessary consequence: that the world at large has a right and a duty to act to protect innocent life when it is jeopardized on a large scale.\(^{196}\)

Thus, perhaps Haass admits a duty to act on the humanitarian intervention prong of his theory, but not on the WMD or terrorism prongs. That conclusion would somewhat unravel what he has stitched together. Or perhaps such a duty only attaches to the world community in the form of the UN, which he was discussing more particularly in the above comment, not to individual states. From a realpolitik perspective, "impossibility of performance" would certainly be a defense for not fulfilling such an obligation (Djibouti could not reasonably be expected to stop singlehandedly a genocide in Nigeria). Thus, the precise application of the theory remains unclear, as perhaps it should if it is to be workable for policymakers.

Among the scholars who would support development of theories such as that put forth by Haass, is Shinoda, who notes, "If the sphere of sovereignty continues to be circumscribed, we need to ask how it ought to be so. What we need to do now is . . . neither attack nor defend sovereignty, but . . . contem plate carefully a healthy development of the constitutional rules of international society."\(^{197}\) Haass deserves credit for his creative contribution to this debate. However, much of the rest of the world, including most of the Great Powers, remains skeptical as to its widespread adherence.

Be that as it may, this entire exercise may be rendered academic in that Haass’ involuntary sovereignty waiver theory may have been killed by friendly fire. Internationalists' disdain for unilateralism, excessive use of hard power, and general weakening of the system of sovereign states is well-known. However, they have not attacked this theory with anything ap-


\(^{197}\) SHINODA, *supra* note 24, at 162.
proaching a robust riposte. It is, in fact, the neoconservatives who may kill this theory in their overzealousness to utilize it.

B. Realists v. Neoconservatives

G.W. Bush’s first term foreign policy team began with a rival mix of realists, internationalists, and neoconservatives. Chief protagonists of the realist school were Vice President Dick Cheney, National Security Advisor Condoleezza Rice, and Secretary of Defense Donald Rumsfeld; the chief internationalists were Secretary of State Colin Powell and Secretary of the Treasury Paul O’Neill; and the chief neoconservatives were Deputy Secretary of Defense Paul Wolfowitz, Undersecretary of Defense Douglas Feith, and the influential Defense Policy Board Chairman, Richard Perle.

All three camps—realists, internationalists, and neoconservatives—have different foundational fathers. Simpson notes that realists, suspicious of international law, trace their intellectual origins back to Rousseau with regard to sovereign equality theory: “equality and sovereignty can best be achieved through anarchy.” Internationalists, however, trace their roots back to Locke: “only a legal order can provide for the secure enjoyment of sovereignty and a guarantee of equality.” Neoconservatives likely find comfort in Hobbes’ view that “only subordination to some superior power can ensure peace.” Presumably, their comfort derives from the United States being that superior power, or alternatively, American dominance within an international organization if one must be used.

In terms of modern doctrinal allegiance, these camps have distinct worldviews that shape their policy preferences. Realist thought depicts world politics as “a state of war among states.” Realists view states as the primary agents in international politics; they are self-interested and pursue

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199 Id.; Stanley Kutler, Perle’s New World Order – and Ours?, BOSTON GLOBE, Apr. 2, 2003, at A19. See also Louis Klarevas, Political Realism, A Culprit for the 9/11 Attacks, 26 HARV. INT’L REV. 18 (2004) [hereinafter Political Realism]. Some question whether the chief realists were actually neoconservatives, but one may deduce from earlier positions (e.g. Cheney’s ardent support of the decision not to go to Baghdad after the first Gulf War) that these leaders at least began their service in the G.W. Bush administration as realists.
200 SIMPSON, supra note 53, at 32.
201 Id. at 32-33.
202 Id. at 33.
their own national interests, particularly their own national security. Accordingly, the most important resources in the pursuit of national interest become the states' offensive military capabilities. Realist thought, therefore, favors unilateralism over multilateralism, values military force as "a privileged means to an end," and views "international law and human rights [as] expendable in the final analysis because morality is never universal." 203

Internationalists, on the other hand, tend to view the world not in terms of fear for security, but in terms of what is achievable. Internationalist thinkers, sometimes referred to as "liberal internationalists," believe that the agents in international politics involve both states and non-state actors such as organizations, groups, and individuals. To the internationalist thinker, these agents' motivations are not strictly selfish, nor do they focus solely on security matters. Their agenda includes collective interests, such as economic, environmental, developmental, and cultural matters, and they equally emphasize the use of "hard" (coercive) and "soft" (persuasive) power to achieve agenda goals. Liberalism does not make sharp distinctions between domestic and international laws and institutions, and therefore it considers a wide range of principles, norms, morals, and rules as being vital to the functioning and order of the international system. 204

Neoconservatives, who generally adhere to a harsher form of realpolitik based on the proposition that America can and should spread democracy around the world, 205 have been described as believing that the United States, the "unchallenged superpower," has the responsibility to act as a "benevolent global hegemon." The United States "should not be ashamed to use its unrivaled power—forcefully if necessary—to promote its values around the world. . . . Any regime that is outwardly hostile to the US and could pose a threat would be confronted aggressively, not 'appeased' or merely contained." 206 Thus, neoconservatives believe that the United States should


204 Klarevas, Political Realism, supra note 194.

205 Boyle, supra note 203, at 7-8; Klarevas, W. Version 2.0, supra note 198.

spend more on defense, particularly on "high-tech, precision weaponry that could be used in preemptive strikes."\(^{207}\)

Haass would be considered an independent realist with internationalist tendencies.\(^{208}\) The policy battles between the internationalists led by Powell and the neoconservatives led by Wolfowitz during the first G.W. Bush administration were legendary. These were generally characterized as traditional tug-of-war turf disputes that periodically erupt between the Defense and State departments, but in reality, they were ideological struggles, with realists caught in the middle. Rumsfeld was co-opted into the neoconservative camp along with Rice and Cheney. Haass leaned more toward the internationalist agenda.

The neoconservatives at the Pentagon, who had been fixating on removing Saddam for most of a decade before returning to power in the Bush administration,\(^{209}\) employed Haass' theory to accomplish this long-sought task when the UN refused to support an invasion of Iraq. Haass himself did not support the Iraq operation, terming it a "war of choice," not of necessity, that did not have to be fought when it was. He could not have been thrilled to see his theory strongly challenged by the ill-conceived War in Iraq, but he has not gone on record condemning the invasion outright, focusing instead on trying to salvage his theory outside of government at the Council on Foreign Relations. Ironically, the foreign policy team of Bush's second term might have made better use of it.

With the quagmire of Iraq deepening at the end of the President's first term, the internationalists left the administration entirely, including Secretary Powell. Discredited by the disastrous occupation of Iraq,\(^{210}\) the neoconservatives either moved on or were demoted. Realists, as a result rose in prominence.\(^{211}\) Their hands are significantly tied, however, because the hard power they rely on is overcommitted with the continuing occupation of Iraq and the ongoing manning of the North Korean border. Moreover, the costs of the War on Terror, increased homeland security, massive infrastructure-laden hurricane recovery from Katrina, and the Iraq nation-building project, to-

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\(^{207}\) Id.

