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Returning Sovereignty to the People

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ABSTRACT

Governments across the world regularly invoke sovereignty to demand that the international community "mind its own business" while they commit human rights abuses. They proclaim that the sovereign right to be free from international intervention in domestic affairs permits them unfettered discretion within their territory. This Article seeks to challenge those proclamations by resort to sovereignty in the people, a time-honored principle that is typically more rhetorical than substantive. Relying on classical interpretations of sovereignty, this Article infuses substance into the concept of sovereignty in the people to recognize that a government is entitled to sovereign rights only as the legitimate representative of the people and only as long as it fulfills its duties to them. The Article then examines the conditions that must be met for a government to claim sovereign rights, as well as how and by whom access to these rights should be determined. Taken to its logical conclusion, sovereignty in the people establishes that (1) sovereign rights can be lost when governments commit less than the most egregious human rights abuses, which differentiates this from the responsibility to protect; and (2) any form of government is at risk of losing these rights, including democracies.

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I. INTRODUCTION

Governments often invoke a claim of sovereignty to avoid international scrutiny of their human rights abuses. They angrily denounce conditions on international relations intended to influence them to stop their violations as breaches of sovereignty. Rather than change their behavior, they proclaim that their sovereignty serves as an impenetrable barrier permitting them unfettered discretion within their territory. Most credible institutions, politicians, academics, and policymakers do not believe that sovereignty leads to this unregulated discretion, yet these proclamations serve as strong rhetoric that the international community should "mind its own business," other than in the most egregious cases. This Article seeks

to challenge this rhetoric by resorting to a different type of sovereignty—sovereignty in the people.

Constitutions throughout the world declare that sovereignty lies with the people, yet the declaration often grants no real rights and does nothing to check the power of governments to control, rather than represent, the people. Infused with substance, however, "sovereignty in the people" could act as a powerful tool to promote accountability and minority rights. Taken to its logical conclusion, the concept establishes that (1) governments can lose sovereign authority even when they commit less than the most egregious human rights abuses, and (2) any form of government is at risk of losing this authority, including democracies—two notions that are likely to be highly contentious.[1]

Part II of this Article provides the background necessary for understanding the meaning of sovereignty. It examines sovereignty as a mechanism for organizing domestic and international politics to protect and enhance the security and common good of the people and considers the challenges to and development of the concept. Relying on classical interpretations of sovereignty and its historical development, Part III articulates a substance-infused concept of sovereignty in the people that identifies the people as the true sovereign and recognizes that the government is entitled to exercise the rights of sovereignty only as the representative of the people. In addition to describing the theory, Part III examines how the

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1. The focus of the bulk of the literature on humanitarian intervention is on the question of whether military intervention for gross violations of human rights violates traditional notions of sovereignty. Peter A. Jenkins, *The Economic Community of West African States and the Regional Use of Force*, 35 DENV. J. INT'L L. & POL'Y 333, 334 (2007); Tyra Ruth Saechao, Note, *Natural Disasters and the Responsibility To Protect: From Chaos to Clarity*, 32 BROOK. J. INT'L L. 663, 672 (2007). The fact that the literature rarely delves past the scenario of military intervention for mass atrocities when questioning whether to "violate" sovereignty suggests that sovereignty remains intact for violations that are less than "massive" or "egregious."

The international community and debates about humanitarian action typically equate the need to stop human rights violations with the need to ensure democracy within a society. *See* Kenneth Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts*, 17 HARV. HUM. RTS. J. 41, 42–43 (2004) (discussing the difficulty of balancing the neutrality of human rights workers with the non-neutral act of government building). This reflects what seems to be an assumption that democracies do not commit human rights violations worthy of international intervention. *See* Maxwell O. Chibundu, *Political Ideology as a Religion: The Idolatry of Democracy*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 117, 143 (2006) (describing the emergence of "[a] dogma . . . that democratic societies irrefutably are just societies in much the same way that religionists deem their cohorts to be good"); Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 504 (2006) (explicitly setting up his argument with the premise that the democratic states he is discussing look after the welfare of their people). This assumption is unfair to members of democratic societies living under a tyranny of the majority, a point discussed fully in Part IV.

international community's response to Libya's Arab Spring, particularly the lead up to UN Security Council Resolutions 1970 and 1973, lends nascent support to the content-infused concept of "sovereignty in the people" advocated here.

Throughout Parts II and III, this Article assumes that "the people" constitute a united and homogeneous political community within the territory of a state. Part IV challenges this assumption by examining who comprises the people and how their will and common good should be determined in heterogeneous societies. It relies on examples from Afghanistan, Sri Lanka, India, and France to show how the people and democracies can run afoul of the requirements for receiving sovereign rights.

