

Chicago Journal of International Law

Volume 5 | Number 2

Article 7

1-1-2005

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Recommended Citation

Rabkin, Jeremy A. (2005) "Recalling the Case for Sovereignty," *Chicago Journal of International Law*. Vol. 5: No. 2, Article 7.

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Recalling the Case for Sovereignty

Jeremy A. Rabkin*

In the spring of 1994, Louis Henkin, then the president of the American Society for International Law, urged that the word “sovereignty” should be “banished from polite or educated society.”¹ By the spring of 2004, as the UN Security Council grappled with the impending transfer of authority to a new government in Iraq, diplomats could not stop talking about “sovereignty.”

Optimists may see the recovery of the word into “polite or educated company” as a sign of progress. Politicians and pundits had learned, after a decade of rhetoric about “global governance” and a “post-sovereign world,” that sovereignty was, after all, an indispensable concept.

Yet among the most insistent champions of “full sovereignty” for Iraq in the spring of 2004 were European leaders who were, at the same time, urging European states to yield more of their own sovereign attributes to the European Union.² And only the year before, such figures as French President Jacques Chirac and German Chancellor Gerhard Schroeder had insisted that the United States could not make war on Iraq without UN approval—which might seem to be a considerable restriction on American sovereignty.³

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¹ *Notes from the President*, ASIL Newsletter 1, 6 (Mar 1993).

² Compare Romano Prodi, President of the European Commission, *A constitution for the future of Europe*, Address at Fondazione Cariplo (July 15, 2002), available online at <<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/343&format=HTML&aged=1&language=EN&guiLanguage=en>> (visited Sept 17, 2004), with Sharon Spiteri, *Prodi Backs Calls for Italian Troop Withdrawal from Iraq*, EUObserver.com (May 14, 2004), available online at <<http://www.euobserver.com/?aid=16039>> (visited Sept 17, 2004).

³ The question is not whether states can agree to restrictions on their war-making authority: centuries of diplomatic practice, as in treaties of alliance or pledges of neutrality, presume the opposite. The question is whether states can delegate to an international authority, such as the Security Council, the exclusive and final authority to determine when such restrictions apply and when, owing to new circumstances, their effect may have ceased. Among other things, the American-led coalition which fought the first Gulf war against Saddam Hussein in 1991 had agreed to a truce, on condition that Saddam’s government dismantle all its weapons of mass

From the most immediate political perspective, there is an obvious thread of consistency in such European protests, since they aim, at every turn, to maintain veto points on American initiatives. Opponents of the American-led war in 2003 had obvious incentive to claim that the war could only be legitimate if endorsed by the Security Council, since the Council was not then prepared to endorse the war. Past opponents of the war had somewhat similar incentives, in 2004, to challenge any arrangement in which the new government in Iraq might be left dependent on troops supplied by the United States and its partners in the war. Those who wanted to challenge or contain the United States had obvious reason to favor an enhancement of central authority for the European Union. Many EU member states had actually sided with the United States in the war against Iraq in 2003, contrary to the preferred policy of the EU's otherwise dominant member states, France and Germany.⁴

At a deeper level, the debate revealed quite different assumptions about the meaning of sovereignty. If it is true, as the French and German governments contended, that only the Security Council can authorize resort to war, then the UN has much greater authority than the United States has acknowledged in its own past practice. The United States has frequently deployed force in its foreign policy since 1945 and usually without any formal authorization, often without even implicit or indirect approval, from the Security Council.⁵

In the spring of 2004, the question was whether forces of the American-led coalition in Iraq would fall under the direct control of the ostensibly "sovereign" government of Iraq. The United States has not been willing to put its forces

destruction ("WMD") programs and verify its compliance by submitting to international inspections. The question in 2002–03 was not whether Saddam had complied with the obligation to verify the dismantlement of all such weapons and weapons programs; there was general agreement, even among UN inspectors, that he had not done so. The question was what remedy should follow from this failure to adhere to the truce conditions. A new, more broad-based American coalition gave a different answer to this question than that preferred by leading members of the Security Council.

⁴ See, for example, *EU/Iraq: Eight States' Letter Rips Open Union's Fragile Unity on Iraq*, European Report (Feb 1, 2003) (discussing an open letter from eight European countries—the Czech Republic, Denmark, Hungary, Italy, Poland, Portugal, Spain, and the United Kingdom—calling for greater support for US operations in Iraq from other European states).

⁵ President Clinton did not seek UN approval for US military actions in Kosovo, President George W. Bush did not wait for UN approval before invading Iraq, and John Kerry has stated that, if elected in 2004, he would never give any "international institution a veto over our national security." Charles Krauthammer, *Tripe a la Mode*, Wash Post A23 (Mar 12, 2004); Karen DeYoung, *Bush: UN Must Act Fast; US Says it Won't Wait Beyond Next Few Weeks for Iraq Accord*, Wash Post A1 (Feb 1, 2003); E.J. Dionne Jr., *The GOP's Dirty Z-Bomb*, Wash Post A19 (Sept 3, 2004). The Korean and Persian Gulf Wars are the only US wars launched with UN approval. Krauthammer, *Tripe a la Mode*, Wash Post A23. For a general discussion of unauthorized use of force in foreign policy under President Clinton, see Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 BU Intl J L 207 (2001).

under foreign control in the past and was not willing to do so in Iraq.⁶ If the interim government in Iraq, however, was heavily dependent on security assistance from coalition forces—in facing threats from an insurgency on its own territory—then it might seem a bit odd to insist that this vulnerable and dependent Iraqi government was entirely “sovereign.” The same European critics who argued that the UN must have ultimate authority on questions of war and peace thus seemed—with a certain consistency—to argue that the UN would have the last word on questions of sovereignty. The new government in Iraq could be “fully sovereign” if the Security Council decreed that it would be.

Beneath the rhetorical posturing on all sides, debate over Iraq simply confirmed, once again, that there are fundamental differences between the way “sovereignty” is viewed in the United States, on the one hand, and by many Europeans, on the other. Whatever one’s view about the policy merits of the Bush administration’s actions in Iraq, there is every reason to think that international differences over sovereignty will continue to complicate American diplomacy in the future. But there are also very solid reasons to think the traditional American view remains deeply grounded in American thinking—and in intractable realities of international affairs.

I. WHY SOVEREIGNTY IS NOT DIVISIBLE WHERE CONFLICT IS IMAGINABLE

The different debates, before and after the war, might seem to correspond to the distinction, commonly made, between “external” and “internal” sovereignty.⁷ The angry debate of 2002–03 was about resort to war, while subsequent wrangling before the Security Council was about defining internal authority within Iraq. But, of course, the two debates were closely connected. And the connection is a useful illustration of how questionable it is, in practice, to distinguish “external” and “internal” sovereignty.

⁶ See, for example, Thomas Walkom, *Uncle Sam Wants You. You, Too*, Toronto Star A29 (Dec 10, 2002) (discussing potential US military operations in Canada and the possibility of Canadian control over US troops given US reluctance to allow foreign control over its soldiers); Nicholas Watt and Richard Norton-Taylor, *Threat of War: British to Command 2,000 US Marines: Symbolic Move Seen as Reward for Loyalty*, Guardian 5 (Mar 3, 2003) (discussing one exception to US policy prohibiting foreign control of US troops in Iraq—because the British officer in question would command under a US general, the foreign control of US troops was, in this case, not an unacceptable violation of US policy); Robert Hansford Hoskins, Comment, *One Tin Soldier: A New Look at the Constitutionality of Placing United States Soldiers under the Command of the United Nations*, 22 Dayton L Rev 125 (1996).

