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Positivism, Humanism, and Hegemony: Sovereignty and Security for Our Time*

Frédéric Gilles Sourgens**

I. Introduction

International law is experiencing a paradigm shift. The idea of sovereignty is coming under increasing attack from academic treatises and practical exigencies. Scholars like the late Susan Strange are declaring that the sovereign is no longer fit to govern in the face of highly mobile, extremely well-funded corporate and criminal enterprises.¹ Senior political figures are equally calling for a re-evaluation of the concept of sovereignty in the light of recent political integrations in the European Union.² Diplomats and judges have also conceded that the current conception of sovereignty is ill-equipped to deal with questions of international peace and security.³ With the concept of sovereignty strained, the very fabric around which structured

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1. *See generally* SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1997).

2. *See generally* ROBERT COOPER, *THE BREAKING OF NATIONS: ORDER AND CHAOS IN THE TWENTY-FIRST CENTURY* (2003).

3. *See* Prosecutor v. Dragan Nikolic, Case No. IT-94-2-S, Judgment, ¶¶ 30-32 (Dec. 18, 2003). In setting up international tribunals, U.N. diplomats implicitly recognized that the current system of sovereignty posed a threat to international peace and security under Chapter VII of the U.N. Charter. Prosecutors were unable to bring to justice the most violent perpetrators of crimes against humanity because Chapter VII shielded these criminals with sovereign immunities.

solutions to problems of international peace and security are constructed is called into question. Yet, sadly, too little theoretical work is currently being performed by international lawyers to suggest a solution to the most pressing problems of this foundational concept of law.⁴ This article will take an accounting of state sovereignty and attempt a reevaluation of the concept. The question it asks is what the main alternatives to a positive system of state sovereignty are.

This article starts from the traditional premise that sovereignty as a functional concept must serve some greater good than the preservation or expansion of state power.⁵ The lack of attention to higher order principles by the international community is causing some of the erosion of the concept.⁶ This article posits that such an attack is warranted. As such, this article attempts to cast sovereignty as a legal concept recognizing the traditional higher order principles of fundamental human rights. It arrives at the conclusion that a humanist, federal conception of sovereignty remains the best answer to the new challenges of international peace and security. This conclusion is by no means revolutionary; to the contrary, it follows a traditionalist reading of the theory of public international law. Yet, such a traditionalist reading is a needed counterweight to much of the current “neoconservative” literature on point.

Due to the underlying shifts in legal perspective, any treatment of state sovereignty must acquaint itself with its historical development.⁷ At its center is the question of what led to the adoption of the current system of state sovereignty. The answer to this question is especially pressing, as sovereignty developed as a political concept first and as a legal axiom second. Both of these processes, the original political conception of sovereignty, and its later canonization in international law, are inherently historical.⁸ Conceptions of sovereignty were the functional answer to the political power struggles of their day.⁹ Misunderstanding this political aspect of the law thus would lead to a

4. See SIR ROBERT JENNINGS, *Sovereignty and International Law, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE* 87-99 (Gerard Kreijen ed., 2002).

5. See EMERICH DE VATTTEL, *LE DROIT DES GENS* 1.4, § 39, 51 (1758) [hereinafter VATTTEL]; EMERICH DE VATTTEL, *THE LAW OF NATIONS* 13, 17 (Joseph Chitty ed., 1879) [hereinafter VATTTEL TRANS.]; Joseph Ratzinger (Benedict XVI), *Die Seele Europas, Sueddeutsche Zeitung*, Apr. 13, 2004, <http://www.sueddeutsche.de/ausland/artikel/656/51605/4/> (last visited Jan. 16, 2007).

6. See, e.g., COOPER, *supra* note 3; Dragan Nikolic, IT-94-2-S, at ¶¶ 30-32.

7. See GEORG JELLINEK, *ALLGEMEINE STAATSLAHRE* 421 (2d ed. 1905).

8. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 24 (2003) (on the pragmatic value of history in the formation of law); see generally HANS GEORG GADAMER, *WAHRHEIT UND METHODE* (Siebeck 1990) (on the value of history in general).

9. See, e.g., JEAN BODIN, *ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH* (Julian H. Franklin ed., 1992) [hereinafter BODIN TRANS.].

myopic and dangerous perspective on one of the axioms of the current international order.¹⁰

To shed light on the political development of sovereignty, this article looks first to the historical origins of the concept. It investigates the Roman law roots of sovereignty and its early sprouts in the Middle Ages. This investigation quickly shows the practical and conceptual problems of the Rinascimento¹¹ with the prevailing ideas of political power and its response with the first full conception of sovereignty.¹² From these doubts arose the conception of sovereignty found in Hugo Grotius and its codification at Münster and Osnabrück at the cusp of the Northern Renaissance.¹³

This Northern Renaissance conception of sovereignty is largely credited for the current paradigm of the equal sovereign power of states in their states and the positive consent model of international law.¹⁴ While this attribution is sufficient for most introductory treatments of sovereignty, it remains very imprecise. In order to remedy this lack of precision, this article will trace the current conception of sovereignty to the Congress of Vienna and the Nineteenth-Century balance of power between the European Great Powers. This historical distinction is important. The Congress of Vienna led to the paradigm shift toward a positive understanding of sovereignty. The earlier Renaissance understanding of sovereignty was still anchored in natural law jurisprudence. The solution brokered at Vienna created a reactionary system of sovereignty meant to protect the status quo ante of autocracy and geopolitical stalemate in Europe. As such, it was not intellectually compelling. It was maintained by necessity, rather than by choice;¹⁵ any noticeable shift in the European balance of power being thought of as a vital security threat and likely cause for war. With the end of the Cold War, this necessity appears to have vanished irrevocably.¹⁶

Any legitimate alternative to the positive system, however, still has to be an organic continuation of existing international legal tradition.¹⁷ The positivist and voluntarist conceptions of territorial sovereignty

10. See JELLINEK, *supra* note 8, at 421.

11. The Rinascimento is the Italian Renaissance.

12. See generally 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1978) [hereinafter FOUNDATIONS].

13. See HUGO GROTIUS, *DE IURE BELLI AC PACIS* 1.3, 1.4 (1625) [hereinafter GROTIUS]; HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 38-67 (Louise R. Loomis trans., 1949) [hereinafter GROTIUS TRANS.].

14. See, e.g., John H. Jackson, *Sovereignty-Modern*, 97 AM. J. INT'L L. 782 (2003).

15. See generally COOPER, *supra* note 3.

16. *Id.*

17. See ALASDAIR MCINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 209-25 (1984) (on the normative value of tradition).

always were little more than a compromise solution to the European problems of the Nineteenth Century.¹⁸ Hence, an apt recasting of sovereignty should look to develop an earlier strand of legal tradition stopped by political necessity rather than by reasoned choice. There are two such rival conceptions which already are stepping to the forefront of political action and academic discourse: hegemony and federation.

Doubts have been expressed as to whether a legal order based on hegemony is feasible today.¹⁹ Nevertheless, important theoretical first steps have been laid for a system of loose international hegemony. Such hegemony would more resemble the Holy Roman Empire of the Middle Ages than its classical namesake. The legal characteristic of such an Empire includes first and foremost the sovereign superiority of the imperial power. The imperial power is the new first among equals of the community of nations. Such superiority is expressed in its right of intervention in the territory of sister states and its claim to mediate in their woes with each other. It is founded on the ideological claim to allegiance through a common ethos of which the hegemon is the appointed guardian. Those who share in this ethos owe diplomatic deference to the hegemon. Nations which do not pay homage to this common ethos are viewed with deep suspicion and are subjected to the constant threat of designation as a "rogue state," or worse, the next target of intervention.

This line of thought has found remarkable resonance in the neoconservative reception of Samuel P. Huntington's *Clash of Civilizations*.²⁰ It also serves as a potential underlying justification for the departure in rhetoric and actions of key western states from traditional international legal standards in light of the attacks on the World Trade Center in New York, the Pentagon in Washington, D.C., and the bombings in London and Madrid.²¹ This article argues that such a hegemonic position fails. Its reorganization of sovereignty would destroy the normative force of international law and would replace it with the autocratic and arbitrary rule of force. Such a system further impoverishes the culture of fundamental rights. It endangers legal stability due to its lack of predicable, substantive rules. Hence, it is a poor alternative to the current state of affairs.

18. See WILHELM G. GREWE, EPOCHEN DER VÖLKERRECHTSGESCHICHTE 502-08 (1984) [hereinafter GREWE].

19. See generally COOPER, *supra* note 3.

20. See generally SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1998).

21. See, e.g., CNN.com, *Blair: Western Values Must Triumph over Radical Islam*, Aug. 2, 2006, <http://www.cnn.com/2006/WORLD/meast/08/01/mideast.blair/index.html> (last visited Jan. 16, 2007).

The far more intellectually satisfying solution to the problem of sovereignty looks to the Rinascimento for inspiration, rather than to the Middle Ages. As did the Rinascimento, it rediscovers the wealth of legal learning handed to us by ancient Rome.²² In its ideal form, this conception of sovereignty returns to the roots of the natural law tradition and views the respect of human dignity as the overriding source of sovereignty.²³ Due to this commitment to a higher value, sovereignty again becomes a functional concept of international good rather than national power. The most important characteristic of such a system is the recognition of legal norms which purport to bind sovereign nations not because of the sovereign consent, but because of their own inherent force. Typically, a system relying on such norms will construct supranational structures of governance to protect and enforce these norms. A federation of states crystallizes around these values and their corresponding legal norms through a common system of discourse and governance.

This system of international reorganization was clearly on the rise in one form or another, even in the days of the Cold War.²⁴ With the demise of the Soviet Union and hence the demise of the need for a balance of power, it sped more prominently onto the world stage.²⁵ Sadly the realization came all too quickly that even such a federal system of sovereignty had gross failings, as became clear in the Balkans, Somalia and Haiti. Even the latest poster child of the more optimistic federal outlook, the International Criminal Court, did little to convince the world of its systemic feasibility or even its intellectual merit. This article concludes that one of the most important reasons for the failure of the federal system of sovereignty has been the widespread misunderstanding of its theoretical basis by scholars and political actors. In attempting a postmodern justification for the newly emerging regime, many commentators are still too entrenched in the modern positivist, voluntarist paradigm. Others who are not so entrenched often lack the historical and philosophical training to propose a coherent alternative system.²⁶ A proper historical understanding of sovereignty is rare and is

22. See FOUNDATIONS, *supra* note 13.

23. See 1 JUSTINIAN, JUSTINIAN'S DIGEST ch. 1 ¶ 9 (Alan Watson ed. and trans., U. Penn. 1998).

24. See Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

25. See generally COOPER, *supra* note 3.

26. See, e.g., Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002). For a succinct critique of the federation model of international law, see ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT, THEORIE UND PRAXIS 31 (3d ed. 1984).

often overlooked due to the scarcity of contemporary proponents. Yet, it is exactly such an understanding that is required to put the concept of sovereignty on the right hook.

II. A Genealogy of Sovereignty

The idea of sovereignty is tied to the question of state power.²⁷ Its history, therefore, is one of power struggles and ancillary battles over legal definitions. The ultimate question of sovereignty historically has been: in whom does ultimate authority and power vest? Many alternatives have been presented: the commonwealth, the church, the emperor, and finally, the state. This struggle has left visible lines in the face of history, philosophy and the law. To understand these struggles over legal definitions correctly, it is of pivotal importance to grasp the common Roman law heritage of all proposed solutions.

While the many different alternatives to sovereignty are deeply indebted conceptually to the Roman law, Roman law itself did not conceive of public law in terms of sovereignty. In fact, the concept of sovereignty is not easily applied in Roman law, as the term was coined in the Renaissance.²⁸ As is often pointed out, sovereignty as a concept is considered to have been foreign to Antiquity.²⁹ Yet, the very absence of such a foundational principle of public law is deeply puzzling. After all, the modern idea of sovereignty was developed from Roman law sources by two humanist legal scholars, Alciato and Bodin.³⁰ The first question, therefore, is: what material did Rome provide for our conception of sovereignty and why did it lack a conception of sovereignty in its own age?

Bodin traces the origin of sovereignty to the Roman concept of *summa potestas*.³¹ This *potestas*, or power, in Roman law was understood in terms of *imperium*, the power to give valid and binding orders. *Imperium* is hence a legal concept which needs to be further probed.³² The Roman conception of *imperium* was very different from our own. Power emanated from one focal point and its application was universal throughout the known world.³³ Roman law creates the impression that power was essentially unified both internally and

27. VERDROSS & SIMMA, *supra* note 27, at 26.

28. *See id.*; JEAN BODIN, SIX LIVRES DE LA RÉPUBLIQUE 1.8 (1576) [hereinafter BODIN]; BODIN TRANS., *supra* note 10, at 1.

29. *See, e.g.*, JELLINEK, *supra* note 8, at 421-26 (2d ed. 1905).

30. *See* BODIN, *supra* note 29, at xiv-xv.

31. *Id.*

32. *See* EUGENE PETIT, TRAITE ELEMENTAIRE DU DROIT ROMAIN 647 (1906); CHARLES DE VISSCHER, THEORIES ET REALITES EN DROIT INTERNATIONAL PUBLIC 11 (1970).