Importantly, this Article's conception of sovereignty in the people does not change the overall structure of international intervention in the affairs of states. Rather, it justifies current practice in response to human rights atrocities that trigger the responsibility to protect, while providing a coherent conceptual framework for countering the "mind your own business" attitudes of governments committing less than the most egregious human rights violations.

II. UNDERSTANDING SOVEREIGNTY

One of the most difficult aspects of a discussion about sovereignty is defining the term. The difficulty lies in the fact that the concept has been evolving over hundreds of years and has been appropriated at different times for purposes not necessarily consistent with current usage.[2] The term has been used, for example, to claim unlimited control over a territory and people, to describe the independence of a country, to proclaim the self-determination of a people, to describe the legitimacy of a government, to express recognition of a state, and to claim government competencies.[3] As one scholar explains, "Because the idea of sovereignty has evolved

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2. *See, e.g.*, Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 1 (1999) ("The meaning of 'sovereignty' is confused and its uses are various."); Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 369 (2005) ("'Sovereignty' is a fluid concept. It is also an evolutionary concept, expanding and contracting over time, depending to a large extent on the meaning with which powerful states allow it to be infused."); Frédéric Gilles Sourgens, *Positivism, Humanism, and Hegemony: Sovereignty and Security for Our Time*, 25 PENN ST. INT'L L. REV. 433, 434 (2006) ("Conceptions of sovereignty were the functional answer to the political power struggles of their day.").

3. Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 143–45 (2004).

profoundly over history, it is surely quixotic to search for a definition that captures every usage since the thirteenth century."[4]

Instead of trying to define the term, this Article examines sovereignty as a mechanism for organizing domestic and international politics to protect and enhance the security and common good of the individuals who form a political community.[5] The concept of sovereignty developed to avoid the chaos and violence of individuals asserting their own interests, often violently and at the expense of others.[6] As is discussed more thoroughly in Part III.A below, these individuals united as a political community to create a sovereign representative capable of organizing the interests and needs of a population in order to avoid the violence. The international rules of sovereignty developed for much the same reason—to prevent a disorganized international system from permitting leaders or rulers to promote their interests by attacking territory under the control of another authority.[7] Examining sovereignty as a set of organizational rules comports with its conceptual development.

Four rules of international law are associated with a claim of sovereignty, which can be made only by states.[8] States rely on these rules as their defensive shield against interference in their domestic politics, including against criticism of their human rights abuses. The rules protect two different types of sovereignty—internal and external. Internal sovereignty permits the sovereign authority, conceived of as the government, to act freely within the territory of its

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4. Daniel Philpott, *Ideas and the Evolution of Sovereignty*, *in* STATE SOVEREIGNTY CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 15, 17 (Sohail H. Hashmi ed., 1997).

5. This framework builds on the description of sovereignty provided by Kathleen Claussen & Timothy Nichol who limit sovereignty to the role of organizing international politics. *See* Kathleen Claussen & Timothy Nichol, *Reconstructing Sovereignty: The Impact of Norms, Practices and Rhetoric*, 10 BOLOGNA CENTRE J. INT'L AFFS. 21, 23 (2007) ("Viewing sovereignty as an institutional arrangement for organizing international politics helps scholars to conceive of ways in which sovereignty is comprised of distinct and interrelated features.").

6. *See infra* Part III.A (discussing the idea of "sovereignty in the people").

7. *See infra* Part II.A (discussing the traditional notions of sovereignty and challenges to them).

8. There are a variety of efforts to recast sovereignty outside of the framework of the nation-state. *See, e.g.*, Oscar Schacter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 18 (1998) (discussing sovereignty in failed states); Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421, 514–15 (2006) (noting that global governance is adopting some of the state's previous roles); Chad Flanders, Recent Publication, 32 YALE J. INT'L L. 275 (2007) (reviewing JÜRGEN HABERMAS, THE DIVIDED WEST (2006)); Veronica Yepez, Recent Publication, 32 YALE J. INT'L L. 278 (reviewing JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW (2006)).

state.[9] Under the first rule of sovereignty, any actions or activities that do not cross state borders fall within the state's exclusive jurisdiction.[10] External sovereignty, which is protected by the second rule, prohibits the interference of one state in the matters of another sovereign state when that interference threatens the territory or the integrity of the second state.[11] It "assert[s] that there is no final and absolute authority above and beyond the sovereign state."[12] External sovereignty forbids cross-border attacks, considering it interference with the integrity of that state.[13]

External sovereignty also serves as the basis for the third and fourth rules of sovereignty. It demands a right to sovereign equality between states, since no country can claim supremacy over or use its power against another under international law.[14] It also establishes the rule that a state must consent to be bound by international legal obligations, since no other body or government has authority to bind it.[15] These rules of international law pertaining to sovereignty are viewed as the rights of sovereignty for purposes of this Article, as they speak to protecting one state from the actions of another through law.