⁷ For a survey of different uses of the term, emphasizing (among other things) differences between “internal” and “Westphalian” (or “external”) sovereignty, see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton 1999).

If the UN really could govern “external sovereignty,” then nations would not need to worry about external threats, because the UN would take care to assure they did not arise. Of course, if nations did find themselves under attack—say, by terrorists based in foreign countries, killing thousands of civilians in the space of a few hours—the UN would then decide what to do. If the UN could not devise adequate responses to forestall future attacks, people in the affected nation might be angry. But they would not be able to blame their own government. The UN would carry the responsibility. So presumably, the UN would take any blame.

But what if people in the affected nation became indignant and demanded that their government take effective action, disregarding the UN if necessary? Could the government resist popular clamor—or even popular rebellion—by pleading that it had no control of its “external sovereignty”? Could the UN, then, keep the relevant government in place by admonishing the impatient people of that suffering country that they must accept the government recognized by the UN? Could the UN really expect to control “external sovereignty” without also controlling “internal sovereignty”? The underlying question is whether any government can really be “sovereign”—even internally—if, in moments of crisis, it is not also sovereign “externally.”

These hard questions need not arise, of course, if there is peace and the assurance of ongoing peace. Whether Canada and Australia or the Irish Free State were entirely sovereign under the evolving norms of the British Commonwealth might not have been easy to determine before the Second World War, when it did not seem necessary to settle such questions. Quite clear answers emerged in the course of the Second World War, when Canada and Australia insisted on their right to withhold troops from military efforts projected by the “Imperial” General Staff in London, and Ireland successfully asserted its right to sit out the war entirely.⁸

In the decade that followed the end of the Cold War, projects of “global governance” gained momentum in a world which imagined that peace was assured. The UN, which had been largely irrelevant to the great conflicts of the previous decades, could now be relied on to govern resort to war—especially if no one imagined any need to resort to war. Global governance seemed plausible when resort to war seemed unthinkable.

⁸ For a general discussion on the background ambiguities in the status of British dominions during the inter-war period, see A.J.P. Taylor, *English History, 1914–1945* at 253–54 (Oxford 1965). For a discussion on the differing interpretations of British authority to commit the dominions to war in 1939, see *id.* at 452–53. For a discussion on assertions of dominion authority regarding British imperial war plans during the war, see Glen St. J. Barclay, *The Empire Is Marching: A Study of the Military Effort of the British Empire 1800–1945* at 184–216 (Weidenfeld & Nicholson 1976).

War was not really unthinkable, however, even in the 1990s. Mass murder in Rwanda was ended only by the military victory of Tutsi forces, mobilized and equipped by neighboring countries. The UN, which had failed to do anything to stop the slaughter of Rwandan Tutsis under the genocidal Hutu government, was content to turn a blind eye to the war which ended the genocide. When earlier UN authorized interventions in the Balkans failed to stop violent turmoil in Kosovo, even France and Germany ultimately supported a NATO bombing campaign against Serbia in 1998—though it was not authorized by the Security Council. A succession of American cruise missile attacks, on Sudan and then Iraq in the late 1990s, was also accepted by France and Germany and other European states, though equally unauthorized by the Security Council. The idea that the UN, on its own, could secure peace was not always taken quite literally, even in the 1990s.

Still, the notion that the United States, and those nations which agreed with it, could launch their own war in Iraq was profoundly unsettling to most Europeans. Perhaps it was the spectacle of real war, with tanks and infantry, that so disturbed people. Perhaps it was the fear that war against a major Arab state would have violent repercussions in other Muslim states and among Muslim populations in Europe. Perhaps it was the fear that America, with its vast military resources, would be an especially destabilizing force in the world if it were not subject to international control—or at least restrained from acting without a chaperone of European cosponsors of any actual military effort.

With whatever exceptions and qualifications, the thought in the background remains the same: the world is supposed to have reached a stage in which nations do not make their own decisions about resort to force. Force is, if not altogether irrelevant, at least, somehow marginal to the main business of government. That is the necessary premise of global governance.

The very term “global governance” betrays this thought. What is the difference between global governance and the previous, discredited idea of “world government”? All the same continents are embraced by the word “global” as by the term “world.” Earlier proponents of world government, however, openly advocated an international authority equipped to enforce its determinations, when necessary by force—or in other words, an international authority equipped to operate as an actual government.⁹ Global governance, the

⁹ See, for example, Frederick L. Schuman, *The Commonwealth of Man: An Inquiry into Power Politics and World Government* (Knopf 1952) (offering a survey of prominent figures, even in the United States, including Supreme Court justices, congressmen and senators, endorsing broad schemes of “world government”). A hint of these ambitions remains in the UN Charter provisions for an international Military Staff Committee to coordinate military operations at the direction of the Security Council—though subject, of course, to the veto of any permanent member of the

catch phrase of the 1990s, was supposed to operate without force. It would “coordinate” more than compel. It would exercise something looser or softer than direct government—something described by the new, evasive term “governance” which deliberately blurred distinctions between private organizations and public authorities. In other words, it was all about abstracting from force. At one level, the debate about sovereignty is really a debate about force.

II. WHY CONSTITUTIONAL INTEGRITY REQUIRES NATIONAL INDEPENDENCE

To say the debate about sovereignty is really about force may sound brutal. We can soften the effect by resorting to the more abstract term “coercion.” But coercion is a term that is often used rather loosely, as when people speak about “economic coercion” from sharp business practices or “moral coercion” from intimidating rhetoric. Governmental coercion is distinctive, because it involves what we usually call—with a more precise idea in mind—“force.” We might call it “physical coercion.”

Only a government has the authority to impose such ultimate punishments as imprisonment or (where it remains lawful) capital punishment. Only a government has the authority to authorize armed force to subdue resistance to the law, which may include deadly force. The *rightful* exercise of physical coercion is at the heart of sovereignty, as traditionally conceived. Lawyers still know this. The Foreign Sovereign Immunities Act of 1976, which purports to codify customary international practice, provides that foreign governments will be accountable in American courts for their commercial activities—for the types of activities that might be pursued by private enterprises—but not for distinctively “sovereign” acts, of which the wielding of coercive force is paramount.¹⁰

Similarly, constitutional guarantees of due process apply to governmental exercise of physical coercion to prevent its unjust use. But these guarantees do not (or do not necessarily) apply to governmental management or distribution of resources that is analogous to the sort of management or distribution that might be undertaken by private organizations.

The initial point of sovereignty is to put the exercise of physical coercion under constitutional control. True, not every sovereign state has a liberal constitution with guarantees of individual rights, and checks and balances to

Council, including the United States. See United Nations Charter, art 47, ¶¶ 1–3; art 27, ¶ 3; art 23, ¶ 1.

¹⁰ Foreign Sovereign Immunities Act of 1976, 28 USC §§ 1602–08 (2000).

make them effective. But every sovereign state does have some means of determining who is and who is not authorized to use force within its territory. Every sovereign state has some means of holding wielders of force at local or subordinate levels accountable to central authority.