\(^{208}\) Although Haass' outlook may be anchored in realism, he is an independent one, not above parting company with other realists. For instance, he disagrees with most realists who assert that increasing Chinese power must be checked by American power. Richard N. Haass, *What to Do About China*, U.S. NEWS & WORLD REP., June 20, 2005, at 52.


gether with the President's generous domestic tax cuts, have left them nothing but crumbs with which to work a new agenda. Consequently, without the hard power or money they need, the realists are likely to be frustrated going forward.

Moreover, their philosophy may be ill-suited to the task at hand. Klarevas notes that realism is too narrow a vision to be a post-9/11 dominant school of foreign policy thought. "World politics in the 21st century is not just the story of great power rivalries," he states. Issues surrounding terrorism, human rights, and the environment have implications for national and international security and they must be considered in addition to realist issues, such as strategic resources and arms control.

Haass attempted mightily to broaden that narrow vision, and the proposed involuntary sovereignty waiver theory is evidence of that. But as it has been left unsupported by the internationalists, inadequately embraced by the realists, and corrupted by the neoconservatives, its future is not particularly bright, unless, as suggested earlier, it can be brought into the realm of collective enforcement—in which case, it may achieve more critical support from internationalists without losing that which it has achieved among some realists. Haass' 2005 book The Opportunity carries this argument forward, although with a healthy dose of desire for increased multilateralism, which will appeal specifically to internationalists. The main arguments, however, remain the same at their core, and the classic realist motivator, avoidance of slippage into chaos, remains unchanged.

IV. EVOLVING USE OF FORCE THEORY

As a general rule, military intervention in the affairs of sovereign states without Security Council authorization is unlawful. Article 2(4) of the UN Charter says as much. Nevertheless, while disagreeing on the method of

212 Id.
213 Klarevas, Political Realism, supra note 194.
216 UN Charter art. 2, paras. 4, 7. Most interpret the generalized prohibition broadly: "In this Article, the Charter prohibits in absolute terms not only war, . . . but every use of force in in-
ratification, a critical mass of scholars has recognized state practice as permitting intervention on humanitarian grounds not authorized by the Security Council, in turn laying a customary law groundwork as a legal alternative to UN approval—to the extent that is possible. However, with regard to unauthorized intervention in states which harbor terrorists or pursue WMD, the debate continues. A similar alternative legal basis must be found if the UN is to be bypassed to effectuate this part of involuntary sovereignty waiver theory. Anticipatory self-defense (ASD) has presented itself as that alternative. Indeed, ASD is the old interventionary doctrine that interventionists have been turning to in this debate. Some scholars support using ASD against terrorists within states while others support using ASD against states pursuing WMD, and a few support it in both instances.

international relations. States are thus, clearly and unequivocally, deprived of their [j]us bellum gerendi . . . . Or, as Kotsch so aptly puts it, “the [j]us ad bellum is replaced by the [j]us contra bellum.” Dijura Ninčić, The Problem of Sovereignty in the Charter and in the Practice of the United Nations 62 (1970) (citing Lothar Kotsch, The Concept of War in Contemporary History and International Law 101-02 (1956)) (emphasis).

International legal scholars have struggled mightily to reconcile humanitarian intervention with the plain text of the UN Charter. Some acknowledge that armed intervention into the internal affairs of a state is illegal, but hope for retroactive “pardon” for the action from the Security Council. Some argue that humanitarian intervention is consistent with the overall purposes of the UN Charter, which they claim protects universal human rights, or that the use of force in such circumstances does not seek to infringe on the political independence of the oppressing nation, because its intent is to stop a humanitarian disaster, not conquest or a change in borders. Prominent American academics have sought to identify a new norm of international law that permits a right to pro-democratic interventions.


Feinstein & Slaughter, supra note 193. However, Feinstein and Slaughter propose attaching this duty to the collective international community operating within the UN system and using ASD in conjunction with other preventative measures. Id.
A. Return of Anticipatory Self-Defense Doctrine

The chief method proposed for carrying out enforcement of international expectations when sovereignty has been involuntarily waived by a particular country is through threat or actual use of military action. In the case of Iraq, this was initially thought to be in the nature of a preemptive strike, known doctrinally as ASD, but the military action turned out to be a preventive war, a related form of ASD. Historically, ASD was a species of self-help which existed alongside reprisal and traditional self-defense in pre-Charter customary international law. ASD is based on the precept that if a state is about to be invaded, that state may attack the invading force before the actual invasion or otherwise ameliorate the effects of it. Unlike its doctrinal cousin, traditional self-defense, the state under imminent threat of attack is not required actually to absorb the first blow before responding with military force.

The concept of self-defense as an equitable response to a prior wrong is "one of the oldest legitimate reasons for states to resort to force." From Ancient Greek and Catholic philosophers to the framers of the Kellogg-Briand Pact, self-defense has been recognized through the ages as a legitimate use of force. In customary law, self-defense could take several forms. Before adoption of the UN Charter, a state could use self-defense "not only in response to an actual armed attack, but also in anticipation of an imminent armed attack." The example usually cited for this latter principle is the Caroline case, which set out essential criteria for ASD to be undertaken.

That case concerned events which took place between unauthorized American supporters of Canadian rebels and British forces in 1847. The Canadian rebellion against Britain was waning, but toward the end, several Canadian rebels obtained American support in Buffalo, New York. Around

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221 Gaddis suggests that 9/11 made obsolete prior distinctions between preemptive and preventive military actions: "The old distinction between pre-emption and prevention . . . was one of the many casualties of September 11." John Lewis Gaddis, Grand Strategy in the Second Term, 84 FOREIGN AFF. 2 (2005).
222 IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257-58 (1963); ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 72 (1993); Kelly, Reprisal Doctrine, supra note 190, at 22.
223 AREND & BECK, supra note 222.
224 Id., (citing Aristotle, Aquinas, and others on self-defense).
225 Id.
1,000 people, mostly Americans, took over Navy Island to use it as a base for raids on the Canadian shore. The Caroline shipped arms and supplies to the group. While the Caroline was docked at Fort Schlosser in New York, the British boarded it at nighttime and started shooting at the crewmembers, who were defenseless and decided to abandon the steamer. Two of the Americans in the crew were killed and two others were temporarily taken as prisoners. The British soldiers then set the steamer on fire and sent the Caroline over Niagara Falls.

Daniel Webster, the US Secretary of State, and Lord Ashburton, the British Foreign Minister, corresponded on the matter. Webster wrote that the British were responsible and in violation of the law of nations unless they could show that they had an "instant, overwhelming" necessity for self-defense "leaving no choice of means, and no moment for deliberation" and that the actions of the local authorities were not "unreasonable or excessive" in light of the magnitude of the necessity. Lord Ashburton accepted these criteria of necessity and proportionality, arguing that the facts of the Caroline case fit these standards.