Under international law, a political community is granted the rights of sovereignty only once it achieves international recognition as a state.[16] It can achieve this recognition only if it meets the four criteria for statehood. Statehood requires: (1) a territory with definable borders, (2) a cohesive political community within the territory,[17] (3) political leadership that has control over the

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9. David Held, *The Changing Structure of International Law: Sovereignty Transformed?*, *in* THE GLOBAL TRANSFORMATIONS READER 162, 162 (David Held ed., 2d ed. 2003).

10. *See* Sourgens, *supra* note 2, at 448 ("The current paradigm of sovereignty relies on the internal exclusive authority of the sovereign over its territory . . . .").

11. *See* KURT MILLS, HUMAN RIGHTS IN THE EMERGING GLOBAL ORDER: A NEW SOVEREIGNTY? 131 (1998) (discussing issues in determining the bounds of domestic jurisdiction).

12. Held, *supra* note 9.

13. *See* Philpott, *supra* note 4, at 20 ("If the state is private property, its external sovereignty is a no-trespassing law.").

14. *See* John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 782 (2003) (noting sovereignty's role in the idea of the equality of nations).

15. Held, *supra* note 9; Sourgens, *supra* note 2, at 448; *see also* Ivan Šimonović, *State Sovereignty and Globalization: Are Some States More Equal?*, 28 GA. J. INT'L & COMP. L. 381, 384 (2000) (noting that sovereign states are members of an "exclusive international club").

16. DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 30–33 (2002).

17. John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT'L L. 907, 920–22 (2006).

territory,[18] and (4) leadership capable of conducting international relations.[19] Once a territory achieves statehood, it can only be lost in the rarest of circumstances.[20]

As Part II.A describes, traditionally the government was considered the sovereign that benefited from sovereign rights. Challenges to traditional notions of sovereignty and to the identity of the sovereign, however, make achievement of statehood an insufficient criterion for determining when and to whom sovereign rights vest. The remainder of Part II explains these challenges, and provides the context for Part III's explanation of the meaning of sovereignty in the people and for determining when a government achieves sovereign authority and can claim sovereign rights.

A. *Challenges to Traditional Notions of Sovereignty*

The traditional concept of sovereignty holds that the state is sovereign. The rights of sovereignty belong to the state, acting through its government, and are absolute.[21] This concept derives from the Treaty of Westphalia, signed in 1648 to end a thirty-year war that devastated much of continental Europe.[22] European rulers sought to establish international peace by creating boundaries for state power vis-à-vis another state.[23] The traditional concept contains no requirement that the government be legitimate in the eyes of the

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18. *See id.* at 920 (describing a "form of governance that operates . . . with some measure of authenticity, effectiveness, and validation by the people" as requisite for statehood); Jackson, *supra* note 14, at 786 (reciting a definition of sovereignty that focuses on the existence of a monopoly over the legitimate use of force within a given territory). One important aspect of that control is that the government must hold a monopoly over the use of force, meaning that the population within the territory recognizes that the government is responsible for policing the territory and its borders. Jackson, *supra* note 14, at 786.

19. Matthew N. Bathon, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT'L L. 597, 618 (2001).

20. *See* Cohan, *supra* note 17, at 930–31 (discussing circumstances where a territory may or may not lose legal "statehood").

21. *See* Kelly, *supra* note 2, at 370 (discussing historical models of sovereignty).

22. *See, e.g.*, *id.* at 374 (noting the impact of the treaty of Westphalia on international law). *But see*, Stephen Carley, Note, *Limping Toward Elysium; Impediments Created by the Myth of Westphalia on Humanitarian Intervention in the International Legal System*, 41 CONN. L. REV. 1741, 1744 (2009) (suggesting that the real source of the traditional concept of sovereignty is unclear).

23. *See, e.g.*, Kelly, *supra* note 2, at 373–74 (describing the historical conditions leading up to the Treaty of Westphalia and discussing how the Treaty made states more independent and equal relative to each other). Prior to the Treaty of Westphalia, sovereignty was in the ruler, most likely to be a king arguing a divine right to rule. *Id.* at 374. The Treaty is considered "the point of marriage between sovereignty and state, simultaneously birthing the modern system of states in international law." *Id.*

people or conform to human rights standards.[24] Nor is the form of government relevant to determining sovereignty.[25] Whoever has the power to control the population, territory, and borders has the right to claim sovereignty and sovereign rights.