33. DE VISSCHER, *supra* note 33, at 12.

externally. In Bodin's analysis, the Roman law gave ultimate authority to, and penned its constitution in terms of, the people of Rome. It is therefore unsurprising that analytically, the power of the State was premised not on its territory, but on the bloodline of its citizens, *ius sanguinis* rather than *ius soli*.³⁴

Antiquity generally considered statehood in terms of nationality and national origin rather than in terms of territory. This is reflected not only in Roman law, but also in Roman literature. For example, it is reprised in the epos of the origins of Rome, Virgil's *Aeneid*. Virgil clearly identifies Aeneas, son of Aphrodite and hero of Troy, and not the Latium itself—the true seat of Roman identity.³⁵ The work served the larger political purpose of tracing the ruling family of Rome, the Julii, back to foreign divinity and not to its domestic territorial roots. The Roman law remained remarkably consistent in its application of public jurisprudence based on heritage. The Roman state only accorded rights to its own citizens or nationals. All others—and their possessions, mobile or immobile—Roman law considered free for the taking.³⁶ The only exception to this rule was the establishment of a treaty of friendship between Rome and the foreign state.³⁷ As a general matter, Rome entered into such treaties on the basis of equality of nations in its early days and later on used treaties to formalize the relations of other states as vassals to Rome.

The Roman conception of power is somewhat savage at first blush. Analytically, it applies the radical natural law theory of capture to international relations. Rome viewed the entire world as a terra nullius waiting for Roman colonization. If such colonization would prove impossible, it allowed for the temporary grant of equality by treaty to the foreign state. These treaties would set forth the rules of sovereign comity and the facilitation of trade. Rome, however, was not kept for long to the terms of its treaties. In the words of Robert Cooper, Rome's conception of sovereignty was that of empire, of hegemony.³⁸ While an

34. See JUSTINIAN, *supra* note 24, at ch. 1 ¶ 9; FRIEDRICH CARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW: A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 57-60 (William Guthrie trans., 1880).

35. VIRGIL, AENEID.

36. See 3 F. LAURENT, ETUDES SUR L'HISTOIRE DE L'HUMANITE 28-31 (1880).

37. See *id.*; COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 213, 217-26 (1911).

38. COOPER, *supra* note 3, at 7. Importantly, Roman hegemony differs from its medieval and contemporary siblings in at least two respects. Roman hegemony did not truly act on an "international" stage; as a legal concept, it operated on a domestic level regarding the domestic legality of a person's actions. It also did not codify the consequences of hegemonic sovereignty on the internal affairs of neighboring states. In other words, the Roman concept of hegemony did not provide a legal justification for the

interesting stalemate between Rome and the Southern Italian Greek colonies may have been possible at some point, the inner divisions of the Mediterranean peoples rendered any compromises in Roman ambition moot.³⁹ Once the rise of Rome to world dominion became all but inevitable, there was no longer a need for Rome to develop a concept of sovereignty because of external stimuli.

Even though Rome had a very intricate public law, it had little reason to develop the idea of sovereignty internally. Power was essentially unquestioned; the little questions that remained were solved by the sword, not by legal deliberation.⁴⁰ As Georg Jellinek pointed out, the idea of sovereignty developed because of the inherent conflict between different parties all laying claim to the same power.⁴¹ While Jellinek's vantage point on Roman history is somewhat dated, his assertion that Rome never suffered the correct kind of such a struggle still holds true.⁴² More precisely put, the Roman constitutional struggle moved Rome from a Republican constitution to a monarchy without much time for legal discourse over legitimacy, and hence sovereignty, to properly take off at Rome itself.⁴³ The reason that Renaissance scholars were nonetheless able to use Roman sources to construct the notion of sovereignty is likely due to the distance with which they could perceive the cataclysmic events of the last Republican century. With such distance, they were able to extract the important legal lessons from the power struggle between the Roman aristocracy, its citizens and the Italian peoples finally received into Roman citizenship after a costly civil war.⁴⁴ In reading Cicero's philosophical works and the Roman historians, it is possible to cast the debate in terms of a struggle for *imperium*, or power, between the different orders of the state vying for legitimacy.⁴⁵ Viewed through this prism, it was possible for later generations to use the Roman law, its history and philosophical underpinnings, to conceive of political power in terms of sovereignty.

supremacy of the Roman government over the internal affairs of foreign states.

39. See generally 1 THEODOR MOMMSEN, *RÖMISCHE GESCHICHTE* (Deutscher Taschenbuch Verlag 2001).

40. See, e.g., RONALD SYME, *THE ROMAN REVOLUTION* (Oxford Univ. Press 2002).

41. JELLINEK, *supra* note 8, at 426-39.

42. *Id.*

43. The notable exception here is Marcus Tullius Cicero, who put in place many of the prerequisites of sovereignty. Arguably, Cicero therefore wielded a great influence on the early modern genesis of public international law. Because this link is not essential to this article, it will not be explored.

44. See generally SYME, *supra* note 41.

45. Indeed, civic humanism has consciously taken sides, favoring Cicero's understanding of legitimate power against that of Gaius Julius Caesar and Gaius Julius Caesar Octavian. See generally FRANCESCO PETRARCA, *LETTERE DELL' INQUIETUDINE* (Carocci 2004); LEONARDO BRUNI, *OPERE LETTERARIE E POLITICHE* (UTET 1996).

It was only with the fall of the Roman Empire that power, and hence sovereignty, again became a problematic concept. While there was still an Empire in the nominal sense after the coronation of Charlemagne in 800 A.D. as the new western emperor, forcible hegemony proved too hard to achieve for any one nation. The discussion of sovereignty is further complicated because the Middle Ages were not organized politically in terms of nation-states.⁴⁶ In theory at least, a universal monarchy of Christendom, or at least occidental Catholic Christianity, was still the highest source of legitimate power.⁴⁷ Yet, feudal principalities slowly challenged this fragile theoretical construct.⁴⁸ It was between these two extremes, the universal conception of sovereignty left from the Roman emperor, and the practical problems of rebellious princes, that the medieval idea of feudal sovereignty emerged.⁴⁹

The seminal author on medieval statehood and sovereignty proves to be none other than Dante Alighieri.⁵⁰ In his short treatise on monarchy, Dante attempts to transpose the spiritual global authority of the Pope into the temporal realm.⁵¹ In this attempt, he seeks to maintain the medieval universalist aspiration of scholastic natural law.⁵² For Dante, there ought to be one temporal ruler of Christendom and the world.⁵³ Dante reaches this conclusion by means of classical learning. He analyzes political society in terms community attachment, drawing ever wider concentric circles out from the immediate family until it incorporates all of humankind.⁵⁴ Continuing in the vein of classical education, he posits that each of these circles needs a ruler—the paterfamilias, the mayor, the prince.⁵⁵ Yet, he does not end his analysis with the prince. Rather, Dante looks to the outermost circle—that encompassing all of humanity—as the most important.⁵⁶ Here, he posits

46. See GREWE, *supra* note 19, at 57. The term sovereignty is used here in an ahistorical manner to describe the highest order authority recognized by states' contemporary legal structures.

47. See *id.* at 77; DE VISSCHER, *supra* note 33, at 12.

48. See DE VISSCHER, *supra* note 33, at 14.

49. For an excellent historical exploration of the medieval international law in light of these struggles, see GREWE, *supra* note 19, at 57-71.

50. See VERDROSS & SIMMA, *supra* note 27, at 26; ERNST CASSIRER, *NATUR-UND VÖLKERRECHT* 61-68 (1919). See generally DANTE ALIGHIERI, *MONARCHIA* (Ruedi Imbach & Christoph Flüeler eds., 1989) [hereinafter *MONARCHIA*].

51. See CASSIRER, *supra* note 51, at 64.

52. For a discussion of the scholastic natural law tradition and its influence on the development of international law, see GREWE, *supra* note 19, at 108-18; FOUNDATIONS, *supra* note 13; see generally RICHARD TUCK, *NATURAL RIGHT THEORIES: THEIR ORIGIN AND DEVELOPMENT* (1981) [hereinafter *NATURAL RIGHT*].

53. See generally *MONARCHIA*, *supra* note 51.

54. *Id.*

55. *Id.*

56. *Id.*

that there also must be a ruler: a monarch, or Christian emperor.⁵⁷

Dante provides us great insight into the political and legal problems of his day. The power of a ruler for all of Christendom was no longer self-evident. It now required a theoretical defense. By choosing universal monarchy, Dante attempts to somehow foreclose the splintering of power which had already occurred and was speeding ahead even further.⁵⁸ He acutely understood the communitarian basis of international law in his era; indeed, it was the solidarity of princes and free cities that formed the backbone of medieval Europe.⁵⁹ Dante attempts to persuade his audience that the occidental Christian communities needed a unity of government in the form of the emperor. Here, Dante's suggestion stood in opposition to the other natural conclusion from the formation of such communities: that of confederation based on similar values and political needs.

While this conflict looks peculiarly like our own, one should not draw analogies too far. The medieval mind did not think in terms of states, but more in terms of "commonwealths,"⁶⁰ or "polities."⁶¹ These commonwealths were organized as feudal realms, with the warrior prince at its head and his military order as the necessary social coagulant,⁶² bearing a striking resemblance in structure to the Platonic ideal of tripartite rule of the guardian philosopher, the guardian military class and the merchant class. The most obvious difference between the modern state and these commonwealths was that the prince's power was based on his personal imperium, not his territory jurisdiction. Due to this immediate basis of power in his orders and actions, these became a crucial focal point of sovereignty. It is noteworthy that the Middle Ages still recognized the right and duty of subordinates to hold their rulers accountable if their acts were unworthy of sovereign rule. In this way, they could be aided rightfully by neighboring sovereigns. The medieval social order was so deeply based in religion, morality and honor that even its ruling classes could not escape its grasp.⁶³

Nevertheless, the concept of national sovereignty arose out of the Middle Ages, possibly even as a response to the ever growing gap between the universalist theory of law and its feudal practice. The Rinascimento took up feudal practice, and in intertwining with humanist

57. *Id.*

58. See JELLINEK, *supra* note 8, at 426-39.

59. See GREWE, *supra* note 19, at 80-81.

60. *Id.* at 83.

61. This was Michael Byers' translation of Grewe's original term, "Gemeinwesen." See WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 61 (Michael Byers trans., 2000).

62. See GREWE, *supra* note 19, at 84.

63. *Id.* at 96.

learning and legal scholarship, developed for the first time a coherent legal theory of the nascent state. The full rediscovery of the Roman law and its interpretation paired with a rekindled interest in the Roman political ideals slowly ate away at the medieval ideals of a universal Christian hegemony of the emperor.⁶⁴ With the growing awareness of the political aspects of power, it finally vanished from the European scene.

Due to growing political awareness of the Rinascimento, two diametrically opposed theories started to take flight: a natural law theory anchored in the Graeco-Roman, stoic understanding of a universal community, and its absolutist rival. This latter conception would evolve into our idea the state, stopping at nothing to cement the new found political power into permanent, positive sovereignty.⁶⁵ The conception of the positive state evolved from *la ragione di stato*.⁶⁶ The *ragione di stato* spawned a genre of political literature addressing questions of proper governance.⁶⁷ Its most cited work was Machiavelli's *Principe*.⁶⁸ Machiavelli argues for the emergence of a new political entity—state, rather than commonwealth. At the core of this new entity was the newly emerging conception of imperium—that of the prince.⁶⁹

The conception of state power was put in terms of “sovereignty” for the first time some forty-five years after the publication of the prince by Jean Bodin.⁷⁰ It proved the natural conclusion of the legal learning of the Rinascimento: a balancing point between a strongly state-driven political theory and existing natural jurisprudence.⁷¹ Bodin defines sovereignty as the absolute and perpetual power of the commonwealth resting in the hands of the state.⁷² It provides an external demarcation against the intrusion of outside powers into the realm of the state.⁷³ Furthermore, it establishes the internal power of the state over its subjects.⁷⁴ While there is some interesting discussion as to which of these two aspects is at the

64. See DE VISSCHER, *supra* note 33, at 17.

65. Compare NICOLO MACHIAVELLI, *IL PRINCIPE* and *I DISCORSI*, in *1 NICOLO MACHIAVELLI, OPERE* (UTET 1999) with DE VISSCHER, *supra* note 33, at 21-22.

66. GREWE, *supra* note 19, at 197.

67. FOUNDATIONS, *supra* note 13, at 113-38.

68. Whether the *Principe* in fact falls into the category of *ragione di stato* has been questioned by scholars on numerous occasions. See *id.*

69. See JELLINEK, *supra* note 8, at 441.

70. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 1-45; GREWE, *supra* note 19, at 198.

71. BODIN TRANS., *supra* note 10, at 89-109.

72. BODIN, *supra* note 29, at 1.8, 2.1; BODIN TRANS., *supra* note 10, at 1-45, 89-109.

73. BODIN, *supra* note 29, at 1.10; BODIN TRANS., *supra* note 10, at 49. GREWE, *supra* note 19, at 198.

74. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 32-45; VERDROSS & SIMMA, *supra* note 27, at 26-27.

heart of Bodin's thought—the positivist or the naturalist—it is truly the balance of both concerns that is responsible for Bodin's lasting importance, irrespective of his historically correct exegesis.⁷⁵

For Bodin, the state is analytically the repository of sovereignty, whether the state is defined by its prince, its nobles or its people.⁷⁶ Sovereign power is that which is used in its own right and not in the capacity of a stewardship.⁷⁷ In other words, sovereignty requires full political independence. Nevertheless, sovereignty is both internally and externally limited for Bodin. Natural law internally limits sovereignty. As sovereignty is power used to just ends through law in the image of God, logic dictates that sovereign decrees be limited to the confines of natural law.⁷⁸ For Bodin, one such example of an internal limitation of sovereignty was the inviolability of property rights and the ensuing need for just compensation in the case of a taking.⁷⁹ However, this internal limitation on sovereignty was severely curtailed by the lack of remedies against its breach; subjects were limited to civil disobedience and were denied the right to revolution.⁸⁰

Sovereignty was externally limited by the law of nations.⁸¹ In as far as the sovereign had entered into treaties, and to the extent that customary *ius gentium* was not unjust, the law of nations was binding on the sovereign. Interestingly, the justification for the binding nature of the law of nations already has certain modern undertones. Because sovereignty is the source of all legal obligation,⁸² the sovereign can only incur obligations through its acts of voluntary submissions to an oath or contract.⁸³ Where such a contract was entered into, it was binding on the sovereign because of its formal, voluntary assent to its terms.⁸⁴

Customary law was justified in line with the internal limitation on sovereignty; these were just and necessary obligations required to maintain sovereignty. Still, for Bodin this external limitation had

75. It is this author's contention that the correct exegesis is one that is slanted heavily in favor of the communitarian natural law roots of classical learning, rather than a positivist state-centered reading. It is in this sense that Bodin is later used in the final section of this paper. See *infra* Part V.