The criteria the Caroline case established essentially reduced the ASD doctrine to writing. Thus, before the UN Charter, customary international law acknowledged that ASD could be used if both necessity and proportionality had been met. Woolsey acknowledged the premise for a legitimate preemptive strike in his 1877 treatise: "A wronged nation, or one fearing sudden wrong, may be the first to attack and that is perhaps the best defense."

Traditional self-defense, both individual and collective, is expressly recognized under Article 51 of the UN Charter. However, Article 51 states that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member." Historically, the most widely accepted interpretation is that the framers of the Charter intended the right of self-defense can only be exercised once an armed attack actually happens, thus limiting customary international law. However, another interpretation, centering on the word "inherent," holds that the framers of the Charter

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227 Id. at 34 (quoting Daniel Webster).
228 Id. at 35.
229 AREND & BECK, supra note 222, at 72.
230 Id.
231 WOOLSEY, supra note 30, at 191 §113.
232 AREND & BECK, supra note 222, at 72.
233 Id. (emphasis added).
234 Id.
did not intend to limit customary international law but “merely desired to list one situation in which a state could clearly exercise that right.”

There are basically, then, two schools of thought on the ASD: restrictionists, who follow the first view that Article 51 limits the old customary international law, and counter-restrictionists, who argue that Article 51 is not a limit on customary international law, but that it actually incorporates customary law as it existed in 1945, or, alternatively, that their reading of Article 51, combined with post-1945 developments like the failure of collective security and the development of nuclear weapons and inter-continental ballistic missiles, shows that the right of ASD exists as a practical matter. The International Court of Justice has never addressed the question of ASD directly, but one judge in the Nicaragua case obliquely recognized a right of ASD in a separate opinion. Nevertheless, states continue to invoke (or stretch) Article 51 instead of relying expressly on ASD doctrine to justify their actions, even when the situation seems to be one of ASD.

While necessity and proportionality are not explicitly required by the Charter, these principles are part of customary international law and both the

235 Id. at 73.
236 For further discussion of scholars falling into either of these two camps, see Leo van den Hole, Anticipatory Self-Defence Under International Law, 19 AM. U. INT'L L. REV. 69, 80-83, n.59, n.62 (2003) (perspective of a counter-restrictionist).
237 The ICJ stated in the Nicaragua case, “the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised . . . the Court expresses no view on that issue.” Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103, para. 194 (June 27). However, ICJ President Nagendra Singh wrote in his separate opinion:

It is indeed a well-established tenet of modern international law that the lawful use of force is circumscribed by proper regulation, and this is so from whichever angle one looks at it, whether the customary viewpoint or that of the conventional international law on the subject. However, the customary aspect does visualize the exceptional need for the provision of the 'inherent right' to use force in self-defence.

238 CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 86 (2000). When Article 51 is invoked, the Security Council's purview comes into play as well. States must report actions taken under Article 51. Such action is temporary, lasting until the Security Council "takes measures necessary to maintain international peace and security." Id. at 88-89 (quoting UN Charter art. 51). States usually comply with Article 51's reporting requirement, apparently heeding the ICJ's statement in Nicaragua that "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence." Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. at 105, ¶ 200.
opinion in *Nicaragua* and the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* "reaffirmed that necessity and proportionality are limits on all self-defence, individual and collective." While a discussion of necessity and proportionality is almost always a factual inquiry particular to a certain incident, agreement has been reached on two points: self-defense cannot be retaliatory and it must be designed to stop and ward off an attack.

Despite ASD’s articulation in *Caroline*, its use was rare prior to the Charter’s adoption in 1945. Minor examples include the Soviet Union’s reliance on ASD for military actions against Outer Mongolia in 1921 and against Manchuria in 1929. It was also raised as a defense by both the Germans and the Japanese before the International Military Tribunals following World War II. Germany argued that its 1941 attack on the USSR “was justified because the Soviet Union was contemplating an attack upon Germany, and making preparations to that end.” The Nuremberg Tribunal dismissed that contention for lack of evidence. Likewise, Japan argued that its invasion of the Dutch East Indies (Indonesia) that same year was in response to a declaration of war upon it (Japan) by the Netherlands’ government in exile. The International Military Tribunal for the Far East rejected the anticipatory self-defense assertion. Japan’s attack on Pearl Harbor was a form of ASD and has been regarded alternatively as an example of a pre-emptive strike, though not asserted as such by the Japanese, and an example of preventive war, also now illegal under the UN Charter.

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239 Id.; *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8).
240 Id.
241 BROWNLIE, supra note 222, at 260-61.
242 Id. at 258 (citing Judgement of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremburg, Germany, Cmd. 6964, at 35 (H.M.S.O. 1946)).
243 Id.
244 Id.
245 Id. ("The fact that the Netherlands, being fully apprised of the imminence of the attack [by Japan], in self-defence declared war . . . cannot change the war from a war of aggression on the part of Japan into something other than that.") (citing *CASES ON UNITED NATIONS LAW* 915 (Louis B. Sohn ed., 2d ed. 1967)).
247 David E. Sanger, *Beating Them to the Prewar*, N.Y. TIMES, Sept. 28, 2002, at B7. Every schoolchild in Japan is taught that the United States-led embargo on Japan was slowly killing the country’s economy and undermining its ability to defend itself . . . . The logic goes something like this, says Graham Allison of Harvard’s Kennedy School of Government. “I may some day have a war with you, and right now I’m strong, and you’re not. So I’m going to have the war now.” But Mr. Allison notes that historically, preventative war has been regarded as illegitimate, because if countries act simply because rivals are getting relatively
Max Boot, a neoconservative scholar, argues that the artificial distinction between the two species of ASD, preemptive and preventive war, should be blurred along the lines of an outcome-determinative basis. According to Boot, it is precisely because England’s preemptive/preventive attack in 1587 against Philip II’s Spanish fleet helped Sir Francis Drake defeat the Armada the following year that such actions are justified. This argument distorts the old legal doctrine and moves squarely into the realm of political realism. The inherent weakness in Boot’s assertion is that it hearkens back to a time of trial by combat, a time the world has since renounced; moreover, outcome cannot always be predicted, and after-the-fact justification is no way to prosecute hostilities in what we hope has evolved into a more predictable field of foreign relations. In either case, as Gaddis suggests, the distinction is really one without a difference. Moreover, the predictable reaction to this frontal assault on state sovereignty from the world community is the same: “For the world’s most powerful state suddenly to announce that its security requires violating the sovereignty of certain other states whenever it chooses cannot help but make all other states nervous.”

During the Cold War period, there was veto stasis between communist and non-communist permanent members of the Security Council. This political dynamic paralyzed the body; accordingly, ASD strikes continued to occur during this time period, though they were limited and infrequent. With the Security Council unable to act in many instances of military aggression, individual powers resorted to the actions that were necessary to keep the peace, while trying to justify them on varying legal grounds in the process. Some examples include the Cuban Missile Crisis (1962), the Six-

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249 Gaddis, *supra* note 221.