At least initially, the advent of the United Nations did little to change this traditional concept of sovereignty. The United Nations seeks to achieve an identical purpose to the Treaty of Westphalia—to avoid war by organizing the international community.[26] Article 2 of the UN Charter enshrines three of the rules of Westphalian sovereignty:

> The Organization and its Members . . . shall act in accordance with the following Principles.
>
> 1. The Organization is based on the principle of the sovereign equality of all its Members.
> 2. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
> 3. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . . .[27]

The United Nations also maintains a consent-based system of international law as it requires members to accede to the international treaties that form the backbone of international law.[28] However, the UN Charter does provide for one key limitation to sovereignty. The remaining text of Article 2(7) permits international intervention in the affairs of a sovereign state when there is "any threat to the peace, breach of the peace, or act of aggression" that threatens international peace and security.[29] If a state defies the rules of sovereignty, then it loses its sovereign rights.

Developments over the last half century, however, have led many to challenge traditional notions of sovereignty, some going so far as to proclaim them obsolete.[30] These developments typically fall within

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24. Helen Stacy, *Relational Sovereignty*, 99 AM. SOC'Y INT'L L. PROC. 396, 399 (2005) (describing how, originally, sovereignty "only vaguely implied that the new national government had any claim to legitimacy").

25. Held, *supra* note 9, at 163.

26. U.N. Charter art. 1, para. 1.

27. *Id.* art. 2, paras. 1, 4, 7.

28. *See id.* arts. 2, 4 (discussing UN membership and how members shall act in accordance to their roles as members).

29. *Id.* art. 2, para. 7.

30. Sohail H. Hashmi, *Introduction* to STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 1, 1 (Sohail H. Hashmi ed., 1997); *see also* Sourgens, *supra* note 2, at 433–34 ("The idea of sovereignty is coming under increasing attack from academic treatises and practical exigencies.").

three categories: (1) global interdependence, (2) continuing strife, and (3) human rights and humanitarian concerns. The global-interdependence category captures challenges to traditional notions of sovereignty related to the growth of international law and the increasing influence of globalization on international relations.[31] As Abram Chayes and Antonia Handler Chayes describe, "[M]odern states are bound in a tightly woven fabric of international agreements, organizations, and institutions that shape their relations with each other and penetrate deeply into their internal economics and politics."[32] States increasingly have been ceding aspects of their sovereignty to international organizations, such as the United Nations and the World Trade Organization, and to regional bodies, such as the African Union and the European Union.[33] According to the treaties establishing these bodies, member states commit themselves to abide by rules established by the outside authority.[34] These organizations essentially serve as a superior authority over states in agreed-upon matters.

While membership in these international and regional governmental bodies remains consent-based, the international community of states also recognizes the existence of customary and *jus cogens* norms of international law that restrain government behavior regardless of express consent.[35] The concept of customary international law developed before the creation of the United Nations, dating back at least as far as 1847.[36] Customary law is determined by "a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*."[37] It serves as a limit on state sovereignty, but arguably maintains the element of consent since it is based on state practice.[38]

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31. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995) ("[S]overeignty no longer consists in the freedom of states to act independently . . . but in membership in reasonably good standing in the regimes that make up the substance of international life.").

32. *Id.* at 26.

33. Cohan, *supra* note 17, at 909.

34. U.N. Charter art. 2; Treaty on European Union art. A, July 29, 1992, 1992 O.J. (C 191); Constitutive Act of the African Union, art. 4, July 11, 2000, *available at* http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm; Marrakesh Agreement Establishing the World Trade Organization art. 2, Apr. 15, 1994, 1867 U.N.T.S. 154.

35. Vienna Convention on the Law of Treaties art. 38, May 23, 1969, 1155 U.N.T.S 331; *see also* MILLS, *supra* note 11, at 40 (defining *jus cogens* as "principles from which there can be no derogation").

36. Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 129 (2007).

37. John R. Crook ed., *Contemporary Practice of the United States Relating to International Law*, 101 AM. J. INT'L L. 636, 639 (2007).

38. Persistent objectors to customary law, however, are not bound by its rules unless they qualify as *jus cogen* norms. *See* Alex G. Peterson, *Order Out of Chaos:*

The increasing interdependence of the international community of states through international governmental organizations and international law has led many to argue that sovereignty no longer exists in its traditional sense:

> [W]here the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense. The new sovereignty is status, membership, "connection to the rest of the world and the political ability to be an actor within it."[39]

The counterargument is simply that these international networks and laws follow the existing rules of sovereignty by retaining the requirement of consent, even if only implied. Until international organizations, institutions, and laws are treated as a superior authority to states regardless of consent, traditional notions of sovereignty remain largely intact.