76. BODIN, *supra* note 29, at 1.8, 2.1; BODIN TRANS., *supra* note 10, at 2, 90.

77. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 7.

78. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 45.

79. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 41. Bodin quotes Seneca: "Omnia rex imperio posidet, singuli dominio." (The king is vested with all power, the individual with all ownership).

80. BODIN, *supra* note 29, at 2.5; BODIN TRANS., *supra* note 10, at 120.

81. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 45; VERDROSS & SIMMA, *supra* note 27, at 26-27.

82. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 12-13, 23.

83. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 35.

84. BODIN, *supra* note 29, at 1.8; BODIN TRANS., *supra* note 10, at 35.

somewhat more bite than its internal sibling. It was, in fact, enforceable. Violations of treaty obligations or truly international rules of conduct could easily give rise to a just cause for war. Furthermore, foreign sovereigns also had the right to enforce the law of nations in internal affairs in cases of tyrannical governments where a tyrant was “notorious for rapine, murders and cruelties toward his subjects.”⁸⁵ Outside of these constraints, however, sovereignty is defined as the ultimate authority to make and enforce law in the worldly sphere; logic dictates that it is unconstrained from further external interference.⁸⁶

It is fair to say that Bodin did not only coin the term sovereignty; he defined it. From there on out, the legal principle of sovereignty would rarely look back to Bodin’s sources. Beginning with Grotius, international lawyers and scholars developed Bodin’s concept further.⁸⁷ Yet, from that point until today, few have ever rejected it. The most important early contribution to this new legal principle was made by Grotius.⁸⁸ Grotius’ understanding of the sovereign further built on Bodin’s work. The sovereign became even more powerful internally and more impermeable externally. Grotius places little of the natural law limitations on the sovereign which Bodin still posits.⁸⁹ The Grotian theory of sovereignty does not derive from divine grace, but from the contractual bond between state and subject.⁹⁰ This contractual device allows Grotius to severely mitigate the natural law conclusions still necessary in Bodin’s conceptual framework. Further, natural law only limits the state externally to the extent of truly international incidents, as its citizens are not allowed to resist it; they only have the right—and the duty—to disobey unjust commands.⁹¹ It governed the behavior between states. It did not allow the intervention of one state in the affairs of another outside of the presence of certain extremely rare factors, such as the oppression of an entire people by a foreign, conquering monarch.⁹²

This strong theory of sovereignty is often referred to as the Westphalian system of international law, which refers to the peace treaty signed at the end of the Thirty Year’s War in 1648.⁹³ However, this

85. BODIN, *supra* note 29, at 2.5; BODIN TRANS., *supra* note 10, at 113 n. 1.

86. BODIN, *supra* note 29, at 1.10; BODIN TRANS., *supra* note 10, at 55-56 (“The first prerogative of a sovereign prince is to give law to all in general and each in particular . . . without consent of any other, whether greater, equal, or below him”).

87. GROTIUS, *supra* note 14, at 1.3, 1.4; GROTIUS TRANS., *supra* note 14, at 38-67.

88. GROTIUS, *supra* note 14, at 1.3, 1.4; GROTIUS TRANS., *supra* note 14, at 38-67.

89. GROTIUS, *supra* note 14, at 1.4.7; GROTIUS TRANS., *supra* note 14, at 62-65.

90. GROTIUS, *supra* note 14, at 1.3.8; GROTIUS TRANS., *supra* note 14, at 44.

91. GROTIUS, *supra* note 14, at 1.4.7; GROTIUS TRANS., *supra* note 14, at 62-65.

92. GROTIUS, *supra* note 14, at 1.5; GROTIUS TRANS., *supra* note 14, at 58-69.

93. See generally GENE M. LYONS & MICHAEL MASTANDUNO, *BEYOND WESTPHALIA?: STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* (1995).

attribution of modern-day sovereignty to the thought of the late Northern Renaissance is more confusing than it is helpful. The concept of sovereignty as it is often associated with the Westphalian system has been considered to be an outright license for the state to treat its subjects with impunity. In the words of a contemporary writer, this notion of sovereignty “could be characterized as the nation-state’s power to violate virgins, chop off heads, arbitrarily confiscate property, torture citizens, and engage in all sorts of inappropriate actions.”⁹⁴ This conception of sovereignty is decidedly not part of the Northern Renaissance.⁹⁵ Even in its most potent formulation, early sovereignty was still deeply anchored in the moral discourse of Cicero and Tacitus. It was very much part of a tradition which condemned tyranny in the starkest of terms. Certainly, by the time Grotius wrote on sovereignty, the impassioned defense of the tyrannicide of Cicero had been left for dead in the writings of civic humanists.⁹⁶ Yet, it still was committed to Tacitus; citizens still had a right to seek in their disobedience and death a more just future.⁹⁷

In fact, the revolutions of 1688, 1776, and 1789 still drew on the very discourse which Grotius sought to mitigate.⁹⁸ In the final analysis through to 1814, sovereignty always rested on the benevolent use of state power.⁹⁹ While absolutism slowly ate away at this theoretical foundation of sovereignty to the benefit of regal power, it never quite displaced it.¹⁰⁰ Only the concerted action of all of Europe and Russia, as well as the

94. Jackson, *supra* note 15, at 790.

95. See GROTIUS, *supra* note 14, at 1.4, 1.5; GROTIUS TRANS., *supra* note 14, at 58-69.

96. Compare CICERO, DE OFFICIIS, in MARCUS TULLIUS CICERO, ON DUTIES (Walter Miller trans., 1913) with GROTIUS, *supra* note 14, at 1.4.

97. See 1 TACITUS, THE HISTORIES ch. 3 (D.S. Levene ed., Oxford 2001).

[N]on tamen adeo virtutum sterile saeculum ut non et bona exempla prodiderit. Comititae profugos liberos matres, secutae maritos in exilia coniuges; propinqui audentes, constantes generi, contumax etiam adversus tormenta servorum fides; suprema clarorum virorum necessitates fortiter toleratae et laudatis antiquorum mortibus pares exitus.

(Yet the age was not so barren in noble qualities, as not also to exhibit examples of virtue. Mothers accompanied the flight of their sons; wives followed their husbands into exile; there were brave kinsmen and faithful sons in law; there were slaves whose fidelity defied even torture; there were illustrious men driven to the last necessity, and enduring it with fortitude; there were closing scenes that equaled the famous deaths of antiquity).

98. See generally CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION (1991); ALAIN DECAUX, DANTON ET ROBESPIERRE (1979).

99. Vattel, *supra* note 6, at 1.4, § 39, 51; Vattel TRANS., *supra* note 6, at 13, 17.

100. See generally THE ENGLISH LEVELLERS (Andrew Sharp ed., 1998); JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, THE FEDERALIST PAPERS (Penguin 1987); Ministère de la Justice, *Déclaration des droits de l'Homme et du citoyen*, Aug. 26, 1789, <http://www.justice.gouv.fr/textfond/ddhc.htm> (last visited Jan. 16, 2007).

inaction of the Americas, finally buried this conditional conception of sovereignty. In the place of natural law and humanist learning, positivism ruled the age.¹⁰¹ With positivism came the conception of sovereignty as the right of the state to do on its territory as it saw fit. The Concert of Nations sought to protect the reign of the *ancien régime* by instituting an ever more powerful conception of the right of states to act as they pleased on their own territory.¹⁰² Sovereignty became vested in the person of the king.¹⁰³ With this new base of sovereignty came the voluntarist paradigm of sovereignty and its attempt to stare down the scare of revolution. The single most defining event for this conception of sovereignty was the Congress of Vienna.¹⁰⁴

The Congress of Vienna established again the *ancien régime* in Europe after the deluge of the French Revolution and the demise of the progressive French Empire in 1814-1815.¹⁰⁵ The newly established Congress of Europe was founded on two complementary ideas: the territorial redistribution of Europe according to pre-revolutionary interests and the pre-revolutionary understanding of territorial sovereignty. It was also spurred by Congress' institution of the first "federal" Europe, which was an agreement between the Great Powers to guide the fate of the continent through the means of a common understanding.¹⁰⁶ Within the framework of this cooperative enterprise, the counterintuitive reinforcement of the notion of sovereignty developed. The voluntarist paradigm had found its first clear vehicle in the Congressional mechanism for the Great Powers especially. The Great Powers were guaranteed the continued existence of the status quo ante, unless they would expressly agree to change it.¹⁰⁷

While Europe did not live in peace for much more than a generation after this newly minted cooperative order, its principle clearly stuck. The positivist order of sovereignty crystallized more clearly. It was perhaps most aptly captured by Charles Calvo:

[L]e gouvernement d'un Etat, en tant que produit et instrument de la souveraineté du pays, peut entretenir deux sortes de relations fondamentales: les unes, de droit public interne, c'est-à-dire celles qu'il entretient au point de vue politique avec les citoyens ou sujets

101. See 1 CHARLES CALVO, *LE DROIT DES GENS THEORIQUE ET PRATIQUE*, 118-19, 130 (3d ed. 1880).

102. GREWE, *supra* note 19, at 502-04.

103. See LASSE OPPENHEIM, *INTERNATIONAL LAW A TREATISE* 351 (Ronald Roxburgh ed., 3d ed. 1920).

104. GREWE, *supra* note 19, at 502.

105. *Id.*

106. *Id.*

107. *Id.* at 508-16.

places sous son action; les autres, de droit public externe ou de droit international, qui embrassent tout ce qui concerne ses rapport avec d'autres Etat.¹⁰⁸

Sovereignty was hence premised on the supreme authority of the state internally and the external international personality of the state to bind it in treaties and international custom.¹⁰⁹ With the advent of the Twentieth Century, it gained ever greater importance. In the interwar period, it had finally become the new orthodoxy. Since the 1920s, this orthodoxy had not been credibly challenged by political events or a scholarly consensus until today. Sovereignty from there on out was premised on the independence of states from one another.¹¹⁰ The sovereign state maintained the highest prescriptive authority on its territory, as well as a monopoly on physical power.¹¹¹ Furthermore, sovereigns do not recognize a higher prescriptive authority outside of the international law which they have bound themselves to through their own consent.¹¹²

III. Failures of the Current Conception of Sovereignty

The current paradigm of sovereignty relies on the internal exclusive authority of the sovereign over its territory, and the external sovereignty of the state to be bound in international law only through its own consent.¹¹³ This system of sovereignty evolved as further sophistication of the previous Viennese system in the interbellum era. Its first principle found multiple expressions in the judicial decisions of the age. Academic writers today rely on the famous *S.S. Lotus*¹¹⁴ case's emphatic endorsement of this voluntarist notion of international law based on the independence of nations.¹¹⁵ The *Island of Palmas* case is further cited for the same proposition: "sovereignty . . . between States signifies independence."¹¹⁶ This conception of sovereignty has received its most

108. CALVO, *supra* note 102, at 146.

(The government of a state as the instrument and product of the country's sovereignty can entertain two sorts of fundamental relations: the first have an internal public law character, meaning those relations it maintains on a political level with its citizens and subjects; the second have an international public law, or international law, character, meaning those relations that embrace all of its dealings with foreign states).

109. *Id.*; OPPENHEIM, *supra* note 104, at 127.

110. VERDROSS & SIMMA, *supra* note 27, at 28-29.

111. *Id.* at 29.

112. *Id.*

113. *Id.*

114. *S.S. Lotus Case (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

115. VERDROSS & SIMMA, *supra* note 27, at 28; see also Bruno Simma & Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302 (1999).

116. VERDROSS & SIMMA, *supra* note 27, at 30 (citing *Island of Palmas Case (Neth. v.*

definitive expression in the Friendly Relations Declaration of 1970.¹¹⁷

The Friendly Relations Declaration broadly sets out the maxims of independence and equality of sovereign states.¹¹⁸ It categorically objects to the intervention of any state in the internal affairs of another. It codifies the equal rights and the right to self-determination of peoples. Finally, it reaffirms the sovereign equality of states.¹¹⁹ The Declaration elaborates on the understanding that sovereignty requires all states to respect the integrity of their peers. This means that no state may directly or indirectly interfere in the right of the sovereign to regulate its internal affairs as it sees fit. This duty of non-interference includes the right of the state to choose its own social and economic order without outside interference.¹²⁰ The only exception which is made to this principle of absolute sovereignty is the right of the Security Council to act under Chapter VII of the U.N. Charter.¹²¹

The mindset apparent in the Declaration shadows the political necessities of its time. The Cold War had essentially driven the Congressional Great Power model of cooperation to its positivist extreme.¹²² A deadlock between the parties of the Cold War, as well as the assurance of mutual destruction in an exchange of hostilities, forced the international community to accept the consequences of positivism. Calvo's principle of full internal autonomy had truly become the accepted standard of international law.¹²³ Against this background, it is possible to understand the normative character of the Friendly Relations Declaration. As a U.N. General Assembly Resolution, it clearly does not create international law of its own accord.¹²⁴ Yet, because of the political necessities of the times, the Declaration arguably assumed customary international force.