250 *Id.*

251 The Soviet Union began assembling delivery systems for ballistic missiles in Cuba. President Kennedy asserted that this was “a deliberately provocative and unjustified change in the status quo,” and ordered a naval blockade to prevent Soviet transportation of the material to Cuba. Though it was not the legal justification for the American blockade, the question of ASD was debated. When the Security Council considered the matter, “there was no specific rejection of the concept of anticipatory self-defense. Instead, there seemed to be an underlying acceptance by most members of the Council that in certain circumstances the preemptive use of force could be justified.” While the Security Council did not sanction ASD, neither did it reject the concept. This ambiguity, combined with the fact that states which opposed the American blockade failed to denounce the action, denotes some tacit acceptance of ASD doctrine in extraordinary circumstances. AREND & BECK, *supra* note 217, at 74-76.
Day War (1967), and the Israeli bombing of the Iraqi nuclear reactor at Osarik (1981).

Although there is still a division concerning the vitality of the ASD doctrine, some states now take the counter-restrictionist view and "support the proposition that in certain circumstances it may be lawful to use force in advance of an actual armed attack." While the concept of ASD might have its supporters, rarely does a state invoke the right of ASD alone. Not only do states usually instead rely on traditional self-defense justification, "they

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252 On June 5, 1967, Israel attacked Egypt, Syria, Jordan and Iraq simultaneously. Defeat of the Arab nations was quick. Israel's justification was that actions by the Arab states demonstrated that an invasion of Israel was immediately impending. While Israel pressed the "anticipatory nature" of its action, other states (Syria, Morocco, and the Soviet Union) noted that Israel was the first to use force and that the first use of force is illegal. Thus, to these states, the critical point seemed not to be the intent behind military action and the distinction between aggression and defense—but that the state which used force first was the aggressor. Even states sympathetic to Israel (the United States and Britain) abstained from debating ASD in the context of the Six-Day War, indicating further preference for ambiguity on the matter. Id. at 76-77; Matt Donnelly, Hitting Back? The United States Policy of Pre-Emptive Self-Defense Could Rewrite the Rules of Military Engagement, ABC News (Aug. 28, 2002), available at http://abcnews.go.com/sections/world/DailyNews/preempt020828.html.

253 In June 1981, the Israeli Air Force decimated an Iraqi nuclear reactor near Baghdad. When the Security Council addressed the matter, Iraq's Foreign Minister denounced Israel's actions as an act of aggression. Israel's Ambassador Blum stated "Israel was exercising its inherent and natural right of self-defense, as understood in general international law and well within the meaning of Article 51 of the United Nations Charter." Every delegate condemned Israel's action, some specifically referring to ASD. Many sided with the restrictionist school of thought, reasoning that "[it was] a concept that has been refuted time and again in the Definition of Aggression . . . and has been dismissed as unacceptable, since it usurps the powers of the Security Council as set forth in Article 39 of the Charter and curtails the Council's authority." But several other delegates sided with the counter-restrictionist school of thought, stating that "the plea of self-defence is untenable where no armed attack has taken place or is imminent." Still other states condemned Israel without debating ASD, including Ambassador Kirkpatrick from the United States. While there was more support for the counter-restrictionist view of ASD, most preferred to either condemn it or leave it in a state of ambiguity. AREND & BECK, supra note 222, at 77-79 (quoting the Statement of Mr. Hammadi, UN Doc. No. S/PV. 2280, June 12, 1981: 16; Statement of Mr. Blum, UN Doc. No. S/PV. 2280, June 12, 1981: 52; Statement of Mr. El-Fattal, UN Doc. No. S/off. rec. 2284, June 16, 1981: 6; Statement of Mr. Koroma, UN Doc. No. S/PV. 2282: 42). For the debate within the United States as to whether Israel's actions were legal and the acknowledgement from Reagan Administration officials that they were not, see The Israeli Air Strike: Hearing Before the Senate Foreign Relations Comm., 97th Cong. (June 18, 19, 25, 1981).

254 AREND & BECK, supra note 222, at 79.

255 GRAY, supra note 238, at 112.
prefer to take a wide view of armed attack rather than openly claim anticipa-
tory self-defence."\textsuperscript{256}

Since there is no established endorsement or rejection, "it would seem impossible to prove the existence of an authoritative and controlling norm prohibiting the use of force for preemptive self-defense."\textsuperscript{257} Nevertheless, the fact that states rarely use ASD as a justification indicates reluctance to accept it as a pre-Charter doctrine returned to the fold: "This reluctance expressly to invoke anticipatory self-defence is in itself a clear indication of the doubtful status of this justification for the use of force. States take care to try to secure the widest possible support; they do not invoke a doctrine that they know will be unacceptable to the vast majority of states."\textsuperscript{258} Indeed, the Bush administration decided ultimately not to stand on ASD as the legal basis for invading Iraq, preferring instead to argue that the decade-old Security Council resolutions from the First Gulf War carried over and provide that footing.\textsuperscript{259}

However, in the post 9/11 world, the American government has decided to return this doctrine to service at least on a policy basis,\textsuperscript{260} but in a significantly altered form. In his 2002 National Security Strategy, President Bush stated that "the United States can no longer rely on a reactive posture . . . We cannot let our enemies strike first." Citing the traditional self-defense justification of an imminent danger of attack, Bush asserted, "We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means." Expressly asserting America’s willingness to deploy militarily against perceived threats, Bush concluded, "To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."\textsuperscript{261}

How exactly is this new “emerging threat” standard to be quantified? The 2002 National Security Strategy is silent on that point and no policy clarifications have been forthcoming. Clearly, the trigger is a lower thresh-

\textsuperscript{256} Id.
\textsuperscript{257} AREND & BECK, supra note 222, at 79.
\textsuperscript{258} GRAY, supra note 238, at 112.
\textsuperscript{259} Sean D. Murphy, Assessing the Legality of Invading Iraq, 92 GEO. L.J. 173, 175-76 (2004); Michael Byers, Agreeing to Disagree: Security Council Resolution 1441 and International Ambiguity, 10 GLOBAL GOVERNANCE 165, 170-173 (2004).
old of evidence than would be required to establish existence of an imminent threat. It perhaps might be a commitment beyond some “point of no return” to carry forth an aggressive act.  Supp. Supporters argue that technology is now at the point that the threat of a nuclear attack negates the imminence showing as the classic breaking mechanism on use of ASD.  

The danger is of states abusing ASD by using their own individualized yardsticks to measure the threat they each perceive. As Murphy notes, “The standards for invasion now are pretty cut-and-dry: if you’re attacked, you can respond. But if you make [ASD] the standard, you open an enormous Pandora’s box.”  Who else can use it once the United States brings it back into play? If there are no clear guidelines and a lowered threshold for its employment, then each state is free to interpret when a threat has sufficiently “emerged” to justify military preemption. Almost any country could conceivably avail itself of the doctrine now that the triggering mechanism has been watered down from an imminent threat to an emerging threat.  For

262 Donnelly, supra note 252:

Critics warn that the evidence the United States needs to attack—the point of no return—has not been clearly defined, and has no precedent. Would the United States wait to invade until there was proof Iraq had built a chemical, biological or nuclear weapon? Or would Bush send in troops as soon as Iraq had all the components?