Globalization also strongly challenges traditional notions of sovereignty in large part because states are finding it difficult to control the flow of information, resources, and even problems across their borders. Globalization has been "defined as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa."[40] The internet, international companies, and cheaper and more efficient travel and transport, among many other factors, link different parts of the globe with each other. Proponents believe globalization offers increased financial opportunities, cultural exchanges, and often cheaper production of goods.[41] Critics perceive globalization as threatening as the increased social connections have spread once-localized diseases; created international terrorist networks; and, for some, permitted Western "cultural domination" of

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Domestic Enforcement of the Law of Internal Armed Conflict, 171 MIL. L. REV. 1, 8 (2002) (stating that states cannot avoid the binding effects of *jus cogen* norms).

39. Cohan, *supra* note 17, at 939 (alteration in original) (quoting Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN J. INT'L L. 283, 286 (2004)) (first level of internal quotation marks omitted).

40. Jan Nederveen Pieterse, *Globalization as Hybridization*, *in* MEDIA AND CULTURAL STUDIES: KEYWORKS 658, 661 (Meenakshi Gigi Durham & Douglas M. Kellner eds., rev. ed. 2006) (quoting ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 64 (1990)); *see also* Richard N. Haass, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University: Sovereignty: Existing Rights, Evolving Responsibilities (Jan. 14, 2003), *available at* http://2001-2009.state.gov/s/p/rem/2003/16648.htm (defining globalization as "the sum total of connections and interactions—political, economic, social, and cultural—that compress distance and increase the permeability of traditional boundaries to the rapid flow of goods, capital, people, ideas, and information").

41. *See, e.g.*, Cohan, *supra* note 17, at 910 (noting the impact of globalization on state sovereignty); Haass, *supra* note 40 (discussing the threats that globalization poses to sovereignty).

local cultures.[42] A positive or a negative depending on the commentator, globalization has weakened traditional notions of sovereignty: "[G]lobalization, with the concomitant advance of information technology and international commerce, is pushing toward a borderless world, which makes it impossible for states to operate unfettered powers of sovereignty."[43]

Globalization also makes it easier to justify intervention by one state in the affairs of another as more and more seemingly domestic actions have a global impact. Information about the internal affairs of a state is broadcast globally and often immediately. International outrage can serve as a check on governmental behavior locally.[44] In rare instances of particularly egregious human rights violations, now publicized, the international community may even be required to act to protect a population under the doctrine of responsibility to protect, a point that will be picked up shortly.

In other instances, globalization unites diverse states behind common causes. States are willing to concede some sovereignty to address challenges and dangers that affect more than one country or that shrink the boundaries between them.[45] For example, poor environmental practices in a state that increase air and water pollution are likely to affect neighboring states, making domestic actions a matter of international concern. Activities once considered sovereign can now be reviewed by neighboring countries as their impact is no longer perceived as purely domestic. International terrorism and crime have the same effect.

Continuing strife, largely internal, offers the next set of challenges to traditional notions of sovereignty. The phenomena of weak states, wars, and terrorism strongly affect a state's claim of sovereignty. Weak states often lose control over some or all of its population or territory, two elements necessary for claiming statehood, although they retain their sovereign status.[46] As John Alan Cohan explains:

> A state may have sovereignty in the legal sense of having control over its borders and of being recognized in international relations, but may be unable to control its domestic affairs due to erosion of political support from within, due to civil war, insurrection, secessionist movements, or corruption. If things get bad enough, as where the sovereign wages an unjust or illegal war, international respect for that

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42. Šimonović, *supra* note 15, at 386.

43. Cohan, *supra* note 17, at 910.

44. *See* Jackson, *supra* note 14, at 789 ("[T]oday's globalized world abounds in instances in which the actions of one nation . . . constrain and influence the internal affairs of other nations.").

45. *See* Cohan, *supra* note 17, at 955 (addressing how globalization can diminish state sovereignty).

46. *See id.* at 909 (discussing common ways for states to lose control of their sovereign powers).

> state's sovereignty could deteriorate, and other states may find it necessary to intervene, either militarily or in less drastic ways, and thereby usurp the autonomy that characterizes traditional sovereignty.[47]

Globalization makes it impossible for continuing strife, even internal strife, to remain hidden from the rest of the world and for other states to turn a blind eye. Terrorism has a similar consequence because the damage to human life or attacks that cross borders provide incentives for other states to intervene.[48]

The final category of challenges to traditional notions of sovereignty—human rights and humanitarian concerns—is closely linked to challenges caused by continuing strife. Increasingly, the international community of states is recognizing the importance of human rights and is refusing to simply watch as they are violated.[49] As Louis Henkin explains: "By state consent, by the growth of systematic 'customary' (non-conventional) norms, international law developed a comprehensive law of individual human rights holding states responsible for how they treated persons subject to their jurisdiction."[50] The international community now expects states to live up to "universal" standards and norms, many of which are "codified" in human rights treaties, or face the possibility of intervention.[51]

Humanitarian intervention on behalf of populations suffering from war, including civil war, has been on the increase since the early 1990s.[52] The United Nations, blocks of states, and even individual states are intervening to protect populations vulnerable to particularly egregious violations of human rights during a conflict. Intervention often includes military action and efforts to change the

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47. *Id.*

48. *See* INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶ 2.10 (Dec. 2001) [hereinafter ICISS REPORT], *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf ("The established and universally acknowledged right to self-defense . . . was sometimes extended to include the right to launch punitive raids into neighboring countries . . . ."); Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2030 (2003) (noting that since the post-WWII trials, international law has drawn a connection between human rights and sovereignty).