Where there is no control of this sort, there is no central state, hence no real sovereignty. At best, there are tenuous truces among local warlords in a situation of continuing strife and uncertainty. In war-torn countries of Africa, where things have fallen to this condition, central governments are recognized more by outsiders than by people in the territory. Even recognition by outsiders is a matter of “courtesy,” because international law does not require other states to recognize a state which is not reliably in control of its own territory.¹¹ In medieval times, when feudal overlords had little hope to control their better-armed vassals, the very word “state” was unknown.¹² Feudal land claims were so jumbled, and conflict among rival complainants so routine, that no one could distinguish international conflict from civil war.¹³

The original argument for sovereignty is that almost any reliable government is preferable to such anarchy. That was the argument advanced, for example, by Thomas Hobbes in the mid-seventeenth century. Pressed to its logical conclusion, this argument implies that the most tyrannical government has as much claim to sovereign authority as any other. Or, as Hobbes, himself put it, that “[t]yranny” is just “[monarchy] disliked”—a term that is mere rhetoric.¹⁴

The obvious rejoinder is that some governments may be so brutal, so rapacious, so murderous, that it is worth the risk of anarchy to be rid of them. That was already the counterargument advanced by John Locke at the end of the seventeenth century. Locke urged a still stronger argument: that a government with constitutional limits is itself the “best fence against rebellion”—hence the

¹¹ “Under the traditional approach of governmental recognition, the government must be in *de facto* control of the territory and the means of administration, have the acquiescence of the population, and indicate its willingness to comply with the state's international obligations.” Captain Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 AF L Rev 235, 269 (1997). For general discussion, see L. Thomas Galloway, *Recognizing Foreign Governments: The Practice in the United States* 5–6 (AEI 1978); Sir Hersch Lauterpacht, *Recognition in International Law* 88 (AMS 1978); Lassa Oppenheim, *Oppenheim's International Law* 150 (Longman 9th ed 1993).

¹² See Joseph R. Strayer, *On the Medieval Origins of the Modern State* 3–4 (Princeton 1970).

¹³ Id at 83 (noting that medieval princes, even as they assembled somewhat formalized organizations for overseeing collection of revenues and specialized expenditures, did not have anything corresponding to ministries of “foreign affairs” because, given complex feudal obligations, “one could hardly distinguish between internal and external affairs”). The term “state” did not come into use until the sixteenth century, possibly under the influence of Machiavelli. See Harvey C. Mansfield, *Machiavelli's Virtue* 288–94 (Chicago 1996).

¹⁴ Thomas Hobbes, *Leviathan* 240 (Penguin 1968).

most reliable defense against a collapse into anarchy.¹⁵ A constitutional government may invite citizens to think their obligations to the government cease when the government no longer protects their rights. But when the government does operate within its agreed bounds, it has for that reason all the more claim to full compliance with its laws.

But this view assumes that outside powers will let disputed questions be determined by the constitutionally established government. What if an outside power demands that a particular territory be governed, not as its own constitutional scheme directs, but as the outside power would prefer? What if the outside power is prepared to make war to enforce such preferences? History offers many examples of imperial powers imposing their preferences on helpless “client” states. This concern suggests that even a constitutional state needs enough force to be able to defend itself against demands from outside. Locke himself claims that the elected legislature is “the soul that gives form, life and unity to the common-wealth.”¹⁶ Yet he still refers to the power of wielding force against foreign threats as the “federative” power—the power that, in some more basic way, holds the commonwealth together.¹⁷

The US Constitution takes this understanding for granted. What if a foreign power demands payment of tribute or cession of territory? The Constitution provides that no money can be payed from the federal treasury without approval from Congress and that no new jurisdiction may be “erected” on the territory of a state without the consent of its legislature.¹⁸ At the least, a president who attempted to secure peace by paying tribute or conceding territory would need legislative approval. If a foreign power were too impatient for such constitutional formalities, the president would have to summon the military capacity to defend the nation against such demands on its constitutional integrity.

The Preamble to the Constitution describes its aim as a “more perfect union,” but the Articles of Confederation had already described the relations among the signatory states as “perpetual union.”¹⁹ What made the “perpetual

¹⁵ John Locke, *Second Treatise of Government* § 226 at 114 (Hackett 1980).

¹⁶ *Id.* at § 212.

¹⁷ *Id.* at § 146. Locke’s own account makes clear that “federative power” is his coinage, not an accepted term which he was obliged to maintain from compliance with conventional usage.

¹⁸ US Const, art I, § 9, cl 7; art IV, § 3, cl 1.

¹⁹ US Const, preamble; Articles of Confederation, title (The “Articles” carry the official title, “Articles of Confederation and perpetual Union between,” with the thirteen signatory states individually named. The word “between” rather than “among” emphasizes the sense in which the “Articles” were conceived as a treaty, a state-to-state agreement). The idea of a “perpetual” treaty seemed so incongruous that *The Federalist Papers* invoked it as an argument proving the need for a

union” into a “more perfect union” was the provision for a perpetual commander-in-chief (in the sense that the office would always be filled), a standing army, and direct powers of taxation and legislation at the federal level to “provide for the common defence”—instead of a mere paper pledge of “friendship” among states.²⁰ This also holds true in the case of domestic rebellion. The president is given ultimate military authority over the state militias. The federal government is made responsible for backing up the Constitution’s “guarantee” to each state of “a Republican Form of Government” and protection against “domestic Violence.”²¹

So the Constitution is designed to ensure that its guarantees to American citizens won’t give way to demands from outside powers (or extraconstitutional powers), even when these demands are backed by force. But what if outside demands are not backed by force? It is tempting to think that demands not backed by force will always be disregarded. Perhaps that is even what the Constitution assumes.

That assumption was not always taken for granted. Even in the midst of his famous argument for religious toleration, Locke made an exception for those preaching papal supremacy over civil authority.²² Anyone who preached adherence to papal pronouncements against contrary laws enacted by the local civil authority would threaten the rights of other citizens—even though the Pope had no troops to back up his claims. On the eve of the American Revolution, William Blackstone’s *Commentaries on the Laws of England* still defended laws limiting the rights of Catholics, on the ground that if they gave their ultimate loyalty to papal authority, they could not expect full protection from their own government.²³

The US Constitution reflects more confidence: it prohibits any “religious test” for office and guarantees “free exercise of religion” as well as “freedom of speech.”²⁴ Americans are free to criticize laws in this country on any grounds,

new constitution, not grounded in this way on a mere treaty. Federalist 43 (Madison), in Charles R. Kesler and Clinton Lawrence Rossiter, eds, *The Federalist Papers* 247–48 (Mentor 1999).

²⁰ US Const, preamble; art I; art II, § 2, cl 1; Articles of Confederation, art III.

²¹ US Const, art IV, § 4.

²² John Locke, *Letter on Toleration*, in David Wootton, ed, *Political Writings of John Locke* 424–26 (Penguin 1993).

²³ William Blackstone, 4 *Commentaries on the Laws of England* ch 4 at 54 (Chicago 1979) (arguing that “papists” who “acknowledge a foreign power, superior to the sovereignty of the kingdom . . . cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects”).

²⁴ US Const, amend I; art VI, cl 3 (“[N]o religious test shall ever be required as a qualification to any office or public trust under the United States.”). The placement of this prohibition is instructive, coming as it does right after provisions making the Constitution “the supreme law of the land” and requiring all federal and state legislators, as well as executive and judicial officers, to swear an

including moral, spiritual or religious grounds. But the premise is that we will not mistake such arguments for law, itself. At the least, moral objections, even grounded in religious belief, are not treated as legally valid grounds for defying enacted law—or reasons for government to withhold the full enforcement of the law.