263 Yoo, supra note 14, at 751-53.

264 Donnelly, supra note 252 (quoting Prof. Murphy, George Wash. Univ.).

265 Michael J. Kelly, Bush’s Pre-emptive Strategy is a Recipe for Chaos, HOUS. CHRON., Sept. 24, 2002, at 20A:

Without establishing a high threshold demanding clear and convincing evidence of an imminent threat, chaos could ensue. If America invades Iraq on its own, outside the UN system, on the basis of pre-emptive self-defense against an emerging threat, suddenly . . . each nation could use a different yardstick to measure the immediacy and gravity of a threat to its national security. In other words, the pre-1945 system of warfare and reprisal would be resurrected. Does the Bush Administration realize its proposed action could transport us back to a time of aggressive war? The world outlawed such action at the Nuremberg Trials. German, and later Japanese, commanders and leaders were hanged for it. A value judgment was made that world order was best achieved by constraining the military options of individual states. Were we wrong after World War II?

Secretary of Defense Rumsfeld, however, is willing to take that risk in the face of new proliferation threats. See generally John Shirek, NBC Affiliate - WXIA Channel 11, Atlanta, Interview with Secretary of Defense Donald H. Rumsfeld, Sept. 27, 2002, available at
instance, acquisition of advanced missile technology by Taiwan could, according to Beijing, constitute enough of a threat to mainland China to justify a cross-strait intervention.

Glennon supports the Bush administration’s resumption of the ASD doctrine: “Waiting for an aggressor to fire the first shot may be a fitting code for television westerns, but it is unrealistic for policy-makers entrusted with the solemn responsibility of safeguarding the well-being of their citizenry.” His realpolitik analysis which leads him to this conclusion is that because the collective security apparatus of the UN Charter has failed, the legal prohibitions on use of force contained in that charter should no longer continue to restrict state action.

Alarmed at the pending demise of the UN collective security apparatus foretold by scholars like Glennon and endorsed by separate state action resulting in the unauthorized invasion of Iraq, Secretary-General Annan called on a group of eminent experts to definitively answer the question as to whether ASD continues to lurk within Article 51 of the Charter. Perhaps predictably, the answer they returned was essentially yes and no. They acknowledged that long established international law allows military action in the face of an imminent threatened attack, and intimated that preventive military action against non-imminent, non-proximate threats may be justified in certain circumstances. However, the experts insisted that it is up to the Security Council to authorize preventive military action when there is good evidence to support it. If the Security Council chooses not to authorize military action, then the State should pursue other strategies, such as persuasion, negotiation, deterrence, and containment. The experts stated that “in a world full of perceived potential threats, the risk to the global order and the norm


267 Glennon “suggest[s] that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere.” Id. at 540-41. He notes that the legal prohibitions against the use of force have already been abandoned in the de facto sense, and argues that they should also be abandoned in the de jure system, which he faulted for being “overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct.” Id.

of nonintervention on which it continues to be based is simply too great for
the legality of unilateral preventive action” and emphasized: “We do not fa-
vour the rewriting or reinterpretation of Article 51.”

Speaking at the presentation of this report to the Council on Foreign Re-
lations in 2004, former US National Security Advisor Brent Scowcroft, one
of the high-level panel members, remarked that the dichotomy delineated by
the report between preemptive and preventive measures was an important
one, and even groundbreaking. In response, Haass decried the notion that
the United States should refrain from taking preventive military action just
because the Security Council vetoed it. Haass put the question to Scowcroft,
“How can you possibly [argue] . . . that essentially we, the United States,
should be prepared to place second our own view of what is in our own best
self-interest?” Scowcroft maintained that the United States should pursue
other strategies, but he admitted in his response that the UN could not as a
practical matter control a Great Power if it chose to act illegally outside the
UN collective security apparatus.

Secretary-General Annan reminded Haass that the legitimacy which
comes from UN endorsement is worth pursuing nonetheless. Annan for-
mally endorsed the high-level panel’s findings in 2005; however, it re-
mains to be seen whether the Security Council will establish such guidelines,
how many states would follow them, or how many actually agree with the
high level panel’s determination. Indeed, so long as the Bush administration
remains in power and the Blair administration follows America’s lead, the
Great Powers, and therefore the Security Council, are likely to remain in
marked disagreement on use of force theory even if they all agreed on the
high level panel’s determination as a good underlying basis. Consequently,
specific guidelines are probably not possible in the near term.

World, Our Shared Responsibility, UN GAOR, 59th Sess., Agenda Item 55, at 54-55 ¶188-
192, UN Doc. A/59/565 (Nov. 29, 2004) (emphasis in original), available at
http://www.un.org/secureworld/report.pdf (“Allowing one to so act is to allow all.”).
271 Id.
272 Id.
273 In Larger Freedom, supra note 268, at 24, ¶ 77.
B. Reciprocity?

The reality of rule by the Great Powers is that international law becomes a one-way proposition. The United States has taken to invoking international law when it suits America's national purposes, but finds ways to sidestep it when it does not. International law supported America's invasions of Iraq in 1991 and Afghanistan in 2002, and it was invoked. International law did not support America's invasions of Panama in 1989 or Iraq in 2003, and it was not credibly invoked.

Moreover, rule by the Great Powers does not lend itself to reciprocity. Great Powers do not take kindly to invocation of international law against them by lesser states. In 1984, Nicaragua sued the United States at the ICJ for interference in its domestic sovereignty in violation of international law by supporting the Contra rebels. The United States walked away from its losing position in the Nicaragua litigation before the case had been decided, and withdrew its compulsory acceptance of the court's jurisdiction after the inevitable adverse judgment, in which the ICJ upheld the principle of non-intervention.

Likewise, in 1999, as Serbia was being bombed by NATO during the non-UN authorized humanitarian intervention to stop the ethnic cleansing of Kosovo, President Milosevic sued the members of NATO in their individual state capacities at the ICJ for violations of international law. The point later became moot, as he was deposed and transferred to The Hague to stand trial for war crimes, genocide, and crimes against humanity. The Court later found that it lacked jurisdiction to hear the cases.

The common weakness inherent in all the intervention justifications is the problem of interpretation and application. The cover of humanitarian intervention can be used by somebody like Hitler to justify moving into the Sudetenland to protect the repressed German minority within that part of Czechoslovakia. Indeed, Milosevic tried the same device (protecting eth-

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278 *Id.*
279 Nathaniel Berman, *The International Law of Nationalism: Group Identity and Legal Histo-
nic Serbs) to justify moving into the break-away republics of Yugoslavia as the federal state was collapsing, and later to occupy Kosovo.  