U.S.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928)).

117. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 121, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/5217 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]; see generally GAETANO ARANGIO-RUIZ, *THE U.N. DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF SOURCES OF INTERNATIONAL LAW* (1979).

118. See generally Friendly Relations Declaration, *supra* note 118; ARANGIO-RUIZ, *supra* note 118.

119. See generally Friendly Relations Declaration, *supra* note 118.

120. On the reach of this provision of the Declaration in state practice, see generally Lori Fisler Damrosch, *Non-Intervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989).

121. U.N. Charter ch. III.

122. See generally Anthony Clark Arend, *The United Nations and the New World Order*, 81 GEO. L.J. 491 (1993).

123. CALVO, *supra* note 102, at 146.

124. For a detailed analysis of the status of the Declaration as international law, see generally ARANGIO-RUIZ, *supra* note 118.

No incident in international law more fully supports this view than the United States Supreme Court's decision in the *Sabbatino* case.¹²⁵ In *Sabbatino*, the U.S. Supreme Court de facto recognized the expropriation of foreign-held property in Cuba by applying the act of state doctrine to the controversy.¹²⁶ The Court applied the doctrine because of its respect for Cuba's sovereignty.¹²⁷ The Court then warned that it would not apply the doctrine in the face of a clear violation of a rule of international law.¹²⁸ However, this comment by the Supreme Court was mere window dressing. At the time of *Sabbatino*, there was a rule of international law which condemned the nationalization of alien property.¹²⁹ Still, the Court gladly set aside this rule of law, ostensibly because it felt that Cuba's sovereign rights trumped the concerns of illegality. While this rule was met with Congressional outrage as far too deferential to foreign sovereign decisions, it nevertheless remained part and parcel of the international legal discourse well into the 1980s.¹³⁰ The *Sabbatino* environment, coupled with the Friendly Relations Declaration and the general political climate from the 1960s to the mid-1980s, turned sovereignty into a near absolutist maxim.

Interestingly, the crack in the system of positivism did not come from the large stage of the Cold War itself. It was first articulated in the nascent field of human rights law in 1966; the U.N. General Assembly adopted the single most important human rights document of the Twentieth Century: the International Covenant on Civil and Political Rights (ICCPR).¹³¹ It entered into force only ten years later. The ICCPR implicitly started a gentle revolution for the concept of sovereignty; it reintroduced the notion of limited and purposeful sovereignty rather than absolute sovereignty. In the key articles of the ICCPR, it implicitly limited sovereignty by making it illegal for states to extrajudicially put any human being to death, to subject a human being to torture or degrading punishment, to allow slave trading of compulsory labor, to imprison a person for the nonperformance of a contract, to convict or sentence a person of a crime without due process of law, not to recognize

125. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); on later influences of the case, see for example Malvina Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68 (1985); Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996).

126. *Sabbatino*, 376 U.S. at 398.

127. *Id.* at 428.

128. *Id.* at 429.

129. See ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 391-407 [hereinafter IEL] (2003).

130. See Halberstam, *supra* note 126, at 68.

131. See generally International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

a human being as a person at law, and to infringe on the freedom of conscience, thought and religion.¹³²

Yet, with this gentle revolution of sovereignty also came the nagging question: does government action which violates these basic human rights principles lack a sovereign quality?¹³³ The positivist system of law must answer this question in the negative. At the most, these principles rise to the level of peremptory norms of international law. Even if they rise to that level, however, states in positivist jurisprudence would remain able to consent to their change. According to the Vienna Convention on the Law of Treaties, it is possible to replace peremptory norms of international law with other norms of a similar character.¹³⁴ The very ability to change these human rights principles means that the positivist jurisprudence cannot conceive of these rights as being a condition of sovereignty at all. As states can consent to their change through sovereign action, their sovereignty must of necessity be independent of the human rights expressed in the ICCPR.

However, the first practical push to undermine absolutist sovereignty derived from a different human right: the right of investors not to be deprived of their property without prompt, fair, and adequate compensation.¹³⁵ Hence, the “push” came in the guise of international economic law and the growing conflict on the questions of nationalization of foreign property. At the pinnacle of the voluntarist sovereign paradigm, developing countries attempted to use the U.N. General Assembly as a means to justify the nationalization of natural resources and other expropriatory measures. These activities began in 1962 and stretched through the 1970s, when sovereignty again was slowly curtailed to the benefit of property rights.¹³⁶ During this period of time, the least developed nations attempted to use sovereignty arguments in order to effect property rights and general economic concerns.¹³⁷ The most marked attempt to use sovereignty for these purposes was the General Assembly’s 1974 passage of the Declaration on the Establishment of a New Economic Order.¹³⁸ In this Declaration, these

132. *Id.* at arts. 4, 6, 7, 8, 11, 15, 16, 18.

133. *See infra* Part IV.

134. Vienna Convention, *supra* note 25, at art. 64.

135. IEL, *supra* note 130, at 391-407 (2003).

136. *See generally* Declaration on the Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), 17 U.N. GAOR, Supp. No. 17, at 15, U.N. Doc. A/5217 (Dec. 21, 1962); Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI) (May 1, 1974); Charter of the Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31 (Dec. 12, 1974).

137. *See generally* NOAH RUBINS & STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK, AND DISPUTE RESOLUTION (2005).

138. Declaration on the Establishment of a New International Economic Order, *supra* note 137; VERDROSS & SIMMA, *supra* note 27, at 311-15.

states attempted to incorporate the so-called Calvo doctrine into general international law; this doctrine would have deemed legal the expropriation of alien property on the basis of sovereign power.¹³⁹ All present in the sovereign jurisdiction are under the sovereign's regulatory authority equally. Hence, one may not differentiate between the status of foreigners and that of citizens under international law.¹⁴⁰

Once sovereignty took on such absolute vestiges, it had clearly overreached. With the assertion of absolute prescriptive rights over their territory, states were now responsible for a caricatured version of sovereignty; the sovereign was now allowed to do as he pleased on his own territory—no matter how distasteful his conduct.¹⁴¹ By attempting to take on the powerful economic interests of global investors, these radical—and perhaps foolish—implications of voluntarist sovereignty were uncovered and slowly rolled back.¹⁴² In the field of international economic law, it was international financial pressure which helped to overcome the threat of ongoing nationalizations with the ratification of over 1,100 Bilateral Investment Treaties over the last few decades.¹⁴³

Nevertheless, once the radical nature of the voluntarist theory on sovereignty had been uncovered, it was difficult to undo its implications. More often than not, sovereignty was perceived as a justification for the erosion of systems of justice and the commission of gruesome atrocities.¹⁴⁴ States were more than happy to fuel this perception of sovereignty by relying on their sovereign rights to suppress domestic civil rights movements, defending their actions internationally only by reference to their sovereign right of non-interference in internal affairs.¹⁴⁵ While such a realization may well not have amounted to a legal critique of the voluntarist sovereignty regime some twenty years ago, it does

139. See IEL, *supra* note 130, at 391-407.

140. See *id.*

141. Jackson, *supra* note 15, at 790.

142. See generally Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Wealth*, 75 AM. J. INT'L L. 437 (1981) (arguing for a middle ground between the traditional compensation rule and the then new doctrine of national treatment of foreign property).

143. See International Centre for Settlement of Investment Disputes, *Bilateral Investment Treaties*, <http://www.worldbank.org/icsid/treaties/intro.htm> (last visited Jan. 16, 2007).

144. This was the justification for the atrocities committed by the Russian Federation in Chechnya. See Stephen Erlanger, *Call for Talks at Deadline for Chechnya*, N.Y. TIMES (late ed.), Dec. 18, 1994, at I22. For the action of Serb forces during the disintegration of Yugoslavia, see Chuck Sudetic, *Another Yugoslav State Breaks Ties*, N.Y. TIMES (late ed.), Feb. 22, 1991, at A3.

145. One such example is the Uighurs in the People's Republic of China, who admittedly get little attention in the international press. For a brief mention and discussion of their status, see Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 343 (2002).

amount to that today.

Today, the fundamental human rights codified by the ICCPR are becoming increasingly important to the minds of international jurists, so much so that they may well become a check against the abuse of sovereignty, if not a precondition of its very existence.¹⁴⁶ Hence, it is crucial to understand the 1984 assertion made by professors Verdross and Simma that the classical voluntarist principle of sovereignty shall remain unchallenged in the light of its times.¹⁴⁷ Then, voluntarist sovereignty remained the fragile international compromise securing the peaceful coexistence of the two super power blocs.¹⁴⁸ The moment that necessity eroded, the previously inconsequential observations that sovereignty indeed had been curtailed—and ought to be curtailed—again became relevant.¹⁴⁹

This legal reaction to the end of the Cold War has been articulated at great length in the last few years.¹⁵⁰ It looks to sovereignty in a different light. Statements by jurists on international and domestic courts that the value of sovereignty may be balanced against the importance of the alleged misconduct by a state were altogether unthinkable under traditional positivism; the impermeability of geographical frontiers, as well as the normative supremacy of governmental acts on its own territory are clearly undermined.¹⁵¹ If a court can disregard sovereignty concerns, or deny that a governmental action rises to the level of a sovereign act where it is wholly consummated on its domestic territory, then the notion of sovereignty as it was conceived of in the last century is no longer the prevailing legal orthodoxy.¹⁵² This is importantly underscored by the continued scholarly work of learned jurists in the field.¹⁵³

Subsequently, the question becomes: what can take the place of this understanding of sovereignty? While the complete dismissal of notions of sovereignty is indeed part of the international legal literature today, such thoughts are premature.¹⁵⁴ The essential query therefore becomes not what concept will take the place of sovereignty, but how sovereignty

146. See COOPER, *supra* note 3; Dragan Nikolic IT-94-2-S, at ¶¶ 30-32.

147. VERDROSS & SIMMA, *supra* note 27, at 37.

148. See COOPER, *supra* note 3, at 26-27.

149. See *id.*

150. See discussion of Calvo *supra*. For a very early example of a similar position in U.S. domestic law, see the Hickenloper Amendment, Section 620(e)(2) of the Foreign Assistance Act of 1961 (codified as amended at 22 U.S.C. § 2370(e)(2) (2000)).

151. See Dragan Nikolic, IT-94-2-S, at ¶¶ 30-32.

152. VERDROSS & SIMMA, *supra* note 27, at 35-37.

153. See, e.g., JENNINGS, *supra* note 5, at 27-44.

154. See Evelyn Ellis, *Book Review: Neil McCormick, Questioning Sovereignty: Law, State and Nation in the European Commonwealth*, PUB. L., Spr. 2001, at 198-99.

should be understood in its contemporary context. There are two options before the world today, one cynical, and one idealistic. Both options suffer from immense practical problems. The cynical position, in addition to being theoretically flawed, may well prove untenable as a matter of realpolitik. The idealistic approach still proves to be a frail continuation of previous legal traditions. For the reasons that follow however, it remains the best alternative.

IV. Hegemony as a New Paradigm of Sovereignty

Maybe the most natural solution to the problem of sovereignty is to proclaim the last remaining super power and ostensible winner of the Cold War the new hegemon.¹⁵⁵ In its hegemonic capacity, the United States would be charged with the keeping of international order and the resolution of international disputes.¹⁵⁶ The United States could also assert its hegemonic position ideologically by pointing to its long-standing Republican tradition.¹⁵⁷ It may be argued that the Republican principles of self-determination and the respect of human rights are the ideals on which the laws of the United States are premised. After some two hundred years of experience managing a Republican society, few states would arguably be placed in a better position to firmly take the reigns of world affairs.

Hegemonic legal theory has deep roots in the international law tradition.¹⁵⁸ As explained previously, the historical development of international law started with the conflicts between the church, the emperor, and the multiple feudal lords in the Middle Ages.¹⁵⁹ It is therefore of little surprise to find that the main justification for hegemony was already present in these early days. Dante's justification for imperial rule still remains the main justification for any hegemonic order: any community requires an effective leader to keep itself from falling into disarray.¹⁶⁰ Regardless, there needs to be a final instance of dispute resolution accepted by all to avoid the escalation of disputes.¹⁶¹ In a

155. See Tom J. Farer, *Beyond the Charter Frame: Unilateralism or Condominium?* 96 AM. J. INT'L L. 359-60 (2002).

156. See generally Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526 (2004) (discussing the arguably hegemonic role assumed by the United States in policing the High Seas as constructed by John Bolton).

157. See Eliot A. Cohen, *History and Hyperpower*, FOREIGN AFF., July-Aug. 2004, at 49.

158. See generally Charles J. Reid, *Legal History: "Am I, By Law the Lord of the World?" How the Juristic Response to Frederick Barbarossa's Curiosity Shaped Western Constitutionalism*, 92 MICH. L. REV. 1646 (1994).

159. See *supra* Parts I, II.

160. See generally MONARCHIA, *supra* note 51.

161. Indeed, the lack of such final dispute resolution is currently partly blamed for

hegemonic system, such authority is vested on the basis of accepted physical preeminence and ideological supremacy.¹⁶² These preconditions were met, at least in theory, by the emperor in the Middle Ages as he was recognized and anointed by the pope as the worldly arm of the Church.¹⁶³ Such recognition proved futile without the requisite physical power needed to credibly wield the authority of this high office. When both were met, however, Dante's argument certainly has some *prima facie* credence.¹⁶⁴ In those circumstances, the imperial hegemon is accepted as the spiritual center and effective ruler of the commonwealth.

The same justification could be used today as intellectual support for a hegemonic reordering of sovereignty. The proponents of this position argue that the military power of the United States stands unchallenged in the world. Its troops are stationed in the Americas, Asia, the Middle East, and Europe.¹⁶⁵ Holding the technological, numerical and professional advantage over all other members of the international community militarily, the United States may well be in a commanding position to assert its hegemonic power. Further, as the leader of the western world in the Cold War, the United States also holds ideological clout.