49. Stacy, *supra* note 48.

50. Kelly, *supra* note 2, at 381–82 (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 12 (1995)).

51. *See, e.g.*, Hashmi, *supra* note 30, at 3 ("There is today a growing consensus that claims of state sovereignty should not be an impediment to international intervention in the face of humanitarian crises."); Kelly, *supra* note 2, at 381–82 (discussing human rights and international intervention).

52. *See, e.g.*, James Kurth, *Humanitarian Intervention After Iraq: Legal Ideals vs. Military Realities*, 1995 FOREIGN POL'Y RES. INST. 88 (referring to the 1990s as "a decade of humanitarian intervention"); Stacy, *supra* note 48 (noting humanitarian interventions in Rwanda, Somalia, East Timor, and Kosovo).

existing government.[53] The shift favoring intervention over sovereignty claims resulted in large part from atrocities and genocide committed in the 1990s;[54] atrocities that spurred then-Secretary-General of the United Nations, Kofi Annan, to ask, "If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violations of human rights . . . ?"[55]

Canada responded to Annan's question by establishing the International Commission on Intervention and State Sovereignty (ICISS) to reexamine sovereignty in light of human rights and humanitarian concerns.[56] The ICISS developed the doctrine of responsibility to protect, which was adopted unanimously by the member states of the United Nations at the 2005 World Summit.[57] Responsibility to protect places a duty on national governments to protect their citizens from genocide, war crimes, crimes against humanity, and ethnic cleansing.[58] Protection includes an obligation to prevent these atrocities, stop them if they occur, and then rebuild the affected society.[59] If national governments fail in their duties, the international community then has a responsibility to intervene on behalf of the population.[60] The doctrine is particularly important in that it does not simply permit intervention in those circumstances, but requires it. It authoritatively alters traditional notions of sovereignty, albeit through the consent of member states. Development of notions of sovereignty to accommodate the human rights and humanitarian challenges are particularly relevant to determining the meaning of sovereignty in the people and is discussed more fully below.

There is little question that the rights of sovereignty are narrowing. Each of the challenges described above is changing the contours of sovereign rights, making it more difficult for governments to hide bad behavior behind a shield of sovereignty. As a former Secretary-General of the United Nations explained, "The time of

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53. Cohan, *supra* note 17, at 954.

54. ICISS REPORT, *supra* note 48, ¶ 1.1.

55. U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶ 191, U.N. Doc. A/54/2000 (Mar. 27, 2000).

56. *Foreward* to ICISS REPORT, *supra* note 48, at vii–viii.

57. G.A. Res. 60/1, ¶¶ 138–139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); *see also* Irwin Cotler & Jared Genser, Op-Ed., *Libya and the Responsibility To Protect*, N.Y. TIMES, Feb. 28, 2011, http://www.nytimes.com/2011/03/01/opinion/01iht-edcotler01.html?_r=1& (recounting the unanimous vote in 2005).

58. *See* ICISS REPORT, *supra* note 48, ¶ 2.29 (discussing a government's "responsibility to protect"); Gareth Evans, *The Limits of State Sovereignty: The Responsibility To Protect in the 21st Century*, Presentation, International Centre for Ethnic Studies (2007).

59. *Id.*

60. *Id.*

absolute and exclusive sovereignty . . . has passed; its theory was never matched by reality."[61]

For some, these changes suggest that the doctrine of sovereignty is unnecessary, irrelevant, or obsolete.[62] These views ignore some of the practical benefits of sovereignty, which include that sovereignty rules and the rights they create retain order and stability within the international community.[63] Sovereignty also provides an outlet for self-determination, particularly for populations that suffer under foreign domination.[64] Most importantly, however, claims that sovereignty is unnecessary, irrelevant, or obsolete overlook the fact that pragmatically it remains the foundation of the international legal system.[65]