With regard to ASD, the possibility of a lesser power undertaking a preemptive strike against a Great Power is unthinkable, both on the military and conceptual level. Or is it? On the conceptual level, certainly the Great Powers do not consider this to be a realistic possibility. America is not in fear of Canada striking it. However, Canada could have justification for doing so under Haass' involuntary sovereignty waiver theory, especially since there is not an accompanying requirement of a significant nexus between the country waiving its sovereignty and the country or countries acting against it.

In this unrealistic hypothetical, Canada’s justification would be that on the humanitarian intervention prong, the United States is considered to be in grave breach of international law in its treatment of foreign detainees being held indefinitely and incommunicado at the naval base in Guantanamo Bay, and in its similar mistreatment of its own nationals who have been labeled “enemy combatants” and thrown into military brigs without access to civilian courts. On the harboring of terrorists prong, the United States has long allowed known or suspected members of the Irish Republican Army to visit friends and relatives or even remain in Boston, sometimes conducting fundraising activities. On the pursuit of WMD prong, the Pentagon announced in 2003 that it would seek development of new, highly accurate, ground-penetrating nuclear weapons. Testing remains to occur.

What Canada would, or could, do is speculative at best. Whether it considers the United States under the present administration to be an “emerging” threat justifying ASD is also speculative. However, one of its nationals was recently kidnapped by United States intelligence in New York and sent


282 Id.


to Syria for questioning and torture under the Bush administration’s extraordinary rendition program, a program in which Morocco, Jordan, and Egypt are also key participants. Since domestic political opinion will not allow the United States to extract information from detainees by torture, this job has been outsourced to other states.²⁸⁵

On the military level, a single strike can be devastating—as witnessed by Japan’s attack at Pearl Harbor in 1941, the last legal instance of ASD,²⁸⁶ or by al Qaeda’s attack on the World Trade Center in 2001. But to attack a Great Power, one must be willing to suffer the consequences. In the case of a state like Japan, part of the calculation prior to undertaking a preemptive strike would include that state’s ability to withstand the response, which itself could be a deterrent—although war with a crippled American Pacific Fleet proved not to be one for Japan. With respect to non-geographically fixed non-state actors, like al Qaeda, that calculation is perhaps easier to make.

Nevertheless, as Woolsey notes, in the realm of the three conditions of interventions proposed by the Haass model of sovereignty waiver, mistakes are less likely to be made in the context of humanitarian interventions, where the killings of people are more objectively evident, than in the case of stopping terrorists or WMD proliferation, which are more subjectively interpretive.²⁸⁷ Indeed, the world is still groping for an accepted international legal definition of terrorism—the problem being that one state’s terrorist is another state’s freedom fighter. Iraq now stands as the classic example of a mistake as to whether a state has or is pursuing WMD.²⁸⁸ Thus, the inherent

²⁸⁵ Jane Mayer, Outsourcing Torture: The Secret History of America's Extraordinary Rendition Program, NEW YORKER, Feb. 14, 2005 (citing The Committee on International Human Rights, Torture by Proxy: International and Domestic Law Applicable to Extraordinary Renditions (2005), available at http://www.umaryland.edu/healthsecurity/docs/TORTURE_BY_PROXY.pdf) (estimating that approximately 150 individuals have been extraordinarily rendered through the program since America began its war on terror in 2001).
²⁸⁶ Kelly, reprisal Doctrine, supra note 190, at 27.
²⁸⁷ Woolsey, supra note 30.

WMD was the primary justification for launching a pre-emptive war against Iraq. Before the war, President Bush accused Iraq of having WMD and enough material “to produce over 25,000 liters of anthrax—enough doses to kill several million people ... more than 38,000 liters of botulinum toxin—enough to subject millions of people to death by respiratory failure ... as much as 500 tons of sarin, mustard and VX nerve agent.”
problems of ASD, and the gravity of the resulting consequences of mistaken use of ASD, not the least of which include civilian collateral casualties, make it an untenable alternative to collective action taken within the UN system.

CONCLUSION

By pulling at the threads of the Westphalian sovereignty system, is Haass asserting that the power of the Great Powers is waning? Or is it waxing? In truth, rule by the Great Powers never went away, it only receded within various institutions during the 20th century. In the post-Cold War world, however, that rule is now re-emerging as raw power—brought out more so by the Clinton and both Bush administrations. The whiff of arrogance that comes with it is distasteful to other states, even other Great Powers. As Germany's Foreign Minister Joshka Fischer contends, “The core of the concept of Europe after 1945 was and still is a rejection of the European balance-of-power principle and the hegemonic ambitions of individual states that had emerged following the Peace of Westphalia in 1648.”

Even today, the cry is heard from lesser states that the Great Powers seek to trample their sovereignty. Sudan claims infringement of its sovereignty by the International Criminal Court (ICC), which is investigating genocide, war crimes, and crimes against humanity in Darfur on a referral to do so from the UN Security Council. President al-Bashir’s government, which is implicated in the atrocities, has quickly established courts to con-

Id.

289 The number of Iraqi civilian casualties since the American-led invasion of Iraq is hard to quantify independently from NGO estimates, but the numbers range between the extraordinarily low and high figures of 15,000 to 100,000. David Allen Larson, Understanding the Cost of the War in Iraq and How that Realization Can Affect International Law, 13 CARDOZO J. INT'L & COMP. L. 387, 404 (2005). However, according to more accurate Pentagon estimates, approximately 26,000 Iraqis have been killed or injured since January 2004 by the militants who were unleashed after the fall of Saddam. Pentagon Counts Casualties, BBC News, Oct. 31, 2005, available at http://news.bbc.co.uk/2/hi/middle_east/4392494.stm.

duct what are widely viewed as sham investigations of their own in an attempt to blunt the ICC’s jurisdiction.  

Sudan’s effort to assert its sovereignty shield, however, will fail—as it should. In the face of collective action by the UN, Sudan agreed when it signed the Charter to abide by Security Council decisions. But if it were facing intervention by Egypt or Ethiopia in their individual capacities outside Security Council approval, Sudan’s case would be stronger, albeit only marginally so since humanitarian intervention is the most widely accepted form of unauthorized intervention. If, however, Sudan were harboring terrorists, as it did with al Qaeda in the mid-1990s, or pursuing WMD, its case would be stronger still—as more countries would resist the call to individual unauthorized intervention on those grounds.

Haass’ involuntary sovereignty waiver theory seeks to justify such interventions and make them more palatable. But it misses the mark by turning to a re-established concert of powers system among the Great Powers for decision and action on a case-by-case basis. By seeking to establish what in effect would be a shadow Security Council, Haass handily undermines the already eroding legitimacy of the legal one. Moreover, there would be no guarantee of consensus when the concert did act, as there is when the Security Council acts, leading to the possibility, or probability, that not all of the Great Powers would agree in each case whether to intervene or how to intervene. If the criteria for each case remain fluid, then predictability and transparency are also undermined—further antagonizing already distrustful lesser states, many of which are former colonial “possessions” of the Great Powers and remember well their decades of servitude.