The theoretical model of hegemonic sovereignty is relatively simple to construct. It is based on similar principles as that of early natural law sovereignty. It grants full sovereignty to the hegemonic power only.¹⁶⁶ It grants equal shares of residual sovereignty to the remaining nation states. This residual sovereignty is premised on the faithful fulfillment of international obligations by these nation states. The two main principles of this model of sovereignty are still impermeability and authority.¹⁶⁷ These principles apply in the same manner as between nation states.

any of the political problems of the Middle Ages. See CHRISTOPHER TYERMAN, *GOD'S WAR, A NEW HISTORY OF THE CRUSADES* 42 (2006) ("One problem created by this mosaic of private usurpation of public rights, which applied to areas with emergent towns such as Flanders, the Rhineland or north Italy as much as in rural provinces, was the lack of sovereign or effective arbitration"). The need for effective dispute resolution was also painstakingly learned after two world wars. It was also the underlying rationale in the establishment of the United Nations and its failed predecessor, the League of Nations. See generally Leo Gross, *Book Review: The League of Nations in Retrospect: Proceedings of the Symposium Organized by The United Nations Library and The Graduate Institute of International Studies, Geneva 6-9 November 1980*, 80 AM. J. INT'L L. 200 (1986).

162. See Cohen, *supra* note 158, at 49.

163. On the Middle Age conception of international law and the struggle between the Church and the Emperor, see *supra* Part II.

164. See *id.*

165. See Michael R. Gordon, *A Pentagon Plan Would Cut Back G.I.s in Germany*, N.Y. TIMES (late ed.), June 4, 2004, at A1.

166. See generally MONARCHIA, *supra* note 51.

167. VERDROSS & SIMMA, *supra* note 27, at 35-37.

States still have a duty of non-interference towards each other.¹⁶⁸ This means that between them, they may not take any action extraterritorially. They are limited to referring the offending state to shared international obligations.¹⁶⁹ If such an appeal were to fail, they may appeal to the new hegemon.¹⁷⁰

The hegemon's full sovereignty is a form of global sovereignty.¹⁷¹ The hegemon alone may make binding interpretations of international law, adjudicate international disputes, and enforce the law worldwide. In the natural law context of any hegemonic theory of law, this means that the hegemon alone holds the *summa potestas* over all three branches of government. It may create international legal standards through its interpretation of the law, it may adjudicate disputes between lesser sovereigns, and it may enforce the law as it sees fit.¹⁷²

It may be argued as to whether hegemonic rule also requires the benevolent use of this supreme power.¹⁷³ Classically speaking, the justification for hegemony remained that the hegemon was in the best position to keep the global well-being at heart—after all, this was the very conception of political power in the Middle Ages that gave rise to this particular means of international political organization.¹⁷⁴ On the other hand, it may be that the hegemonic rule of one nation over all others means that there is law for lesser states, and boundless rule for the remaining imperial civilization.¹⁷⁵ Of course, the practical implications of hegemony always were somewhat less rosy than its theoretical underpinnings would suggest. Systems of hegemony always are also systems of unbridled power used towards the satisfaction of personal or factional interests.¹⁷⁶ This realpolitik implication of hegemony, whatever its theoretical justification may be, has left indelible marks on world history. The power struggles for the imperial throne in the Holy Roman Empire are ample testament to this development.¹⁷⁷ Yet, these very real implications also are the backdrop of much of the early history of the Rinascimento and its struggle against papal and imperial hegemony.¹⁷⁸

168. See U.N. Charter art. 2, ¶ 4.

169. Such a complaint would take the traditional form of a diplomatic note.

170. For such an arbitral practice, see generally M. Cary, *A Roman Arbitration of the Second Century B.C.*, 16 J. ROMAN STUDS. 194 (1926).

171. See DE VISSCHER, *supra* note 33, at 12.

172. See generally MONARCHIA, *supra* note 51; BODIN, *supra* note 29.

173. See VATTEL, *supra* note 6, at 1.4, § 39, 51 (1758); VATTEL TRANS., *supra* note 6, at 13, 17.

174. See generally MONARCHIA, *supra* note 51.

175. See LAURENT, *supra* note 37, at 28-31.

176. See FOUNDATIONS, *supra* note 13, at 128-38; see generally MACHIAVELLI, *supra* note 66.

177. GREWE, *supra* note 19, at 55-157.

178. Therefore, the learned observer of international law does not need to look any

Both theories of international stewardship and of self-interest are represented in current hegemonist literature. Some hegemonists deny the validity of international law altogether as applied to the hegemon, which they identify as the United States.¹⁷⁹ Others suggest the former rationale for hegemony, equally identifying the United States as the appropriate hegemon.¹⁸⁰ This view is most often associated with the neoconservative school of thought.

Neoconservatives view the hegemon as the protector of international democracy and of democratic values around the world. They believe the main purpose of the protection and spread of democratic values is the greater global stability which it will engender. Neoconservatives advocate the use of force to achieve this goal.¹⁸¹ The use of force is justified in terms of the long-term stability that will flow from a “democratized” world order. Neoconservatism as a conception of hegemonic power is more of a stewardship position that is akin to early natural law thinkers. It considers it an honor and a duty to intervene in foreign states to instill good—meaning western—government in the local political culture.¹⁸² It hence wields its hegemonic might with the religious fervor of the Christian crusaders of the Middle Ages. It seeks to spread the new civic religion of democracy to the key countries in unstable regions.

The latter neoconservative alternative is the only conception of a new sovereignty fathomable under international law. Because the realist position of hegemony boldly posits the irrelevance of international law, it *a priori* takes itself out of any legal discourse.¹⁸³ Taken to its logical conclusion, it argues for the unabashed superiority of the factional interest of one state over any outside check whatsoever.¹⁸⁴ It advocates the end of law itself.¹⁸⁵

The neoconservative position does not step into the same intellectual debacle. To the contrary, it posits the higher authority of a code of conduct to which the hegemon is bound. In its most ideal formulation, it elevates basic human rights norms to become the

further than the seminal work on the Renaissance history of ideas to garner an accurate portrayal of the interplay of power and political theory. See generally FOUNDATIONS, *supra* note 13.

179. See generally John R. Bolton, *Is There Really “Law” in International Affairs?* 10 TRANSNAT’L L. & CONTEMP. PROBS. 1 (2000) [hereinafter “Law”].

180. See Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?* 25 MICH. J. INT’L L. 691, 708, 716-19, 724-27 (2004).

181. See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, n.291 (2004) (citing Vanity Fair Interview of Paul Wolfowitz with Sam Tannenhaus).

182. See Michael Hirsch, *Bush and the World*, Sept.-Oct. 2002, FOREIGN AFF., at 18.

183. See generally “Law,” *supra* note 180.

184. *Id.*

185. *Id.*

benchmark of international law and action.¹⁸⁶ Neoconservatism is therefore theoretically committed to binding the hegemon to act on these concerns. Wherever there is a serious infraction of these basic human rights, it requires hegemonic intervention to remedy the problem. Because it recognizes international law as a binding body of norms, it becomes a more credible contender for a new conception of sovereignty.

Of course, the neoconservative position runs into the same kind of practical limitations as its realistic counterpart. It may be suspected that in practice, the neoconservative rhetoric leads to the same practical results as the realist assertion of raw power.¹⁸⁷ Its power will rarely, if ever, be used without an accounting of the same factional interests that the realist position elevates to ultimate supremacy. This is a practical consequence of the tension between security and stability interests and the value interests of the neoconservative position in the observation of human rights standards.

Furthermore, the only candidate for hegemony, the United States, lacks the military power to rule as a hegemonic power in the current world climate. Today, it still has antagonists in the world.¹⁸⁸ On the conventional scale, it lacks the military might to intervene everywhere at once. Its military is currently stretched thin with the occupation and military assistance in Iraq and its deployments in Afghanistan and the Korean peninsula.¹⁸⁹ It may be surmised that if a new threat would arise, it would lack the military and economic means of meeting it head-on without compromising its position in these other scenarios.¹⁹⁰ The

186. See Murphy, *supra* note 182, at 173, n. 291 (citing Vanity Fair Interview of Paul Wolfowitz with Sam Tannenhaus).

187. Thus, even the neoconservative view is faced with the dilemma of its stability interest conflicting with its fundamental human rights values. This conflict has been brought to the forefront in the war on terror. It has put before academics and world leaders the question of whether the loss of civil life or the rights of terror suspects trump the concern to seek out and destroy terrorist organizations. Thus far, it appears that security and stability concerns have carried the day. See Editorial, *Torture by Proxy*, N.Y. TIMES (late ed.), Mar. 8, 2005, at A22; Robert M. Chesney, *The Sleeper Scenario: Terrorism Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 44, n.230 (2005).

188. These antagonists certainly include Iran and North Korea, and may well be extended to include the People's Republic of China, depending on the political climate on the coasts of the Formosa Straights. On a certain détente between the U.S. and Iran, see Najmeh Bozorgmehr, Doug Cameron & Guy Dinmore, *Iran has Dual Role in Nuclear and U.S. Oil Talks*, FIN. TIMES (London), Jan. 27, 2005, at 12. On the current state of talks with North Korea, see Anna Fifield, *Conciliatory tone on North Korea Pleases Seoul*, FIN. TIMES (London), Feb. 4, 2005, at 3.

189. See Quentin Peel, *A Full Agenda but a Dearth of Ideas*, FIN. TIMES (London), Jan. 20, 2005, at 19; JAMES A. BAKER, III AND LEE H. HAMILTON, Co-Chairs, THE IRAQ STUDY GROUP REPORT 7 (2006), available at http://www.usip.org/isg/iraq_study_group_report/report/1206/index.html (last visited Jan. 16, 2007).

190. See *id.*

administration's position on nuclear tests in North Korea and Iran shows that it does not act on neoconservatist, hegemonic grounds. To the contrary, the United States' actions in these scenarios, focusing on multi-lateral pressures, commendably acts not as a hegemon at all, but as a facilitator of negotiations.

A more serious practical threat comes from ideological groups that operate independently of nation states, such as terrorist groups and criminal cartels.¹⁹¹ While these enemies may not have the weapons or the manpower to pose a serious conventional threat, military miniaturization technology and asymmetric field tactics still put any potential hegemon at grave risk. If one combines these threats, it is clear that there is no world power in the position of dominance that the classical Roman—or even the British Empire—enjoyed, arguably because of the voluntarist bedrock of egalitarian sovereignty and its practical effects on the world stage through the last fifty years. Any hegemonic world order would thus remain fragile, contingent on the economic and military support of its “vassal” states. Such hegemony has historically been fraught with the most serious of complications, as the Medieval Roman Empire so pertinently exemplifies.¹⁹²

Hegemony encounters even more serious challenges from the theory of international law. These challenges can be summed under two different headings: legal hegemony is internally inconsistent, and hegemony undermines the foundational principles of general international law, whether in a sophisticated natural law or in a voluntarist tradition. These two problems are, of course, related. The internal inconsistency can largely be explained by the deeper philosophical underpinnings of international law. Yet, it is important to deal with them in turn so as to understand just how untenable such a hegemonic position truly is.

The internal inconsistency of hegemonic international law can be explained in terms of H.L.A. Hart's classical formulation of what constitutes a legal norm.¹⁹³ According to Hart, law requires two fundamental principles: its general availability to the public and a generally recognized means of generating legal norms.¹⁹⁴ Hart distinguishes the rule of brute force from the rule of law; in its historical context, it was an attack on Austin's early legal positivism.¹⁹⁵ He

191. On the subversive influence of criminal organizations on the state, *see generally* STRANGE, *supra* note 2. For a fictional account of their possible cooperation, *see* TOM CLANCY, *THE TEETH OF THE TIGER* (2004).

192. *See generally* BARBARA TUCHMAN, *A DISTANT MIRROR* (1987).

193. H.L.A. HART, *THE CONCEPT OF LAW* 18-99 (2d ed. 2004).

194. *Id.* at 90-99.

195. *Id.* at 18-76. For an insightful article on the historical development of English

correctly points out that the fear of brute force lacks general normative force;¹⁹⁶ it is an order one would do well not to refuse, yet it does not have the normative character of law. Such normativity is only generated when it is possible to ascribe rightful authority to an order or rule that is capable of internalization.¹⁹⁷ This threshold of law requires that there is a clear rule of law, rather than a chaotic attempt at organized coercion. The rule of law also requires that a person know what primary rules have binding character, and why he holds such a position by recourse to secondary, power-conferring rules.¹⁹⁸ In other words, a person ought to be able to sufficiently inform himself of the law to be able to follow it; further, he ought to know the means by which a pronouncement becomes law.

In terms of hegemonic law, both of these criteria become somewhat doubtful. The realist position clearly fails both hurdles. It amounts to little else than the subjection of the world to the gun of an international strongman.¹⁹⁹ Yet, the *prima facie* tenable neoconservative position runs into problems as well. It is unclear whether it provides a means of sufficient publication to nations for what standards of conduct ought to be imposed on them. In Hartian terms, it is unclear whether there is a rule of law with regard to primary rules.²⁰⁰ More damningly, the neoconservative position runs into somewhat of an aporia when it comes to the generative principles of law—or Hart's secondary rules.²⁰¹

The first problem concerns the public availability of what the law is. At the moment, there is a practical lack of any information on such a hegemonic "codification of international law."²⁰² What is available to the world is a set of criteria that the United States, if it acted as a hegemon, may apply to declare a nation to be a rogue state on which it will keep a watchful eye.²⁰³ The three most important criteria to be classified as a rogue are: (1) consistent disregard for international obligations; (2) state-sponsored terrorism; and (3) the unsupervised

jurisprudence, see Neil Duxbury, *English Jurisprudence between Austin and Hart*, 91 VA. L. REV. 1 (2005). Arguably, Hart did not do Austin justice in his treatment. See generally Gerald B. Wetlauffer, *Gunmen, Straw Men, and Indeterminacy: H. L. A. Hart, John Austin, and the Concept of Law*, 82 IOWA L. REV. 1487 (1997).