But what happens when moral claims—or claims about moral law—are invested with the seemingly more precise and lawlike authority of international law? No one doubts that the Constitution allows the United States to make treaties with other nations which can then have the force of law. Treaties, when duly approved, may have the same force as federal statutes, both of which, as the Constitution stipulates, are “the supreme law of the land.”²⁵ But in the past, the Supreme Court has repeatedly cautioned that just as with congressional statutes, treaties must be consistent with the Constitution.²⁶ Insofar as it is grounded in treaties, international law would thus seem securely subordinate to the Constitution and the powers invested in the federal government.

That is not adequate for ambitious notions of global governance. Among other things, the traditional view implies that the same government which makes a treaty can repudiate it, just as Congress can repeal any statute by the same power it exercises in enacting statutes. So, ambitious notions of global governance seem to require that international law claim some priority over the ordinary decisions of our constitutional organs. Even when constituted authorities do not openly resist, they may drag their feet in implementing international obligations. Therefore, international authority, if it is going to engage in extended governing ventures, needs more than diplomats and conference rooms—adequate as these might be for the sorts of treaties envisaged by the framers of the Constitution.

Europeans understand all this. The European Union now has a permanent bureaucracy, authorized to issue regulations which take direct effect in the legal systems of member states. If national courts raise constitutional objections to such regulations, the European Court of Justice (“ECJ”) has asserted the authority to override national constitutions, even as interpreted by national

oath “to support this Constitution.” Swearing loyalty to the Constitution takes the place of any (or any other) “religious test.” Private citizens are not required, by the Constitution, to take an oath of loyalty to the Constitution. What if private citizens, then, held the admonitions of some outside religious authority to take precedence, regarding their own obligations, over the laws enacted by the system established in the Constitution? Would it be reasonable to suppress religious organizations preaching such doctrines of religious supremacy over the constituted government? The First Amendment seems to block any impulse to follow British precedent in this way. But it was not part of the original Constitution—and was long thought to apply only to federal laws, not to protective measures which might be adopted by state legislatures.

²⁵ US Const, art VI, cl 2.

²⁶ *Geofroy v Riggs*, 133 US 258, 266–67 (1890); *Reid v Covert*, 354 US 1, 16–18 (1957).

constitutional courts, in the name of upholding European law.²⁷ The whole scheme has been established by mere treaty. It has rolled forward without anything close to a European constitution. The “constitution” prepared by a “constitutional convention” of European leaders in 2002 is, in fact, merely another treaty.

The whole edifice rests on the premise that a national government, invoking the treaty power granted to it under the national constitution, may deploy that power to revise the national constitution, establishing a whole new governing scheme in its place, which can then claim higher authority than the national constitution itself. In other words, the whole European structure rests on the very strange notion that a national constitution authorizes a government to escape the arrangement of powers set down in that constitution, so long as this escape is accomplished in conjunction with foreign partners.

The rest of the world is not close to committing itself to a global counterpart of the European Union. But parallel thinking is already in play. In the 1990s, for example, the UN Security Council established two “ad hoc” tribunals to prosecute war crimes in particular territories. Resolutions of the Security Council are not treaties. They go into effect—with whatever significance attaches to their “effect”—when they secure the requisite votes within the fifteen member Council.²⁸ Delegates to the Council cast their votes, of course, at the direction of the relevant executive authorities in their home countries.

It is not at all obvious from the UN Charter that nations which have adhered to it have agreed to bind themselves to new institutions created by the sole action of the Council. It is not at all obvious that what we normally understand by “due process of law” is consistent with trial by an “ad hoc” tribunal, established for special purposes by executive fiat. When challenged on these grounds, the International Tribunal for the former Yugoslavia explained that international law could not be bound by the same standards as domestic law—but it still retained the authority to override domestic constitutional objections.²⁹

²⁷ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, 1970 ECR 1125, 1134 (1970). See also J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L J 2403 (1991) (providing an overview of the way the ECJ “constitutionalized” the treaties establishing the European Economic Community (forerunner to the European Union)).

²⁸ See UN Charter, art 27.

²⁹ *Prosecutor v Tadic*, 105 ILR 419, 472–73 (Int'l Criminal Tribunal for the Former Yugoslavia App Chamber 1995) (“[T]he principle that a tribunal must be established by law . . . is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting”—that is, a “principle” which does not apply to international tribunals). An international jurist has protested that the reasoning in this ruling seems to indicate

If a tribunal of this kind could be imposed on sovereign states in the Balkans or on the new (post-genocide) government in Rwanda, there seems no reason, in principle, why the same sort of judicial authority could not be imposed on American soldiers or American officials operating in Iraq or on the American base at Guantanamo—or indeed at the headquarters of US Central Command in Florida. In principle, there seems no reason (under international law) why such authority could not be imposed on US citizens in all the United States. If the Security Council is supreme over small nations, it has, presumably, the same claim to supremacy over large nations. In practice, no doubt, the US delegate to the Security Council would resist such an intrusion into the American legal system. But President Clinton agreed to establish a Balkan tribunal with jurisdiction over American forces in that region. If the issue is simply up to the president, then the extent to which Americans can be subjected to UN tribunals is simply a matter of political judgment or policy discretion.

If that is all there is to it, and the Security Council has the last word, then a UN-sponsored tribunal can displace American courts, even though international tribunals do not observe all of the procedural safeguards guaranteed in the American Bill of Rights (as, for example, trial by jury, following indictment by a grand jury). We would then have constitutional guarantees of due process—except when the president decided they weren't necessary. What no US court would accept on the sole authority of the president, what no American president would accept on the demand of a hostile power, we might have to accept, if presented as the resolution of a council speaking for all nations. The legal logic is quite straightforward, but only if one holds to the European view that international law can rightfully take priority over national constitutions.

Meanwhile, human rights advocates insist that standards in human rights treaties often become part of customary international law. That means that nations which have not ratified a particular treaty may still be bound by the standards it sets out. The UN Human Rights Committee, charged with monitoring compliance with the International Covenant on Civil and Political Rights, claimed in this way that a nation which had attached specific reservations to its ratification could still be bound even to those provisions which it had, through such reservations, declined to ratify. The Committee suggested its own

that standards enshrined in the International Covenant on Civil and Political Rights as well as the European Convention on Human Rights, requiring states to administer justice only through tribunals "established by law," does not apply to international tribunals—which, in the name of international human rights, thus seem to claim authority to disregard international human rights standards supposed to be binding on national states. James Crawford, *The Drafting of the Rome Statute*, in Philippe Sands, ed, *From Nuremberg to the Hague: The Future of International Criminal Justice* 109, 129–32 (Cambridge 2003).

pronouncements could offer authoritative guidance on which provisions had become universally binding in this way.³⁰

If the United States comes to accept this view of customary international law, we have a whole new system for making law—not mere treaty law, governing US obligations to other nations, but some of the most basic aspects of domestic law, governing relations between American citizens and their own government. In the past, the Supreme Court has insisted that even formal treaties must be consistent with the Constitution.³¹ And there are, in fact, obvious conflicts between international human rights law and guarantees in the US Constitution. The International Covenant on Civil and Political Rights, for example, requires nations to enforce limits on “propaganda for war.”³² This provision was one of several that Senate reservations were supposed to hold inapplicable, since it would contravene the free speech guarantee in the First Amendment, at least as that guarantee has been interpreted by the US Supreme Court.³³

But in the last few years, the Supreme Court has indicated that international practice or international opinion can justify reinterpreting the US Constitution, even when the new interpretation runs precisely contrary to interpretations previously advanced by the Court itself.³⁴ On this view, it might not be necessary ever to proclaim the superiority of international law to the US Constitution, so long as courts contrive to assure no conflict by reinterpreting our own Constitution to satisfy what are taken to be international standards. It would require some such reinterpretation to hold that American law could be established by something so amorphous and unstructured as “international opinion.” Where the Constitution specifies a precise procedure for enacting federal law and a still more onerous procedure for amending the Constitution, this new approach would establish a new kind of legislative authority that requires no direct vote by American legislators—and no precise rules about

³⁰ For survey of the claims by the Human Rights Committee and countering claims of US representatives, see Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher and David W. Leebron, *Human Rights* 784–94 (Foundation 1999).