B. *Reconceiving Sovereignty*

Reflecting these numerous challenges to sovereignty and the narrowing of the concept, new definitions of and nuances to sovereignty have been proposed. The literature is rife with new ways to describe sovereignty, attaching words that modify or limit sovereignty to reflect apparent changes to the traditional doctrine.[66] Kathleen Claussen and Timothy Nichol provide a helpful framework for understanding the new definitions or reconceptions of sovereignty. They divide the modifying or limiting terms into three categories of "qualifiers": (1) collectivity qualifiers, (2) divisibility qualifiers, and (3) contingency qualifiers.[67]

Collectivity qualifiers, such as "pooled" or "collective," cover new conceptions of sovereignty based on the growing number of regional and international governmental organizations to which states cede aspects of their sovereignty.[68] These qualifiers recognize that the

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61. Jackson, *supra* note 14, at 787 (quoting U.N. Secretary-General, *An Agenda for Peace—Preventive Diplomacy, Peacemaking, and Peace-Keeping: Rep. of the Secretary-General*, ¶ 17, U.N. Doc. A/47/277-S/24111 (June 17, 1992)).

62. *See, e.g.*, Claussen & Nichol, *supra* note 5 at 21–22 (summarizing various theories advanced to explain the perceived death of the doctrine of sovereignty).

63. *See* ICISS REPORT, *supra* note 48, ¶ 2.7 (describing the ways in which sovereignty orders international relations); Haass, *supra* note 40 ("Sovereignty . . . has fostered world order by establishing legal protections against external intervention and by offering a diplomatic foundation for the negotiation of international treaties, the formation of international organizations, and the development of international law.").

64. *See* ICISS REPORT, *supra* note 48, ¶ 1.32 (explaining the impact of the idea that sovereignty grants all nations equal rights).

65. *See, e.g.*, Hashmi, *supra* note 30 (arguing that sovereignty has become the cornerstone of international relations).

66. *See* Claussen & Nichol, *supra* note 5 at 24–25 (analyzing various reinterpretations of the doctrine of sovereignty that have arisen in recent decades).

67. *See* Claussen & Nichol, *supra* note 5 at 26–28 (explaining the three categories of qualifiers).

68. *See id.* at 26 (explaining collective sovereignty).

state is not always supreme within the international community, although the system of supranational organizations remains based on consent. They respond to the challenges to sovereignty created by global interdependence.

Divisibility qualifiers separate out the different functions of sovereignty to permit allocation of parts of sovereignty to state or nonstate actors that together create full sovereignty.[69] These qualifiers include: "disaggregated sovereignty, late sovereignty, earned sovereignty, imperial sovereignty, pluralistic sovereignty, constrained sovereignty, phased sovereignty, limited sovereignty and partial sovereignty."[70] They serve a similar function to collectivity qualifiers. Both highlight that the state rarely retains full sovereignty in the traditional sense; rather, aspects of sovereignty devolve to others through consent[71] or, at times, by force.[72] These qualifiers reflect challenges to sovereignty from global interdependence, continuing strife, and human rights and humanitarian concerns.

The last category, contingency qualifiers, reflects the belief that states must meet certain conditions before they can claim sovereignty, in addition to the four requirements for statehood described above.[73] Examples of contingency qualifiers include contingent sovereignty, conditional sovereignty, and relational sovereignty. The types of conditions placed on sovereignty vary by theorist and range from requiring a democratic form of government to abiding by UN human rights obligations.[74] At a minimum, they require states to meet certain human rights and humanitarian law requirements or be stripped of sovereign rights.[75]

Missing from the Claussen and Nichols categories are qualifiers that reflect a change in understanding over the identity of the sovereign. Historically, sovereignty rested with a religious or clan

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69. *See id.* (explaining divisibility of sovereignty).

70. *Id.*

71. For example, a state may cede part of its sovereignty to an international or regional organization.

72. *See* Claussen & Nichol, *supra* note 5, at 27 (describing "earned sovereignty" and how sovereignty can devolve during times of conflict).

73. *See id.* at 27–28 (describing how the criteria states must meet to retain their sovereign status have multiplied recently).

74. *See, e.g.*, Stacy, *supra* note 24, at 396 (discussing a commission report recommending that sovereign rights be made contingent upon multiple factors, including respect for human rights); Symposium, *Commentary by Experts*, 4 NW. U. J. INT'L HUM. RTS. 39, 41–42 (2005) (discussing the development of the idea of contingent sovereignty in international dialogue).