196. HART, *supra* note 194, at 27-41.

197. *Id.* at 82-91.

198. *Id.* at 90-99.

199. See generally "Law," *supra* note 180.

200. HART, *supra* note 194, at 90-99.

201. *Id.*

202. The current administration does not even seem to acknowledge the existence of the closest compilation to such a code. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d), (e) (1987).

203. National Security Council, *The National Security Strategy of the United States of America*, <http://www.whitehouse.gov/nsc/nssall.html> (last visited Jan. 16, 2007).

development of Weapons of Mass Destruction and advanced military technology for aggressive purposes.²⁰⁴ This category of rogue states may well be the only indication which the subjects of the potential hegemonic international law may have as to its content. Currently, these criteria are too vague for comfort, as a creative reading would make even the United States, as well as most NATO member states, out to be international rogues.²⁰⁵ They arguably used force illegally in Kosovo.²⁰⁶ They may fund guerrilla groups with the intent to overthrow a foreign government.²⁰⁷ Furthermore, most of these states currently also have weapons of mass destruction—or at least easy access to them—without international supervision.²⁰⁸ If, for example, the United Kingdom and Iran are in a similar legal position with regard to the rogue state standard, then such a standard clearly fails the sufficient publication standard of legal norms.²⁰⁹ Of course, it is not inconceivable that a clear legal standard would be publicized to the world at large. Still, in the current

204. *Id.* at Part V. The full list runs as follows:

- (1) brutalize their own people and squander their natural resources for the personal gain of the rulers;
- (2) display no regard for international law, threaten their neighbors, and callously violate international treaties to which they are parties;
- (3) are determined to acquire weapons of mass destruction, along with other military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes;
- (4) sponsor terrorism around the globe; and
- (5) reject human values and hate the United States and everything it stands for.

Id. For further discussion, see John R. Bolton, Under Secretary for Arms Control and International Security, *Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction*, Remarks to the Heritage Foundation, <http://www.state.gov/t/us/rm/9962.htm> (May 6, 2002) (last visited Jan. 16, 2007).

205. See National Security Council, *supra* note 204.

206. See generally Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention*, 93 AM. J. INT'L L. 824 (1999).

207. Such incidents are rarely given the attention that they deserve. However, it is undoubted that such efforts are part and parcel of the current foreign policy arsenal of the United States. See *Military and Paramilitary Activities in and against Nicaragua*, (Nicar. v. U.S.) 1986 I.C.J. 14 (June 27). The U.S.-led response to the Taliban in Afghanistan can also be seen as funding guerilla groups to overthrow a foreign government. The effort relied heavily to existing local opposition to the Taliban known as the Afghan Northern Alliance to provide adequate ground forces to remove the Taliban regime. Legitimate though the intervention was, the use and funding of guerrilla forces became a much noted feature in the overall military and political strategy.

208. See generally David P. Fidler, *International Law and Weapons of Mass Destruction: End of the Arms Control Approach?* 14 DUKE J. COMP. & INT'L L. 39 (2004).

209. Both states can arguably fulfill the criteria of rogue nations set by the U.S. government. In the case of the U.K., its treatment of the Northern Irish may be considered on the edge of "brutalizing;" its participation in the invasion of Iraq was a callous violation of international law, it possesses weapons of mass destruction, and it sponsors political movements which may or may not have an armed faction.

political climate, it is unlikely that such a standard will ever be developed.

The reason for this lack of publicity is the inherent impossibility of finding a generally recognized means of generating such norms in a hegemonic system. There are two chief means to achieve such a process: reception and legislation. All other means are a combination of these two extremes.²¹⁰ Neither of these means is feasible under the new hegemonic paradigm. Reception—meaning the complete adoption of foreign law as the new law of the land—goes against the grain of the current hegemonic paradigm.²¹¹ The legislative approach is equally problematic.

Reception is a term of art. It signifies that a state accepts wholesale the laws of a different country or time as its new law.²¹² The best examples of reception are found on the European continent and its adoption of the Roman law as its own during the late Middle Ages through the Renaissance.²¹³ This reception of the law was founded on two complementary grounds: first, the Roman law was perceived to be normatively superior to existing law;²¹⁴ second, it was perceived as a morally legitimate source to turn to due to the religious underpinnings the Roman law evoked. After all, the law of the early Christian Empire and its Church had an almost saintly penumbra.²¹⁵ Such reception of international law is unlikely in a hegemonic world order. It would recognize an older and greater power to which the hegemon would admit some type of allegiance. Yet, it is exactly the opposite that the current hegemonic law seeks to achieve. It seeks to bond all others in allegiance to the hegemon and the rules promulgated by it, not the hegemon in allegiance to some outside first principles or foreign law.²¹⁶

Legislation is equally problematic. The neoconservative position on international hegemony was deemed acceptable due its recognition that a

210. This is a more inductive conclusion than *a priori* necessity. However, as law has to come from somewhere, it seems reasonable to assert that a person either has to accept someone else's efforts as his own, or he has to create his own independent legal regime.

211. See *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); Linda Greenhouse, *Rehnquist Resumes his Call for Judicial Independence*, N.Y. TIMES (late ed.), Jan. 1, 2005, at A10.

212. See generally Reinhard Zimmermann, *Roman-Dutch Jurisprudence and its Contribution to European Private Law*, 66 TUL. L. REV. 1685 (1992); George L. Gretton, *Reception without Integration?: Floating Charges and Mixed Systems*, 78 TUL. L. REV. 307 (2003); M. H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753 (2002).

213. See Zimmermann, *supra* note 213, at 1685.

214. See generally JOLOWICZ & NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* (3d ed. 1972).

215. *Id.*

216. See *Lawrence*, 539 U.S. at 586.

hegemon remains bound by the standards it prescribes, at least in theory.²¹⁷ Such a position is anathema to setting up a domestic process of new legislation to codify international law. Putting aside the fact that there is no qualified domestic legislative body in a hegemon to meet the task, such a process *a fortiori* would turn the neoconservative position into its realist rival. It would no longer recognize some outside norm to which the even the hegemon was bound. It would much rather place the hegemon in a normative void in much the same way the realists did. In other words, the hegemon would not be bound by law at all; the law would only apply to other states.

The only theoretical exception to this problem stems from a curious philosophical explanation of limited sovereignty in the Seventeenth Century. Such a position would posit that a sovereign may impose limits on itself by the means of an oath or covenant.²¹⁸ Through such a self-limitation, it may be possible for a hegemonic power to bind itself to some normative standards with regards to its subjects—here the community of nations.²¹⁹ However, this possibility is neglectful of the underlying bright-line rule for the respect of fundamental rights which leads to the debate of changing sovereignty. Unless such a position would receive these rights as legally binding, it remains in the same normative void as its realist cousin. Its covenant with the world would otherwise enforce something less than the current voluntarist paradigm has set out as a bare minimum respect of human rights. Such a regress is unacceptable on a philosophical as well as a legal basis, as it would erode the very rights it was meant to further. Moreover, Hart's keen analysis throws open another flaw in this possibility that may prove even more damning. If a domestic legislative model is indeed recognized as norm-creating internationally, it would only take a domestic authorization in accordance with the domestic constitution to undo the covenant made with the rest of the world.²²⁰ In the cruel way of the Seldenian sovereign, a potential hegemon would then have acquired the allegiance of the world with no price attached to it.²²¹

If the neoconservative position is serious about the existence of international law and its compatibility with hegemony, it must view a hegemon as the enforcer, rather than the source of the fundamental norms binding international society. Therefore, as neither reception nor legislation are appropriate solutions (at least currently) for the generation of legal rules under the hegemonic paradigm, there is no means by which

217. See *supra* Part IV.

218. See GROTIUS, *supra* note 14, at 1.3; GROTIUS TRANS., *supra* note 14, at 52.

219. *Id.*

220. See HART, *supra* note 194, at 90-99.

221. See NATURAL RIGHT, *supra* note 53, at 82-100 (1981).

a hegemon could amount to more than a sophisticated highway robber if it were to assert its hegemonic ambitions.

The conclusion against hegemony as a viable solution to sovereignty stems from a Hartian analysis of the way in which it would govern. In the final analysis, a hegemonic solution would not guarantee a better anchor for the respect of rights. To the contrary, the hegemonic solution is likely to undo the very normative fabric of international law. The normative fabric of international law requires a public and a procedural backdrop for its postulates to stand as more than brute coercion. Hegemony is likely going to undo both of these requirements because of our own historical contingencies. It is true that in the early days of the international law tradition, hegemony was an accepted means to further international law.²²² However, in those days, there was an underlying respect for the foundational principles of law that not even the pontiff or emperor could violate.²²³ This respect was backed by the very real power and fear of a universal religion. Hence, the argument Dante made in *Monarchia* for the supreme power of the emperor must be read in the context of his *Inferno*.²²⁴ Today, there is no such fiber holding together the law of nations. Thus, this solution lacks a key conceptual component to function as an effective theory of law.

V. Federation

The value of human rights in a stable and peaceful international system must find a different foundation than the ones discussed thus far. The voluntarist paradigm is conducive to the worst offenses against human dignity from the nation state.²²⁵ A reintroduction of hegemonic sovereignty would lead to practical instabilities, as well as the inherent dangers of the abuse of fundamental rights.²²⁶ In order to safeguard our commitments to these values, a different system must be contemplated. Such a system must have these fundamental principles of dignity at heart. It must also provide for adequate checks and balances in order to curtail the nascent abuses of such fundamental rights and protect its overarching value-based consensus. Such a system is the growing federation of like-minded states.²²⁷

222. See DE VISSCHER, *supra* note 33, at 17.

223. GREWE, *supra* note 19, at 96.

224. See 1 DANTE ALIGHIERI, *THE DIVINE COMEDY* 34.10-15.

225. See *supra* Part II.

226. One such example is the practice of rendition the current U.S. administration is engaged in. See *Torture by Proxy*, *supra* note 188. Another example is the torture which the United States exposes Guantanamo Bay inmates to. See *Europarat verurteilt U.S.A. wegen Folter*, *Sueddeutsche Zeitung*, Apr. 26, 2005, <http://www.sueddeutsche.de/tt2m3/ausland/artikel/39/51987/> (last visited Jan. 16, 2007).

227. For a practical description of how such a federation can work, see COOPER, *supra*

A federal approach to international peace and security is by no means novel. In his exposition of the rising security problems of the twenty-first century, Robert Cooper eloquently draws on such a perspective to provide new guidance.²²⁸ Still, how such a notion of federation can be borne out of the international legal discourse on the question of sovereignty has not been sufficiently elaborated there or elsewhere.²²⁹ According to Cooper, sovereignty is either understood as a break with current legal tradition, or at least as a postmodern twist on the existing concept.²³⁰ These approaches to sovereignty are insufficient to make a lasting impact on the international law tradition.²³¹ In order for them to have legal significance, they must be explored in the language and tradition of international law. The last section of this article provides a sketch of what such an apology of federal sovereignty in international law should resemble.

In order to recast the idea of sovereignty, one must look first to philosophical foundations capable of achieving such a paradigm shift. Any reinterpretation of the law logically is only as capable as this underlying political philosophy allows. The problem with a postmodern basis for sovereignty is the inherent philosophical weakness of its outlook. Postmodernism, as the term has been understood in the Anglo-Saxon context, is deeply wedded to a realist-relativist outlook.²³² The realist outlook is notoriously incapable of creating the needed ideological cohesion for a rights-based recasting of the idea of sovereignty. In as much as it looks to the political landscape for guidance, it puts the cart before the horse when it comes to exercises in reconstruction. In a curious way then, it is caught by the very same trappings of the philosophies it critiques; it remains glued to the modern rationalist and liberal approach which spawned voluntarist positivism.²³³ In looking for alternative ways of defining sovereignty, the realist-relativist outlook will inevitably remain in the realm of politics rather than law. This outlook is intriguingly *a priori* unable to escape Simma's and Verdross'

note 3, at 78-80.

228. *See id.*

229. *Id.*; JENNINGS, *supra* note 5, at 27-44.

230. COOPER, *supra* note 3, at 55-151.

231. VERDROSS & SIMMA, *supra* note 27, at 35-37.

232. *See, e.g.*, RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989). The European understanding of postmodernism is infinitely more complex, as it is sometimes taken to encompass phenomenism, its instantiation in the work of Husserl's immediate lineage, as well as post-structuralism and deconstruction philosophy. Hence, it tracks a variety of schools of such noted authors as: Heidegger, Gadamer, Deleuze, Derrida, and Foucault. The criticism of postmodernism presented here cannot account for their philosophical work, which is infinitely more sophisticated than its American namesake.