Haass’ theory also does away with the fig leaf of legality that the UN places over military interventions. Seemingly unconcerned that a resurrected concert of powers would do nothing to replace it, Haass envisions a world in which lesser states would bow to the influence of the Great Powers or risk the consequences. To his credit, he advocates a carrot and stick approach, and admonishes the United States and others to use all the carrots they have first, before resorting to the sticks. His main problem, however, is with the ultimate stick—military intervention, which he views as ineffectual and not always available within the current collective security apparatus of the UN system. Hence, he proffers his alternative system.

Yet the fig leaf remains vitally important because it provides the political cover necessary for other states to participate in whatever interventions must occur.\textsuperscript{292} In addition to legitimizing such operations—and legitimacy after all is only a function of perception—the fig leaf helps lesser participants think of themselves as stakeholders in the process. Collective action through the UN means that the world community is acting and all states are part of the UN system. Even small states that happen to be non-permanent members of the Security Council, be they Guinea or Ecuador, have a say and consult with the other small states in their regions, which further co-opts world opinion in favor of whatever action is undertaken. A concert system would not consult the Guineas or Ecuadors of the world; they would not be co-opted into the process even if the Great Powers were working in their best interests, and the credibility of best interest assertions would be low and met with recriminations of paternalism.\textsuperscript{293}

America acting alone is no answer, as Haass rightfully acknowledges. Although American hegemony has continued well beyond the end of the Cold War, scholars are skeptical about America's ability to continue in this capacity despite disagreement about the primary reason for this reduction in its relative power, ranging from the rise of rival powers such as China and the European Union to the collapse of domestic support for America's global leadership role.\textsuperscript{294} Indeed, some observers, such as Kupchan, advocate resurrection of the Great Powers system and a devolution of American hegemonic responsibility to a concert of Great Powers that share liberal norms and common networks of binding membership in multilateral institutions.\textsuperscript{295}

On the other hand, while Nye is more pessimistic about challenges from rival powers in the near term, he advocates an institutional preference for use of American "soft power," such as cooperation within multilateral institutions, non-threatening but sustained public diplomacy, and cultivation of strategic alliances, over "hard power," that is, military use of force.\textsuperscript{296} Preferential use of hard power, as demonstrated time and again by the G.W. Bush administration, actually reduces America's influence abroad, Nye ar-


\textsuperscript{293} Goldsmith & Posner, \textit{supra} note 292.


\textsuperscript{295} \textit{Id.} at 33-34, 247-303.

\textsuperscript{296} Joseph S. Nye, Jr., \textit{The Paradox of American Power} 4-17 (2002).
gues. Preferential use of soft power, however, would shore up US influence and allow America to continue directing efforts on behalf of the Great Powers, who will follow much more willingly. Walt, another soft power advocate, advises that America “must make its dominant position acceptable to others—by using military force sparingly, by fostering greater cooperation with key allies, and, most importantly, by rebuilding its crumbling international image.”

Thus, increased soft power, together with continued operation of the Great Powers behind the patina of international legal institutions, offers some hope. The question posed at the beginning of this section is whether the power of the Great Powers is waxing or waning. It can be said to be waning in the sense that the Great Powers, and especially the United States, are proving increasingly incapable of persuading reluctant states to go along with their agendas—especially in the area of non-proliferation. This results from a reduction in use of soft power which spirals down to represent an erosion of remaining soft power. Great Power reactions have been diverse.

The European Union (mainly France, Britain, and Germany) has reacted with redoubled efforts at negotiation in dealing with Iran’s truculence over ending its pursuit of nuclear arms. China, Japan, and Russia have reacted with a confusing mixture of threats, innuendo, and friendly negotiation in dealing with impasse over North Korea’s refusal to relinquish its nuclear weapons and stop production. A frustrated United States and Britain switched to hard power and invaded Iraq to interrupt—mistakenly it turns out—Saddam’s imminent acquisition of nuclear weapons.

The power of the Great Powers could also be said to be waxing, however, if that means the stripping away of the institutional cover previously considered necessary for use of hard power. Haass’ involuntary sovereignty waiver theory represents an effort to do just that, even though he would like to see a concomitant increase in America’s use of soft power to achieve results so that hard power need not be used. Nevertheless, he wishes to see the braking mechanism on the Great Powers’ ability to unsheathe their swords ameliorated, perhaps betting that the mere threat of easier access to force projection will keep renegade states in line.

Either way, one school of thought is that we are now at a neo-Westphalian moment, inviting changes in sovereignty consideration, such as involuntary sovereignty waiver theory proposes:

297 Id. at 154-63.
298 Id. at 138-47.
[S]everal factors—nonstate actors, international organizations, and changes in the global social or political environment—are weakening all states and portending the end of the international system of sovereign states. This view is deeply pedigreed and has several contemporary versions. Some international law scholars treat the state as so transnationalized, globalized, cosmopolitanized, or transgovernmentalized that sovereignty seems to be disappearing as a basis for organizing international interaction. For many international law commentators, we are at a neo-Grotian or neo-Westphalian moment at which sovereign state structures are melting away in favor of more direct governance by international law and institutions.  

If true, then perhaps sovereignty waiver theory is merely one among myriad manifestations of a general backlash against this process, albeit a more intellectualized one than that of the unilateralist neoconservatives or political isolationists, such as the former Senator Jesse Helms. However, to accept that conclusion would be to accept that sovereignty waiver is a refreshed response to the problem of sovereignty loss. While that may be a chief concern of neoconservatives or isolationists, it is not the underlying animus for sovereignty waiver theory. What motivates proponents of sovereignty waiver, the realists, is a fear of chaos. Controlling atrocities such as genocide and destabilizing refugee flows, truncating the spread of weapons of mass destruction, and snuffing out terrorist support systems are all extensions of a hyper-protectionist national security impulse rather than a heightened fear of sovereignty loss.

The subtitle to this paper asks whether sovereignty waiver theory represents a revolutionary international legal theory or merely a return to rule by the Great Powers. The easy answer is both. The more complicated answer reveals why this is the case. Sovereignty waiver theory is revolutionary, or at least innovative, in that it challenges fundamental, generally accepted precepts of sovereignty. But it also seeks to recast the global discussion of sovereignty in terms of the communal interests of nation-states. Ironically, this is true even as neoconservative members of the Bush administration con-


continue to insist on emphasizing America's own narrow state interest above that of other states—preserving America's sovereignty prerogative first and foremost. Consequently, although a return to undisguised Great Power rule is sought by the realists, the neoconservatives will gladly use sovereignty waiver theory as a handy vehicle to get where they want to go, ignoring the inherent incongruence of their strategy.

In other words, because two voices predominate within the current US foreign policy apparatus, America is in the position of lecturing the world on their shared interests in eroding the sovereignty of lesser states while simultaneously using sovereignty concerns to ignore compliance with international law, to defeat multilateral cooperation on terrorism and international crime issues, and to disengage from treaty regimes which appear to place the United States in a non-dominant position. American withdrawal from the Kyoto Protocol to the UN Framework Convention on Climate Change and from the Rome Statute creating the International Criminal Court was primarily animated by concerns that the United States would not be able to call the shots sufficiently within those multilateral regimes, thereby eroding American sovereignty.