³¹ *Geofroy*, 133 US at 266–67 (cited in note 26); *Reid*, 354 US at 16–18 (cited in note 26).

³² International Covenant on Civil and Political Rights (1976), art 20, cl 1, GA Res 2200, UN GAOR, 21st Sess, UN Doc A/6316, 999 UN Treaty Ser 171.

³³ US Const, amend I. See, for example, *Meese v Keene*, 481 US 465 (1987) (allowing statutory regulation of “political propaganda” but only because the regulation did not substantially violate First Amendment rights); *Watchtower Bible & Tract Society of NY v Village of Stratton*, 536 US 150 (2002) (finding a First Amendment right to distribute religious and political pamphlets and canvass door-to-door).

³⁴ See, for example, *Atkins v Virginia*, 536 US 304, 316 n 21 (2002); *Lawrence v Texas*, 539 US 558 (2003).

which foreign authorities must vote by what majority to impose a new standard on the United States.³⁵ It would be a major change in the past understanding of constitutional arrangements for lawmaking in the United States, but the Supreme Court now seems prepared to contemplate major changes in the traditional constitutional scheme.

The new approach might seem entirely plausible, if Americans no longer cared about American sovereignty—or saw no objection to an extra-constitutional procedure for lawmaking. In a way, it would be voluntary. But if adherence to international standards is really voluntary, what gives it the force of law? It would seem to rest on moral force. Is that enough? Perhaps it is, when people are in full agreement with the moral claim. One might even hope that moral force would only be sustained when people agreed that its claims were compelling.

Of course, this supposes that people—at least, most people, most of the time—have the wisdom to discern when this amorphous higher law should be preferred to the existing law of their own country. It also supposes that they have the moral discipline to adhere to this wisdom. If you are confident that this can work, you need not worry about having a constitution. So you need not worry that international authority is not bound by any well-established limitations or procedures, or anything that adequately corresponds to a constitution. After all, it is not really government.

The thought had crossed the minds of the American Founders—but they were quick to dismiss it. “If men were angels,” *The Federalist* acknowledged, “no government would be necessary [and] if angels were to govern men, neither external nor internal controls on government would be necessary.”³⁶ But in the world we inhabit, angelic qualities can’t be presumed, either in those who are governed or those who do the governing. In this world, when “framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself.”³⁷ Both admonitions speak to the same problem: Government is, at some level, about “control” because it presumes disagreement among those who are governed. A constitutional government must have internal controls—as well as some ultimate accountability to the electorate—because, again, there will rarely be full consensus on what should be done, even when what is done is claimed to be “the will of the people.”

³⁵ US Const, art I, § 7; art V.

³⁶ Federalist 51 (Madison), in Kesler and Rossiter, eds, *The Federalist Papers* 288, 290 (cited in note 19).

³⁷ Id.

III. NO SECURITY WITHOUT SOVEREIGNTY

The historic argument against sovereignty is that if people within each nation think only of their own national concerns, there will always be risk of conflict among nations. The historic rejoinder is that for nations to put aside their own priorities and adhere to the same, universal law, that higher law must be quite clear in its requirements. But in practice, people agree only on the most abstract admonitions and often disagree quite sharply on their practical implications. Nations that insist that all others adhere to the same standards are asking for conflict with those who disagree.

That is a very old lesson. The unity of medieval Christendom, such as it was, developed against the backdrop of ongoing struggles against Islam. In later times, after crusading had ended, Catholic princes, who continued to demand a higher unity among European states, conceived this unity as a common front against the new heresy of Protestantism. Wars between Catholic and Protestant states ravaged central Europe for almost a century. Higher allegiances are no guarantee of peace.

The historic argument in favor of sovereignty was that distinct interests are more likely to coexist in peace if boundaries of control are clearly demarcated. The argument for sovereignty was closely connected with the argument for property: Let each state decide for itself, as each owner decides for himself—and voluntary agreements will then be more likely to displace war for ultimate stakes.

Peace may not always prevail, of course, even in a world of sovereign states. Not all states are inclined to compromise when disputes arise. There may be determined aggressors—as there are, in private life, those who seek their gain from fraud or theft rather than honest trades. Why not, then, create a global authority to keep aggressors in place, just as governments try to protect private citizens against private pillage?

But the international problem remains the same when it comes to security as to other matters. Either international authority can stop aggressors by moral appeals or it must have reliable force. Arguments for endowing the United Nations with independent force have few champions today.³⁸ It is too obvious that force of this kind, accountable to no nation in particular, would be too risky to rely upon. Either it would be so strong as to risk developing into a world

³⁸ See, for example, Shibley Telhami, *Is a Standing United Nations Army Possible? Or Desirable?*, 28 *Cornell Intl L J* 673 (1995) (arguing that such an army is neither possible nor desirable in the near future). But see Laurence I. Rothstein, *Protecting the New World Order: It Is Time to Create a United Nations Army*, 14 *NY L Sch J Intl & Comp L* 107 (1993).

tyranny, or it would be so constrained by vetoes or resource limitations that it could not operate effectively.

The ultimate issue is not about institutional design at the international level. It is about the premise of the project: that all nations will agree, when it comes even to matters of security. Does every nation care equally about the security of people in every other nation? Does any nation think its own security should rightly be sacrificed to international consensus? What if the world believes that it is better to live with a genocidal regime? What if the world believes it is better to let a dictator with a history of unprovoked aggression secure weapons of mass destruction? What if the world believes that terrorist organizations can be contained by restricting their transit through third countries, rather than directly confronting the states that harbor and collude with terrorists? These are not, of course, hypothetical questions.

The fact in the background is that outsiders are not likely to care as much about the security of others, as those most menaced care about their own security. There is good reason to think that individual human beings—whatever one might say about an ultimate, residual right to individual self-defense—will be more secure if they bind themselves to the most well-tested structure for mutual defense: a sovereign state. Quite a lot of history supports this assumption.³⁹ No experience supports the idea that nations will be more secure if they bind themselves to obey an ultimate global protector.

We know that citizens can be induced to risk their lives to protect others in their own nation. We know that people can regard an attack on one part of their country as an attack on the country as a whole. A whole country can rally to the call to protect “us” against “them.” We have no good reason to think humanity as a whole cares as much about all humanity. We have painfully clear reasons to know this is not so. And we have much reason to doubt whether, even if people regard themselves as loyal to humanity, this abstract loyalty will respond to the

³⁹ And not only history. The current situation in Somalia, for example, illustrates the conflict and insecurity that result when there is no reliable state structure to enforce economic rights.