233. *See generally* RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* (1999).

criticism of federalism made in the 1980s.²³⁴

The philosophical solution that this article suggests is deeply rooted in civic humanism.²³⁵ Civic humanism originated in the Florentine Rinascimento as a reaction to the chaos of the Middle Ages and its rampant penchant for despotism and tyranny. It was kindled by the rediscovery of classical wisdom in the civil law and classical moral discourse.²³⁶ It is from this renewed interest in classical philosophy that the concept of human dignity, so precious to any meaningful reconception of sovereignty, arose.²³⁷ This philosophy is rooted in civic participation and civic education in the classical moral virtues. Its political philosophy was deeply rooted in a revival of classical natural law theories with a distinctly Ciceronian bend.²³⁸

Today, civic humanism is far from dead. Rather, it has become part and parcel of a communitarian revival of Republican thought.²³⁹ In political philosophy and the history of ideas, this approach is gaining ever greater momentum. Since the late 1970s, it has gained acceptance as one of the few viable alternative conceptions of political society to a rationalist liberal philosophy so brilliantly brought into the late Twentieth Century by John Rawls.²⁴⁰ Nevertheless, few have asked how this particular political outlook would impact foundational concepts of international law.²⁴¹ Relying explicitly on the humanist philosophical tradition, this article reconstructs an adequate conception of sovereignty paying due regard to the fundamental importance of its respect to human dignity.

VI. Humanist Sovereignty

The humanist tradition has historically been prolific on questions of international law. Both Bodin and Alciato, the founders of the idea of sovereignty, were humanists.²⁴² Grotius and Selden also remained

234. VERDROSS & SIMMA, *supra* note 27, at 35-37.

235. For an interesting introduction to civic humanism as a relevant starting point for today's political philosophy, see generally QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1997).

236. FOUNDATIONS, *supra* note 13, at 84-88.

237. See PICO DELLA MIRANDOLA, *DE HOMINIS DIGNITATE* (Gerd von der Gönna ed., 1997).

238. 2 QUENTIN SKINNER, *VISIONS OF POLITICS* (2002).

239. See generally PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1999); MCINTYRE, *supra* note 18.

240. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (2d ed. 1999); JOHN RAWLS, *THE LAW OF PEOPLES* (2001).

241. Such scholarship is most often found in the historical rather than legal fields. See generally NATURAL RIGHT *supra* note 53; RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE* (1999).

242. See FOUNDATIONS *supra* note 13, at 203-06; 2 QUENTIN SKINNER, *THE*

deeply influenced by the humanist tradition.²⁴³ While the British openly broke with the humanist tradition in the post-Seldenian Oxford circle—most notably amongst its members—Thomas Hobbes, the continental tradition of international law, remained firmly influenced by humanist scholarship.²⁴⁴ The most sophisticated answer of this continuation of civic humanism was Emerich de Vattel's *Le Droit des Gens*.²⁴⁵ This work addressed sovereignty teleologically. It posited that sovereignty must be used for the benefit of the governed and the formation of a well-governed state.²⁴⁶ This approach hence views sovereignty not as a justification of state power, but as a functional concept for the protection of fundamental natural rights.

The relevance of such an abstract notion of sovereignty needs to be put in practical perspective. By treating sovereignty as a functional concept with the goal of furthering the rights of participating citizens, it becomes possible to explain the supremacy of human rights over state rights. The impact of the ICCPR on sovereignty was discussed previously.²⁴⁷ Now, it is possible to justify the central place of such a codification of fundamental human rights. They no longer remain positive human rights within the ambit of state consent and state power.²⁴⁸ They can now be cast in the vestiges of fundamental natural rights. This shift from positive to natural rights in the context of a teleological understanding of sovereignty for the betterment of human society as a whole allows for an important insight. Sovereignty and sovereign action can now be made conditional on the respect of these fundamental principles. In as far as the principles are the expression of basic human dignity in political society, any government action which violates them ceases to be sovereign.²⁴⁹

Such a distinction has important consequences for the law of sovereignty. Most of all, it would cause a momentous shift in the law of state responsibility, sovereign immunity, international criminal justice, and the field of humanitarian intervention. While a detailed discussion of these consequences is beyond the scope of this article, a quick sketch of their change in outlook is required to fully grasp the impact of a return

FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978) 290-93.

243. See NATURAL RIGHT, *supra* note 53, at 58-100.

244. *Id.* On the relationship between later British political philosophy to humanism, see QUENTIN SKINNER, REASON AND RHETORIC IN THE PHILOSOPHY OF HOBBS (1997).

245. See VATTEL, *supra* note 6, at 1.4, § 39, 51; VATTEL TRANS., *supra* note 6, at 13, 17 (1879).

246. See *id.*

247. See *supra* Part III.

248. See Vienna Convention, *supra* note 25, at art. 64.

249. See CHRISTOPHER G. WEERAMANTRY, UNIVERSALIZING INTERNATIONAL LAW 37 (2004).

to a civic humanist, natural law perspective in the law of sovereignty.

Architecturally, the significance of this new perspective most deeply affects the law of state responsibility, which is defined as responsibility for internationally wrongful acts attributable to the state.²⁵⁰ Such wrongful acts are committed by the state's act or omission of an international obligation.²⁵¹ A reconception of state sovereignty in terms of the state's respect for the fundamental principles of human dignity will drastically increase the kinds of actions for which a state is internationally responsible. Because the natural rights arising out of the fundamental principle of human dignity have become international law, a state may now be responsible for its domestic actions on the international stage.²⁵² Furthermore, such violations would also be beyond cure even if the relevant government agency gives official consent.²⁵³ Because of the definition of sovereignty in terms of its respect and furtherance of human dignity, such consent would not be a sovereign action—even worse, it may also be an internationally wrongful act.²⁵⁴

The significance of such a stance on state responsibility is great. The current practice of rendition of prisoners by the United States government to foreign governments is an important example.²⁵⁵ This practice is already of dubitable legality in the international sphere.²⁵⁶ A definition of sovereignty that would vitiate state consent as a means of curing an internationally wrongful act would effectively rob the United States of any and all defenses it may have with regard to such treatment.²⁵⁷ No state may consent to such actions. Hence, there is not even the slightest leeway with such practices. By addressing horrendous practices like rendition directly through a recasting of sovereignty, a powerful tool is added to the arsenal of analyzing threats to international peace and security, as well as a means to their just resolution.

This just resolution would not necessarily have to come from the diplomatic stage; it could also come from national and international

250. *Draft Articles on State Responsibility for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, in OFFICIAL RECORD OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-THIRD SESSION, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, FIFTY-SIXTH SESSION, at ch. IV.E.1, art. 1, Supp. 10, U.N. DOC. A/56/10 (Nov. 2001) [hereinafter Draft Articles].*

251. *Id.* at art. 2.

252. *See id.* at art. 12.

253. *See id.* at art. 20.

254. *Id.*

255. *See Torture by Proxy, supra* note 188.

256. *Draft Articles, supra* note 251, at art. 16 (assuming that the practices used by the host state violate Article 7 of the ICCPR and that the United States had knowledge of such practices in the host state regarding prisoners).

257. Interestingly, international criminal justice already robs individuals of such immunities before its bar. *See discussion infra.*

court. With regard to the pursuit of legal action against states violating these principles, the question of sovereign immunity comes into sharp light.²⁵⁸ Sovereign immunity has all too often proven a bar to legal action against a state for its violation of such fundamental human rights.²⁵⁹ Yet, with a recasting of sovereignty in terms of its humanist heritage, the question would become moot. By definition, sovereign immunity can only attach to the sovereign acts of a state. If an act were characterized as essentially lacking sovereign authority, no such bar could exist. In this regard, the humanist position would by far exceed the current position of the International Law Commission (ILC) on questions of sovereign immunity regarding tortious actions against a foreign government.²⁶⁰ The ILC's proposed solution to tortious government action is to allow an exception to sovereign immunity where an action took place in whole or in part in the forum state.²⁶¹ The humanist position would completely dispense with such a requirement. In denying sovereign status to the state action violating basic human rights principles, the tortious state act loses all claims to special immunities. The only remaining question would become whether the forum state is indeed the best available forum for a suit to lie—a question which U.S. jurisprudence correctly classifies as a prudential concern for the sound discretion of the judge.²⁶²

The action would not thereby become a private action.²⁶³ It can still be firmly attributed to the state.²⁶⁴ However, such a categorization as an official state action cuts against immunity. By violating the very international preconditions to sovereignty, the state has acted *ultra vires*. Such *ultra vires* action can be prosecuted to the fullest extent of the law, as it falls outside the realm of sovereign immunity. As there is no immunity regarding the act, and because there are no specific grounds

258. This section of the paper has greatly benefited from a talk given by Professor Handl on the topic of sovereign immunity in the spring of 2005. I thank him for an insightful and inspiring roundtable discussion. He deserves credit for many of the ideas presented below. However, flaws in their execution remain firmly rooted with the author.

259. See Stephen C. McCaffrey, *The Thirty Fourth Session of the International Law Commission*, 77 AM. J. INT'L L. 323, 328-29 (1983) (discussing the process of the ILC on sovereign immunity and noting that the ILC was struggling with absolute immunity of sovereign action under general international law).

260. See United Nations Convention on Jurisdictional Immunities of States and Their Property, GA Res. 59/38 (Dec. 2, 2004); for a discussion of the Convention, see generally David P. Stewart, *Current Development: The U.N. Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194 (2005).

261. U.N. Convention on Jurisdictional Immunities of States and Their Property, *supra* note 261, at art. 12.

262. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

263. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 121, ¶ 61 (Feb. 14, 2002), *reprinted in* 41 I.L.M. 536, 551-52 (2002).

264. See discussion of state responsibility *supra*.

need to be pled to vitiate immunity, judgments may be entered against a state and may be enforced against the assets of any of its agencies in the jurisdiction.²⁶⁵

Similar consequences can be anticipated in the nascent field of international criminal law.²⁶⁶ Currently, there is a noticeable strain between the law of sovereignty and international criminal law.²⁶⁷ By moving outside the scope of state responsibility and vitiating all immunities of a person before its bar, the Rome Statute of the International Criminal Court is leading a frontal assault against the way sovereignty is currently understood.²⁶⁸ The strong underlying voluntarist principles of jurisdiction somewhat mitigate its impact on the development of international law as a whole.²⁶⁹ This principle is further underscored by the fact that *ad hoc* criminal tribunals may still have to recognize immunities *ratione materiae* on the basis of official capacity.²⁷⁰ Viewed in the context of a humanist recasting of sovereignty, the Rome Statute's position is essentially sound, whereas the position of its sister tribunals is not. As there is no sovereign act which can lend cover for the actions made punishable under the Rome Statute, most immunities, save the functional immunity of a sitting head of government or foreign minister *ratione personae*,²⁷¹ are rendered void *ab initio*. Therefore, international criminal justice already appears to operate under the auspices of a humanist natural law theory. As such, it may require a natural law recasting of sovereignty to remain in sync with the remainder of general international law.²⁷²

The question of humanitarian intervention may prove more troubling.²⁷³ Its permissibility unabashedly forms the cornerstone of natural law sovereignty.²⁷⁴ Since its inception, the leading natural lawyers have held it out as an honorific act of princes to free foreign

265. See generally *Letelier v. The Republic of Chile*, 748 F.2d 790 (2d Cir. 1984).

266. See generally Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407 (2004).

267. *Id.*

268. *Id.* at 419-30; Rome Statute of the International Criminal Court arts. 25(4), 27, entered into force July 1, 2002; but see *id.* at art. 98.

269. Akande, *supra* note 267, at 417.

270. See generally *Prosecutor v. Blaskic*, Case No. No. IT-95-14-AR, Objection to Issue of Subpoena Duces Tecum (Oct. 29, 1997); Akande, *supra* note 267, at 418.

271. See Arrest Warrant of 11 April 2000, *supra* note 264.

272. For a critique of the ICC as futile due its lack of cohesion with general international law and politics see generally Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

273. See LYONS & MASTANDUNO, *supra* note 94, at 252-60 (introducing the problem of whether the current system of sovereignty has moved beyond a state-based system and concluding that while there are indications to the contrary, such a shift has not yet occurred).

274. See *supra* Part II.

peoples from tyrannical rule.²⁷⁵ In the current international security climate, such a position needs important checks and balances. Without these checks and balances, a natural law position on international law in general, and sovereignty in particular, may prove devastating. This may lead to the war against all which Thomas Hobbes so effectively conjures as the ultimate reason for respect of state power.²⁷⁶ The check and balance required to temper natural law sovereignty is that of conscious federalism.²⁷⁷ Such a conscious federalism must establish rigorous requirements for humanitarian intervention and must explain that the use of force is the last resort, rather than a fast tool to impose one's will. These qualitative criteria must further be backed by a procedural apparatus that stands in the way of the foolhardy use of force.

A well-conceived federal system provides such a system. It imposes several stages of deliberation in the respective domestic executives, followed by their common deliberations between themselves. These deliberations are in turn checked by independent federal structures of accountability in the form of common independent courts and common independent executive leadership. Once an action has successfully passed through all of these stages of deliberation, it may safely be surmised that the international security architecture will not be exposed to overeager interventions. Rather, the international architecture would again have an effective means through which the evils of the Balkans, Rwanda, Darfour, and many other theaters of atrocities could effectively be stopped for the sake of peace and human dignity.

Civic humanism is philosophically predisposed to a federalist position. The bulk of humanist learning is centered on shared humanity.²⁷⁸ Where it is not explicitly cosmopolite, the logic of its arguments implicitly makes it so.²⁷⁹ Yet, such a philosophical predisposition is insufficient to counter the latent international security threats we face today. A more stable federalist structure must be constructed in order to safeguard such a humanist conception of

275. See, e.g., BODIN, *supra* note 29, at 2.5; BODIN TRANS., *supra* note 10, at 113 n. 1.

276. See Lori Fisler Damrosch & Bernhard H. Oxman, *Agora: Future Implications of the Iraq Conflict: Editors' Introduction*, 97 AM. J. INT'L L. 553 (2003); see generally THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., rev. ed. 1996).

277. Again, this position is better reached through inductive reasoning rather than deductive logic. Voluntarist sovereignty has been critiqued in Part III above; hegemony has been excluded as a viable alternative in Part IV. Short of states becoming lambs by their own volition, a federal approach seems to be the only remaining alternative.