The base precept of Great Powers rule, after all, is that the sovereignty of the Great Powers is unassailable because they are the more mature states and they, paternalistically, "know best." This is borne out by their superior economies, democracies, civil societies, and military capabilities. But the sovereignty of lesser states is conditional because they are less mature, less developed, less capable, and in need of guidance. The shades of colonial thinking are apparent along this superior/inferior divide. To the extent that lesser states refuse such guidance or go astray, the Great Powers can return to set them straight—which is what the Haass model allows in the instances of genocides, WMD proliferation, or terrorist support.

Again, rule by the Great Powers never truly went away after decolonization. It merely exists behind the artificial patina of the UN system, which, when it grants UN approval for military action, confers the fig leaf of legitimacy for Great Power military action. But, as stated earlier, that modicum of political cover is important for co-opting world opinion. Great Power rule also lurks in the controlling share structures of the major development bank institutions, the secretive periodic global policy-setting G-8 meetings, and other formal and informal institutions. That said, global adherence to involuntary sovereignty theory is not yet a foregone conclusion, even though the Bush administration is extolling it vigorously. Although the superpower supports it, other Great Powers are hesitant and none but Britain has em-
braced the Haass model fully—instead endorsing only the portions that suit their interests.

Thus, realists and neoconservatives have come to agree that the old patinas covering effectual rule by the Great Powers can and should be stripped away when they actually become an impediment to that rule, or, more specifically, an impediment to the United States effectuating its interests. The full flower of involuntary sovereignty waiver theory bloomed with the American and British-led invasion of Iraq. The justifying reasons were all perceived to be present: crimes against humanity on a wide scale, pursuit of WMD, and support of terrorists, even though WMD was the prime concern. Because the other Great Powers were not convinced, and so denied UN approval for the invasion, the United States went ahead without the UN fig leaf legitimizing the invasion with world approval. The effect has been disastrous.\(^\text{302}\)

Without a broader military, political, and financial coalition under a UN banner, as was the case with the First Gulf War, the lion’s share of casualties and costs have fallen on the United States in the War in Iraq. The lack of legitimacy, which could have flowed from more significant participation by Muslim and Arab countries as it did when the UN was involved in the First Gulf War, has only fueled a violent insurgency that continues to stymie efforts at reconstruction and stabilization and threatens to force US occupation of that country beyond the foreseeable future.\(^\text{303}\) In short, without the UN, America’s job of winning hearts and minds was made much more difficult, and winning that battle is key to dismantling the insurgency.\(^\text{304}\)

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\(^{303}\) Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT’L & COMP. L. REV. 1, 32 (2003) (“[B]efore the Persian Gulf War, the United States engaged in a three-month diplomatic blitz that recruited a number of Arab states . . . to provide support or even troops. [T]he participation and cooperation of these states [gave] the coalition vital international legitimacy . . . .”).

\(^{304}\) Mueller, *supra* note 302, at 6:

[B]ringing order to the situation [in occupied Iraq] was vastly complicated by the fact that the government-toppling invasion had effectively created a failed state which permitted widespread criminality and looting. In addition some people—including some foreign terrorists drawn opportunistically to the area—were dedicated to sabotaging the victors’ peace and to killing the policing forces. Shunned by the Bush administration, the international community was not eager to join in the monumental reconstruction effort. The inability of the conquerors to find any evidence of those banned and greatly feared weapons of
Use of the realists' sovereignty waiver theory by the neoconservatives to drive the invasion of Iraq got them to Baghdad. However, the botched job of occupation may have doomed the theory to a single-use phenomenon. Indeed, it may not have been sustainable to begin with, but the Iraq fiasco will most certainly make American and British governments think twice about using it to justify interventions again in the near term. That said, the humanitarian intervention doctrine may emerge from the fallout unscathed. It existed prior to its incorporation in the Haass model, and it has its own foundation of support among at least the Western Great Powers and within the international community generally.

Moreover, the reasons to support unauthorized humanitarian intervention are also far more compelling than those supporting terrorism or WMD-based interventions. The motives of humanitarian interventionist states are, by definition, usually altruistic; the rights sought to be secured are typically human rights as opposed to state rights. The motives of terrorism and WMD-based interventionists, on the other hand, are usually national security driven; and the rights sought to be secured are state rights (to the extent state security can be said to be an overriding "right").

More broadly, some assert that the Great Powers either do not functionally exist, or cannot exist within a renewed concert of powers system as Haass proposes. The hegemony of the United States is too great to be overcome, and may ultimately spell the end of the Westphalian system as we know it. This pessimistic view is shared even by some within the UN orbit, such as Ramesh Thakur, Senior Vice-Rector of the United Nations University, Tokyo, and member of the International Commission on Intervention and Sovereignty:

> [T]he Westphalian order may have passed its use-by date. All states are not equal in status, capacity, legitimacy, and morality. On most objective criteria, there is the United States, and there are the rest. The fact that some "legitimate" governments . . . are engaged in criminal activities indicates the troubling degree to which the very word has been corrupted. Why should a concert of democracies willingly submit its actions to the restraining discipline of the judgment of such regimes? The structure of global governance, including international organizations, must bear some relationship to the mass destruction, much less links to international terrorism, only enhanced this reluctance.

_Id._ (footnote omitted).
underlying distribution of power. Is the weight of anomalies now too heavy for the Westphalian fiction to be sustainable?305

I am more optimistic. The United States, hegemonic as it is, went to the UN on multiple occasions as well as NATO seeking support for invading Iraq in 2003 before departing with Britain to lead the intervention on its own. The United States then returned to both the UN and NATO when the occupation became more untenable for support and participation. Indeed, the impulse for multilateralism is still there.306 Haass correctly calls for its re-invigoration. With the influence of the neoconservatives within the second Bush administration’s foreign policy apparatus waning, this may yet come to pass. Security Council reform is moving forward within the UN, despite American and Chinese resistance. It may yet build a body that is more responsive, more legitimate, and more active in effectuating its collective security responsibilities—thereby reducing the perceived need for the Great Powers to adopt theories such as involuntary sovereignty waiver or return to 19th century concert of powers dynamics using equally rusty customary law of war doctrines like anticipatory self-defense.

For the many reasons stated above, I find myself in the position of accepting Haass’ first premise for intervention, humanitarianism, while rejecting the second two, preventing terrorism and WMD proliferation. Not only will his theory, carefully crafted as it is, prevent neither terrorism nor WMD proliferation, it may well induce the call by some quarters to move forward more aggressively in those areas. Aggression, like history, is cyclical, and tends to beget more aggression. To the extent that unauthorized and aggressive military solutions to the problems of terrorism and WMD proliferation in developing countries carry forward, I believe they will draw even more aggressive responses. Consequently, this is not a policy that the United States should continue to endorse. America is better than that.