All Somali people, whether they live in Ethiopia, Somalia, Kenya or Djibouti, claim solidarity and unity under shared norms of culture and self-governance. The primary allegiance of the nomads is to their kinship group. Their norms of behavior . . . are determined by their customary laws . . . Some of the nomads are not even aware of the existence of the states that call them their citizens . . . Nomadic pastoralism is characterized by conflict, be it a conflict within a single group or inter-group conflict. This is so because of the scarcity of the basic resources of food and water needed to sustain life.

Dolores A. Donovan and Getachew Assefa, *Homicide in Ethiopia: Human Rights, Federalism and Legal Pluralism*, 51 Am J Comp L 505, 516–17 (2003). Without a strong sovereign authority, there is no prospect of ending intertribal conflict—save by a miraculous increase in the resources afforded by nature.

most urgent needs in particular precincts of humanity. People facing particular threats are bound to give more priority to addressing those threats than people who think only about humanity as a whole.

International authorities can call for action to defeat or constrain a particular “common” threat. To believe this will always be sufficient, one must believe that the call of international authority is always or usually reliable, because it is always or usually heeded. Either everyone is so angelic as to respond with equal devotion to the common cause—protection for all humanity—or everyone is so passive as to accept whatever it is that higher authorities decree. The scheme did not work for medieval popes. Everyone was for Christendom in medieval Europe—but not for everything urged by popes in its name. And the same princes who endorsed common crusades abroad could readily turn on each other in murderous wars at home, which popes and bishops were helpless to stop.

Of course, medieval warriors were not just pious Christians. Proud nobles and powerful princes were not always mindful of Christian teachings about charity toward the needy or forgiveness toward enemies. Hope for global governance seems to rest on the belief that what Christianity could not do in past centuries, a new international doctrine—calling for universal human rights and universal peace and harmony—actually can achieve in our time. The new faith can succeed in rallying humanity to its dictates because it is—what? More persuasive? More precise in its practical implications for policy? Papal appeals were, at one time, sufficient to launch powerful armies into crusades in distant lands. How many nations are now prepared to sacrifice their own troops for the new international faith?⁴⁰

Earlier wars, it is true, were organized by princes and nobles, even when initially urged by popes and bishops. Perhaps the common people, “the masses,” were usually more inclined toward peace. Perhaps in today’s world, where most governments seek popular support, most governments would be more inclined to cooperate for the preservation of peace. Perhaps it is reasonable to hope, then, that governments will eventually find it impossible to resist the determinations of international authorities, because ordinary people around the world are so insistent on accepting whatever is necessary to preserve peace.

The premise of this vision may not be quite so pleasing, however, when one stops to think about its implications. As the world subdues or suppresses its

⁴⁰ See, for example, *Spain Will Only Send 485 Troops to Afghanistan*, *El Mundo* § 8 (Dec 28, 2001); James Meek, Richard Norton-Taylor, and Michael White, *War in Afghanistan: Forces—No 10 Retreats on Plan to Send More Troops: Situation ‘Fluid’ but No Rift with US*, *Guardian* 5 (Nov 20, 2001) (referring to British doubts about sending troops to Afghanistan); Mark Phillips, *Afghan Military Plea Rejected*, *Courier Mail* 2 (Apr 2, 2004) (citing Australian reluctance to send additional troops to Afghanistan).

prideful spirits, almost everyone will be inclined to submit to higher authority, because almost everyone else has such compliant inclinations. Perhaps this does describe the passive, submissive peoples of Western Europe, who submit so readily to the hollowing of parliamentary accountability and constitutional safeguards in the name of a transnational abstraction. Only a few decades ago, these same peoples acquiesced to monstrous tyranny, finally acquiescing even to genocide, when their leaders urged collaboration with Nazi Germany for the sake of “peace.” If all people were as submissive as the Dutch or the French proved to be, we might have universal peace. Or we might have universal tyranny.

If people were sufficiently submissive, global authorities might indeed hope to rule without force. They might aspire to the controlling reach of totalitarian regimes, but without resorting to torture or secret police. If people were sufficiently trusting and submissive, they might take on trust whatever the global authorities decreed as necessary for peace or human welfare or global justice. Perhaps this is not, after all, a particularly pleasing prospect.

But for good or ill, it does not seem to be a plausible prospect outside Western Europe—barring dramatic advances in pharmacology. After decades of the most severe repression, people still raised their heads against Soviet tyranny the minute it was relaxed. National loyalties, long supposed to have disappeared, raised their claims in the Baltic region and in Eastern Europe—and also in the Balkans and in Chechnya, where people still were willing to kill for their national aspirations.

We have, on the whole, done better than we might have feared. The claims of different peoples have been sorted out by an old formula—sovereignty. It was pressed into service in case after case, among captive nations in the Soviet Union and among the submerged nationalities of the former Yugoslavia.

IV. CONSTITUENCIES FOR EVADING SOVEREIGNTY

The American Founders assumed that sovereignty was crucial to liberty and order at home, as also to security from external threats. That is why they took pains to “perfect” the sovereignty of the federal government. The underlying thought is still readily intelligible to most Americans. In the nineteenth century it was the common wisdom of what was then called the “community of nations.” Why is this outlook now so much challenged in other parts of the world?

To start with, there is the situation in contemporary Europe. Sovereignty was first developed as a political doctrine by Europeans, but in today’s Europe, most states are no longer fully sovereign. The EU has gained legal supremacy over member states, however, by disclaiming anything like sovereignty for itself. Member states do not, according to the popular account, transfer their

sovereignty to a federal European state. They “pool their sovereignty” in a postmodern construction in which members are in some way still sovereign except not in the traditional understanding of sovereignty.⁴¹

So member states of the EU retain their own armies and their own diplomatic envoys and their own seats at the UN. The EU has no army of its own, no police of its own, no voting representation at the UN. EU member states pledge to pursue a “common foreign and security policy” even though not all members are actually pledged to provide forces to assist other members.⁴² Some member states, for example, are in NATO and others are pledged to neutrality.⁴³

For Europeans, to raise basic questions about sovereignty is to raise basic questions about the strange new hybrid construction they now live under. The Iraq war split the EU, with some members sending troops to assist the Anglo-American war and others leading the international opposition to it. It is not surprising that on a question of war and peace, different states took different sides. It is not surprising that they had different calculations regarding the larger question in the background—whether it was more important to have solidarity with the United States as the most powerful potential ally against future threats, or more valuable to maintain solidarity with France and Germany, the core of a more cohesive future Europe. Different nations made different calculations. The institutional structures of the EU were not strong enough to assure a “common foreign and security policy” when the question came to something so fundamental as war and peace. EU states can readily agree on rather abstract statements of ideals. In a time of war, that is not sufficient.

The project of European unity without European sovereignty presupposes that issues so fundamental as war will not arise. That is reason enough for Europeans to resent the United States for raising the question so directly as it did in Iraq. There is the additional challenge that when it comes to war, the United States has very large military resources and European states do not. In a world in which everything is decided by international negotiation, the affluent,

⁴¹ For a general discussion on the concept of “pooling,” see Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* 67–68 (Cornell 1998).

⁴² Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (Oct 2, 1997), art 1, ¶ 3, 1997 OJ (C340) 1 (hereinafter Treaty of Amsterdam).