278. See generally PETRARCA, *supra* note 46; BRUNI, *supra* note 46. On the cosmopolitan background of the humanists' source material, see Gisela Striker, *Origins of the Concept of Natural Law*, 2 PROC. BOSTON AREA COLLOQ. ANCIENT PHIL. 79 (1986); James Bohman, *Cosmopolitan Republicanism: Citizenship, Freedom and Global Political Authority*, 84(1) MONIST. 3 (2001).

279. See generally MIRANDOLA, *supra* note 238.

sovereignty from imploding.²⁸⁰

The starting point for this conception of federal sovereignty must remain a deep commitment to treating sovereignty as a teleological concept for the pursuit of human dignity.²⁸¹ It is this commitment which, in Cooper's treatment of federation, erodes the notion of positive sovereignty for the benefit of a postmodern understanding of shared values.²⁸² As has been established, it is not necessary to justify this end through a postmodern erosion of sovereignty. Rather, it is possible to give a philosophical accounting of a strengthened conception of sovereignty from the same political circumstances. Cooper correctly points out that such a federation must grow by necessity.²⁸³ It must break down historical barriers of distrust. In order to do so, however, the federation must realign itself not by notions of nationality, but through identification with shared interests across boundaries. Such realignment is not inimical to a natural law understanding; indeed, the humanist will point to precedent for such a position in the founding days of Rome.²⁸⁴

In order to achieve a politically stable federation on the grounds of a civic humanist understanding of sovereignty, recent history would suggest that two distinct requirements should be met.²⁸⁵ The first requirement is entirely prudential: following the earlier voluntarist paradigm in the formulation of a treaty which purports to bind the several members of the federation to meet in their national capacities to discuss issues of common interest and take common action. The second branch, which is of deeper theoretical importance, is the establishment of common institutions that are disjointed from national rule and are enabled to bind national governments to their principled commitments.²⁸⁶ These two requirements are the foundational procedural aspects of the European experiment. By combining a ministerial council with the European Union (E.U.) Commission and the European court system, the E.U. succeeded in building a stable and lasting federation of states in the pursuit of common values.

In order to establish that these two ingredients are the correct checks and balances on humanist sovereignty, their theoretical value must be

280. Arguably, such a humanist position could be made to fit with the neoconservative perspective discussed in *supra* Part IV. The problems of "humanism in one country" could, however, be cured through a federalist approach.

281. See generally MIRANDOLA, *supra* note 238; VATTEL, *supra* note 6, at 1.4, § 39, 51; VATTEL TRANS., *supra* note 6, at 13, 17.

282. See COOPER, *supra* note 3, at 129.

283. See *id.* at 171.

284. PLUTARCH, NUMA, in PLUTARCH'S LIVES (Arthur Clough ed., 2001).

285. See Ellis, *supra* note 155, at 198-99; Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003).

286. Carozza, *supra* note 286, at 38.

explored. The voluntarist foundation of sovereignty in the form of a treaty is theoretically more difficult to integrate in the civic humanist conception of sovereignty. After all, the civic humanist perspective is based on natural law, rather than positive conception of law. In fact, the continued existence of national sovereignty is deeply troubling for the civic humanist tradition. It is quite capable of reversing the development away from a state-centered sovereignty toward its rights-based cousin.

The value of a voluntarist foundation comes from the conservative bias it adds to path-breaking decisions. This conservative bias is a stabilizing factor in the international security arena. The maintenance of strong state governments has had the advantage of keeping the European Union out of the war in Iraq. Local political pressures against the war were clearly felt in a panoply of national governments.²⁸⁷ While several European leaders made the decision to go to war against popular sentiments, the E.U. did not go down that path.²⁸⁸ The theoretical explanation for this development can be put into relatively simple terms: a strong federal government unifies political power.²⁸⁹ As such, it is possible for relatively few political leaders to take action, even if it is against the will of their respective political societies. In the case of a weak federal structure, it could well be the case that several leaders may make a similar decision for their own home state. Yet, it is almost certain that in the face of grave public discomfort, a majority of states will make a different decision.²⁹⁰ This majority will in turn be able to mount a significant amount of pressure against the use of force when it is not strictly necessary. In light of recent events, such a retardant for international action is a much needed coolant for international peace and security.

Nevertheless, the ideal version of federal sovereignty in the humanist paradigm would look distinctly different from the prudential approach found in the E.U. The ideal version would take its cue from Aristotle, advising on small governmental units.²⁹¹ Such smaller, sub-national units would govern more efficiently, as well as allow more room

287. See Judy Dempsey & Quentin Peel, *Sunday's Surprise Defeat of the Ruling Party Showed that Voters' Hostility to the War in Iraq had been Reawakened. Some Wonder Whether Europe Could Drift Away from Support for Fighting Terror*, FIN. TIMES (London), Mar. 16, 2004, at 19.

288. See *id.*

289. See generally Philip R. Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT'L L. 750 (1989).

290. See the discussion of "veto-gates" in the passage of Congressional legislation in the U.S. in ESKRIDGE, FRICKEY & GARRETT, *CASES AND MATERIALS ON LEGISLATION* 1-38 (3d ed. 2001).

291. See generally ARISTOTLE, *POLITICS*, in *THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION* (Jonathan Barnes ed., 1984).

for direct citizen participation. Active and educated citizenship is the ideal of any humanist conception of politics.²⁹² In considering a political model of federal sovereignty, a humanist tradition would likely prefer to grant regions, rather than countries, large autonomy to achieve these goals.²⁹³ These smaller units would be able to provide more effective civic education, and would foster a sense of political community so dearly lacking from our contemporary world.

The second element of federal sovereignty is far more easily justified. The existence of strong and independent federal institutions safeguarding individual rights against state infringement must be the centerpiece of any political system that hopes to capture the philosophical lessons of civic humanism. After all, history is replete with examples of the most well-meaning state putting the very rights it stands to preserve in jeopardy.²⁹⁴ The function of an independent federal branch of government must be to point out the limits of sovereignty.²⁹⁵ It must ensure that the sovereign states it supervises stay within the ambit of their powers. To this end, the European experience has attempted to forge an independent executive and judiciary to deal with exactly such questions. On the whole, it has been successful.²⁹⁶

However, the notion that the member states of any union or federation seize some of their sovereignty to such institutions must be dispelled. It is in these terms that the European experience is traditionally cast.²⁹⁷ Such a perspective on the European experience is viewed exclusively in terms of the voluntarist paradigm—as the limitation of states' rights for the benefit of a higher authority federal structure.²⁹⁸ While such an analysis holds true for several aspects of the structure of the E.U., it misses the point where the conception of sovereignty is concerned. The revolutionary potential of a humanist, federal understanding of sovereignty comes from moving away from the original voluntarist paradigm. By so doing, the paradigm shift which is still in the making can be appreciated. If viewed from this different vantage point, there is no actual transfer of sovereignty. Far from taking sovereignty from the member states, the federal structures actually foster

292. See FOUNDATIONS, *supra* note 13, at 88-91; 122-23; 241-43.

293. This was the ideal of the free Italian city states in the early Rinascimento. See *id.* at 186-89.

294. Sadly, one of last examples of such an occurrence was not held in check even by a strong independent judiciary. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

295. See Carozza, *supra* note 286, at 38.

296. See *id.*

297. See, e.g., Tony Weir, *ALL or Nothing*, 78 TUL. L. REV. 511 (2004).

298. *Id.*

and safeguard national sovereignty.²⁹⁹ By curtailing government action which stands in violation of basic principles of human dignity and welfare, these structures enforce the underlying teleological justification for humanist sovereignty.³⁰⁰ They do not impose foreign restraints on government action, but simply watch out for their “constitutionality.” In other words, rather than being the evil stepmother, federal institutions take the role of a loving and experienced chaperone.

The federal idea of sovereignty is based on the fundamental commitment to the basic notion of human rights as developed from the idea of human dignity. In its federal structure, sovereignty attempts to keep state power true to its initial commitment, which it may otherwise cast aside in times when immediate interest outweighs its underlying ideals.³⁰¹ In return, a federal structure promises greater economic stability and international clout. By forming a federation, like-minded states will be able to bring the idea of human dignity to the world stage through their combined political weight.

The humanist conception of federal sovereignty is clearly a stabilizing factor in international relations. In his analysis, Cooper correctly points out that with the growth of a federal ideal, our means of diffusing and reacting to international conflicts drastically increase.³⁰² The self-evident, yet often overlooked, stabilizing factor remains that nations bound in the federal structure are increasingly unlikely to create international conflicts with each other. In the case of the European Union, with the United Kingdom, Germany, France, Italy, and Poland as current members, and with the potential accession of the Balkan states and Turkey, nearly every powder keg of modern warfare on the western hemisphere will be pacified. A more subtle factor is the political muscle which such a federation can wield.³⁰³ It has increased economic clout and available military options for the direst circumstances. Due to the daily necessities of cross-cultural governance in such a federal structure, such a federal sovereign would further be able to negotiate more effectively in troubled regions. Of course, these means of persuasion are far from perfect; in fact, the European Union has yet to stop a single military or civil conflict before it escalates. Still, the long-term potential

299. See Vattel, *supra* note 6, at 1.4, § 39, 51; Vattel Trans., *supra* note 6, at 13, 17.

300. See generally Mirandola, *supra* note 238; Cicero, De Officiis, in Marcus Tullius Cicero, *On Duties* (Walter Miller trans., 1913).

301. For an example of such a check of excessive power in the U.S. context due to a reawakening independent judiciary, see *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

302. See Cooper, *supra* note 3, at 170-71.

303. One such nascent attempt by European states to use their combined clout was the official denouncement of U.S. conduct in Guantanamo Bay by the Council of Europe. See *Europarat verurteilt USA wegen Folter*, *supra* note 227.

both to defend the value of human dignity as a condition of sovereignty, and to use the requisite means to make it a more globally accepted basis for government action, is already a huge step in the right direction.

Finally, a federal understanding of sovereignty also satisfies the larger philosophical ambitions of the civic humanism. Humanism remains a deeply cosmopolitan philosophy.³⁰⁴ Its cosmopolitan goal finds expression in the potential which this model of federal sovereignty opens up for cross-cultural dialogue. Federal sovereignty—and the humanist natural law tradition in general—have universal aspirations.³⁰⁵ However, these aspirations are not expressed in the form of a “one size fits all” mentality. Rather, they attempt to bridge cross-cultural gaps through mutual engagement in discussion and through truly global civic education. The virtue of civic participation at the core of the humanist tradition translates to the international stage. Through engaging each other in this dialogue on the premise of the respect of human dignity, we may yet find the value in a truly multicultural community of nations. In this dialogue, we may also find the key to lasting international peace and security.³⁰⁶ Such a final good—the political *oikeiosis*³⁰⁷ of stoic ethics—is certainly utopian and yet all the more desirable.³⁰⁸

VII. Conclusion

This article examined the changing nature of sovereignty, starting from the premise that sovereignty, as the basic functional concept of international law, forms the cornerstone of any solution to international peace and security problems. It used the fundamental and unalterable commitment to human dignity and fundamental human rights as a guide in its examination of the different competing options. In so doing, it examined the underlying historical and philosophical systems of

304. See James Bohman, *supra* note 279, at 3.

305. See generally CICERO, DE LEGIBUS, in MARCUS TULLIUS CICERO, ON THE REPUBLIC, ON LAWS (Clinton W. Keyes trans., 1928).

306. In the words of a Nobel peace laureate: “We now are emerging into an age when different civilizations will have to learn to live side by side in peaceful interchange, learning from each other, studying each other’s history and ideals, art and culture, mutually enriching each other’s lives. The only alternative in this overcrowded little world is misunderstanding, tension, clash—and catastrophe.” See Gunnar Jahn, Presentation Speech: Nobel Peace Prize 1957 (Dec. 10, 1957), <http://nobelprize.org/peace/laureates/1957/press.html> (last visited Jan. 16, 2007).

307. *Oikeiosis* means the stoic highest good.

308. While such a state of affairs certainly is a utopia on the stage of international relations, small “experimental communities” which attempt to teach these ideals through practical application and academic study do exist and have been successful for the last forty-three years under the watchful eye of open-minded world leaders and Nobel Peace laureates. See United World Colleges Home Page, www.uwc.org (last visited Jan. 16, 2007).

sovereignty and their relationship to international security and found that the notion of sovereignty originated with the humanist natural law tradition in response to medieval power struggles between the Empire, Church and local princes. From these origins, an ever-growing discourse on sovereignty as the ultimate guarantor of state rights and state power developed.

This conception culminated in the voluntarist paradigm of international law, which while being theoretically only a stop gap measure in the face of European political instability, has remained the underlying philosophical basis of international law for the last 190 years. This article also examined the colossal failure of the voluntarist system of sovereignty to guarantee the fundamental principles of human dignity. This failure was the reason the voluntarist system crumbled over the last few years. It is also a root cause of the lack of a coherent global strategy to holistically address the security threats we face in the Twenty-First Century.

With the waning influence of voluntarist thought, this article looked for alternatives to international orthodoxy. It found such alternatives in the hegemonic theory of sovereignty advanced by the neoconservative school of thought and in a humanist, federal recasting of sovereignty. It concluded that hegemonic sovereignty cannot theoretically qualify as a legal theory due to the lack of legal stability which it engenders, and practically fails, due to the overwhelming military commitments it would require of the hegemonic power to “police” a world populated by asymmetric security threats. Faced with the impasse of hegemonic sovereignty, this article examined the option of continuing in the pre-voluntarist natural law tradition. For good or for ill, the only means of safeguarding the basic and inalienable value of human dignity and of providing a manageable approach to international security problems remains with a natural law recasting of sovereignty.