⁴³ The following EU member states are also in NATO: Belgium, the Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, and the United Kingdom. The following EU states have been historically neutral: Austria, Ireland, Finland, and Sweden. See Mark C. Anderson, *A Tougher Row to Hoe: The European Union's Ascension as a Global Superpower Analyzed through the American Federal Experience*, 29 Syracuse J Intl L & Comm 83, 115 (2001).

populous states of the EU might hope to exert as much influence as the United States, since the United States is no larger (in population) and no wealthier (in aggregate GNP) than the newly enlarged EU. But of course, when it comes to war, the nation that does most of the fighting is always going to have the largest say about when and how the fighting will be conducted.

No nations outside Europe have submitted to anything so visionary as an EU-style “pooling of sovereignty.” But nations outside Europe have their own reasons to pretend that they believe in international control. It provides them with leverage they would not otherwise have. It is appealing for lesser powers to claim veto rights over the deployment of American force, should these powers happen to find themselves on the Security Council. And wider schemes of global governance offer other attractions, as well.

The UN Human Rights Commission, for example, offers seats to some of the world’s most repressive regimes, such as Sudan, Cuba, Libya, and China. And the most repressive regimes eagerly seek such positions. It makes perfect sense. Only in an institutional structure in which all states are formally equal could despotic governments expect to exert “leadership” in the supposed cause of “human rights”—which they deploy, of course, not only to condemn their enemies but to deflect criticism from themselves. Everyone can embrace the abstract universal cause—most especially those who think in the most calculating and self-interested ways about its potential uses.

There may be a third reason why so many people, in so many parts of the world, now seem drawn to the vision of global governance. For most of the twentieth century, socialism was a very powerful moral force. It promised equality, prosperity, and security—with no harmful side effects. In practice, the economic costs of socialism (not to speak of its moral costs) proved intolerable. Socialism now remains the established public faith only in a few remote despotisms, like Castro’s Cuba and Kim Jung Il’s North Korea—places where no one is allowed to point out the failures of socialism in public. International affairs, which are more abstract and remote for most people, most of the time, seem to be the last redoubt of socialist thinking. There can be peace and prosperity and security if only we trust the central planners, so the socialist vision suggests.

The appeal of this dream may owe something to the particular configuration of power in today’s world. Since the collapse of the Soviet Union, the power differential among different states appears wider now than ever before. The military preeminence of the United States makes it the natural subject of envy and resentment. The natural response is a kind of egalitarian enthusiasm, which looks to transcend conflict between the rich and the poor, the strong and the weak, by placing its hopes in a common authority, looking out for all.

But such visions do not answer the actual challenge. Expropriating capitalists does not produce wealth. Hobbling the world's largest military power does not produce peace. The question still remains, if the world is threatened by terrorists or rogue states or more determined aggressors, who provides the countering force? The UN is not equipped to provide it. European states by and large have not been willing to fund the military preparations necessary to deal with actual threats. The world would probably be better off if other democratic nations had as much deployable military strength as the United States. But there is no reason to think that Europeans would always find themselves in agreement with the policies of a rearmed Japan or a resurgent India. And there is no reason to think these new powers would be more amenable to UN direction or to moral hectoring from Europeans.

The basic facts are as they always have been. Nations do not evaluate the same threats in the same way. Calling something a "common threat" does not mean that all nations will agree on what to do about it. Nations did not have the same view about disarming Saddam Hussein in 2003. They had different views about helping him to circumvent sanctions or escape sanctions before 2002. Decades earlier, nations had different views about whether it was reasonable to place all nuclear weapons under international control, as the United States proposed. The Soviet Union insisted on developing its own nuclear weapons, followed soon after by Britain and then by France and then by China. Earnest appeals against proliferation of nuclear weapons did not stop India and then Pakistan from joining the nuclear club in the 1990s, and such appeals have done little to dissuade North Korea and Iran from seeking to develop their own capacity to build nuclear weapons. In almost every case, other nations may have deplored the spread of nuclear weapons but they were not prepared to do very much to stop particular countries from getting these weapons. Israel's attack on the Iraqi nuclear program was widely condemned in 1982, though subsequently acknowledged as a great boon to regional security—at least after 1990, when a UN-authorized coalition was able to counter the invasion of Kuwait by a still non-nuclear Iraq.

Nuclear weapons may raise the stakes but the underlying pattern was evident before the advent of nuclear weapons. When Germany launched an unprovoked attack on Poland in 1939, no one bothered to summon condemnations from the League of Nations. The question was who would come to Poland's defense. Britain and France demanded German withdrawal from Poland and declared war when Germany persisted in its course. The Belgians, Dutch, Danes, and Norwegians clung to neutrality—until overrun themselves by German armies less than a year later. They had not previously underestimated the threat posed by Hitler's Germany but they were too well aware of their inability to stand up to it. Even France, after a few months of war, decided it was better off repositioning itself as a neutral.

After the war, these chastened former neutrals joined the NATO alliance. But Sweden and Switzerland, which had managed to retain their neutrality during the Second World War, opted to remain neutral during the Cold War. They were not less aware of the threat posed by the Soviet Union, but they had more hope that they could again avoid direct involvement in any future conflict—and leave NATO nations to assume the burden of halting or deterring direct Soviet aggression in Europe. Similarly, during the 1970s and 80s, even NATO members in Europe turned a blind eye to Arab terrorists operating on their soil, in hopes of keeping terrorists focused on Israeli rather than European targets.

Nations evaluate risks differently. A nation that sees itself as the likely target of aggression will evaluate the threat differently from a nation that hopes to sit on the sidelines in the event of war. A nation that has more capacity to fight back will view the risks of war rather differently than a nation which has very little military capacity. There is no reason to assume that an international consensus provides just the right balance for determining the proper response to a particular threat. Threats do not affect all nations equally and the costs of war will not be borne equally by all potential participants.

We can imagine a world organized in such a way as to constrain all states from responding to threats, until international authorities agreed on what responses would be proper. But it would be a world unlike any ever known. Either international authority would have to be incredibly strong—or nations incredibly trusting and passive about their own security. Nations, after all, have to worry about attacks that might entail huge casualties, even to civilians. Some nations have to worry about threats to their continued existence. It is no easy thing to persuade such nations to trust their fate to the detached or distracted assessments of fifteen other nations or perhaps a hundred other nations in the background.

If we can imagine a world authority which was actually trusted by all or almost all nations to guarantee their external security, it is still very hard to imagine such an authority limiting its reach to the bare suppression of cross-border aggressions. Why, after all, guarantee nations against outside attack when citizens within particular nations may still be subject to terrible violence or repression from their own governments? Why not go after the causes of international tension, as many people diagnosis them—in unbalanced distribution of wealth and resources, in cultures that promote chauvinism or xenophobia, in economic systems that blight opportunity for restless young people? And how could a world authority, once entering into these other matters, confine its attention to the very worst offenders or the very most immediate dangers? Wouldn't it feel obliged, instead, to assert and enforce new standards for all nations, so as to retain some semblance of universal concern and escape any taint of partiality or favoritism?

None of this is remote fantasy, of course. The United Nations imagines that it is now promoting human rights for all people in the world, and particularly for women, children, indigenous peoples, national or racial minorities, and working people of all types and nationalities. The UN also aspires to save the global environment and to safeguard endangered ecosystems around the world—along with distinctive cultural and historical landmarks, which it conceives not as distinctive to particular cultures or peoples or nations but as part of the “world heritage.” And, of course, the UN also claims a role in promoting international trade and economic development—not simply to encourage higher levels of production and exchange, but to promote environmentally “sustainable development” as well as improved distribution of resources and technologies. The UN also seeks to assure that the world is mobilized against epidemic diseases and now, too, against the evils of tobacco use. Reviewing the far-ranging and far-flung activities of the UN, one might think that securing peace was a mere sideline.

Some people imagine that the experience of working together in so many other matters will condition the peoples of different nations to forget their differences and come to regard themselves as common citizens of a single global polity. The same reasoning has persuaded many people that Europe can forge a common polity if bureaucrats in Brussels are granted more authority to manage more and more policy—after which European citizens may consent to have officials in Brussels exercise such traditional attributes of sovereignty as direct powers of taxation and command of military or policing forces. Perhaps by then, Europeans will have grown even more accustomed to the idea that broad powers can be exercised by officials who are no longer subject to the full system of parliamentary accountability and constitutional limits, which they once thought necessary in national governments.

If this evolution can work in Europe, why not in the wider world? Certainly international institutions aspire to provide security, just as Europe’s “common foreign and security policy” purports to do.⁴⁴ The aim is as reasonable in the one case as in the other, so long as there are no real threats. Coordination can be extended to many fields beyond security, especially if people do not disagree about what should be done. But why would people disagree, if global governance provides for all their needs? Isn’t a common policy better than the fuss and bother of constitutional government and the awkwardness of two hundred separate governments, able to disagree?

⁴⁴ Treaty of Amsterdam, art 1, ¶ 3 (cited in note 42).

V. WHY THE UNITED STATES CANNOT EVADE THE QUESTION

One can say this vision, whether ultimately realistic or not, is still something that can't be fully implemented in the near future. How it ultimately might be achieved can be left to future generations. Why worry about ultimate hopes in the here and now?

One could have said the same thing about the Marxist vision of the communist future—that promised land in which all people would cooperate freely and happily, without necessity and without constraint. It was always a distant vision. But quite a lot of needless misery followed from the attempt to achieve it in the twentieth century.

The point isn't that every country must disregard others. The point isn't that even a nation so powerful as the United States can dispense with partners or allies. It is always better to have help. The question is always at what cost. And cost itself must be viewed against alternatives. Allies or partners for some ventures may not be willing to cooperate in others. Mexico and Canada are vital economic partners for the United States, a partnership now reinforced and extended through NAFTA. Still, these major trade partners were unwilling to join the American-led coalition in Iraq in 2003. That was regrettable but it was not startling or frightening. Mexico and Canada remain sovereign nations. Partners in one project may decline to be partners in a different venture.

Perhaps this sounds like the modern world of business, where partners change from one venture to the next. The analogy is instructive. No one in business acts entirely alone. Even the smallest business does not operate in isolation, but in a web of relations. A business has managers and employees, creditors and investors, customers and suppliers. Each set of participants may change over time. The point of incorporating a business is to specify the locus of decisionmaking authority and legal responsibility, precisely because the identities or loyalties of individual participants in a firm may shift a great deal over time.

In business, many relations can be stabilized by contracts, backed by the enforcement power of courts. In relations among states, where there are no reliable means of enforcing interstate agreements, self-help is the rule. That makes sovereignty—the set of rules which specify which power is authorized to act for which people—all the more crucial.

Early theorists of sovereignty were quite prepared to acknowledge a higher law binding on states. The treatises of Grotius and Vattel, for example, insisted that sovereign states must be entirely independent of outside control but still acknowledged that sovereign states were bound by the precepts of natural law in

their dealings with each other.⁴⁵ But they assumed this law could only be enforced by states—if necessary, against other states. They therefore assumed that particular applications would often be disputed. So, far from viewing this higher law as an assurance against war, they assumed that sovereignty might often have to be enforced by war or the threat of war. They assumed that natural law or some more extended version of international law, as a law among states, would not have quite the same degree of determinacy, precision, or reliability as the municipal law which states enforce on private citizens in their own territory.

The rights of individuals can be made more secure by establishing sovereign authority. But it doesn't follow that the rights of states can be made more secure in the same way. Citizens of a particular state can often be rallied to the defense of their own state, because it is their own state. The defense of humanity or the law of humanity is something else again. Citizens can be induced to accept constraints imposed in accord with their own constitution, since the alternative may mean revolution or civil war. It is vastly harder to persuade nations to accept constraints in the name of some higher law of humanity when the law of humanity cannot assure their safety.

None of this means that nations cannot enter into mutually beneficial agreements. They do so in many areas and will doubtless continue to do so. We may call treaty-based agreements law and they may have many of the characteristics of domestic law. But it makes an enormous difference whether international agreements are conceived as discrete determinations of the sovereign states, accountable in the end to the continuing agreement of particular participating states—or as threads in a more encompassing web of claims and obligations, ultimately transcending and subsuming the rights of sovereign states.

A sovereign state can make a treaty. It can also break a treaty, or determine for itself when a treaty commitment is no longer binding or applicable. Changing

⁴⁵ See Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres (The Law of War and Peace Three Books)* 17–29 (Carnegie 1925) (Francis W. Kelsey, trans) (stating that natural law is the law which “binds many nations together”); id at 42–44 (explaining how “the existence of the law of nature is proved”); id at 169–85 (distinguishing “just” or “justifiable” reasons for resorting to war). But see id at 102 (“That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will.”). See also Emmerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains (The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns)* 4 (Carnegie 1916) (Charles G. Fenwick, trans) (stating that “those precepts which the natural law dictates to States . . . [are] no less binding upon them than . . . upon individuals”). But see id at 7 (stating that “[s]ince Nations are free, independent, and equal . . . [when] differences arise each Nation in fact claims to have justice on its side, and neither of the interested parties nor other Nations may decide the question”); id at 243–53 (distinguishing “just” from “unjust” reasons for resorting to war).

a constitution is or ought to be a more serious matter, because it defines the terms on which citizens live with each other. Certainly for Americans the Constitution is valuable beyond anything that might replace it. Americans, who enjoy one of the world's most long-lasting and effective constitutions, ought to be especially fearful of anything that might undermine the Constitution. Exalted notions of global governance are inherently threatening to the integrity of constitutional government at home. And what they offer in its place is vastly less reliable.

Most countries do not enjoy such a solid and reliable constitutional heritage. They still have more to gain from developing their own constitutional traditions than trusting the fairy tale of global governance. And any sort of reliable constitutional scheme depends, in the first instance, on a reliable capacity to assert and defend national sovereignty.

Sovereignty is not the answer to every political question any more than individual rights are the answer to every personal challenge. Still, the American Constitution rests on the premise that sovereignty is the precondition to decent politics. Not everyone agrees with that premise in today's world. That is a challenge for American policy. We don't want a world in which jihadist terror networks can operate above states in the name of a revived Islamic caliphate. We don't want a world in which their pacifist counterparts, post-Christian, post-modern globalists, whether in Europe or elsewhere, claim the authority to prevent the United States from acting in its own defense. In moral terms, sovereignty is the first line of national defense. The United States cannot prevent others from dreaming about alternatives. But it also cannot let itself be intimidated by foreign political visions which are incompatible with constitutional government—or with the preservation of national sovereignty, on which constitutional government depends.