75. *See* Claussen & Nichol, *supra* note 5 at 27–28 (explaining the role of humanitarian principles in the composition of the basic prerequisites to contingent sovereignty).

leader or a monarchical figure,[76] whereas now there is an expectation that the people constitute the true sovereigns.[77] In the past, the leader or ruler was the source of law and therefore above it,[78] whereas currently the people act as the source of law, which limits the government. Identity qualifier terms such as "popular sovereignty" and "democratic sovereignty" exemplify this change, reflecting the belief that the state represents the people rather than serves as the sovereign.[79] These qualifiers indicate the shift in focus in international law from solely protecting the interests of states to recognition of the importance of human rights regardless of state boundaries.[80]

While the thesis of this Article does not rely on attaching particular words to the term *sovereignty* to limit or modify its meaning, two of the categories described above play an important role in understanding the meaning of sovereignty in the people. As the next Part examines in depth, the principles underlying identity and contingency qualifiers are closely linked and together explain why governments cannot simply employ sovereignty to avoid intervention into their domestic behavior.

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76. *See* Kelly, *supra* note 2, at 364 (explaining that the concept of sovereignty has not always been tied to the state); Šimonović, *supra* note 15 (noting that at one time, monarchs possessed what would later be called state sovereignty).

77. *See* Šimonović, *supra* note 15 (noting some of the questions raised by the idea that the people of a nation are sovereign).

78. *See* Cohan, *supra* note 17, at 908–09 (reviewing the traditional conception of sovereignty).

79. Popular sovereignty does not require a particular form of government to serve as a representative of the people. *See, e.g.*, MILLS, *supra* note 11, at 42 (arguing that the people of a state are the ultimate source of that state's sovereign authority, regardless of the state's form of government). Democratic sovereignty presumes that "the state itself . . . [is] the democratic expression of the political community." Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1261 (2005) (reviewing ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004)).

80. This becomes apparent in international law through concepts such as universal jurisdiction and responsibility to protect. Universal jurisdiction allows any state to prosecute a political leader who has committed crimes against humanity, war crimes, or both against his or her constituency. Universal jurisdiction does not require a jurisdictional connection to the prosecuting country and has no regard for the sovereignty of the state or any sovereign rights that accrue to the political leadership. Responsibility to protect also effectively lands on the side of the people as the sovereign as it ignores any claim to sovereignty by a government committing mass atrocities. If the political leadership were the true sovereign, such intervention would be a violation of sovereignty and illegal under international law.

III. SOVEREIGNTY IN THE PEOPLE

Governments that use sovereignty to hide from criticism and to prevent international intervention[81] to stop human rights abuses wrongly assume that they are the sovereigns entitled to the rights of sovereignty and that these rights are absolute. Relying on the justifications for contingency and identity qualifiers, Part III challenges this assumption by giving content to the concept of sovereignty in the people. Part III.A identifies the people as the sovereign and the government as their representative. Under this formulation, the government's access to sovereign rights is not inherent, but instead is contingent on it fulfilling its duties as representative of the sovereign. Part III.B describes the duties that a government must fulfill before it can claim sovereign rights on behalf of the people. Part III.C then tackles what happens when governments fail to respect the identity of the sovereign and meet those conditions. Who determines whether a government is meeting its duties is addressed in Part III.D. Part III.E concludes with a description of how the lead-up to international support for the rebellion in Libya during the Arab Spring lends nascent support to the concept of sovereignty in the people proposed here.

A. *Identifying the Sovereign*

The phrase *sovereignty in the people* captures the true identity of the sovereign vested with the rights of sovereignty. While traditionally the international community treated the state (or the government acting on its behalf) as the sovereign, domestic and international law supports the shift of sovereignty to the people. From the most liberal democracies to the most autocratic states, most constitutions proclaim that the people are sovereign.[82] The concept

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81. As explained in Part III.C, intervention refers to any measure used to encourage or coerce a government to change its policies. Intervention covers nonmilitary measures such as censure, conditions on aid, trade and diplomatic relations, and political and economic sanctions. It also covers military intervention as well as those that violate territorial integrity, including dropping unwanted food and other supplies in devastated areas, providing funding and other support to opposition or armed groups, and also conducting military activities within the territory of another state.

82. *See, e.g.*, QĀNŪN-I ISĀSĪ-I AFGHĀNISTĀN art. 4 (noting that Afghanistan's sovereignty "belong[s] to the nation," which is defined as all Afghan citizens); CONSTITUTION DE LA RÉPUBLIQUE ALGÉRIENNE DÉMOCRATIQUE ET POPULAIRE art. 6 (1996) (vesting sovereignty solely with the people); BANGLADESH SHONGBIDHAN art. 7 (vesting all national power in the hands of the people); KANSTÍTUTSÍIĀ RE'SPUBLIKI BELARUS' art. 3 (designating the people as the "respository of sovereignty"); CONSTITUIÇÃO FEDERAL [C.F.] art. 1 (Braz.) (designating the people as the source of all

often appears in the titles of states, such as "The People's Republic of," or in provisions expressly stating that sovereignty lies in the people.

Sovereignty in the people also likely forms part of customary international law. The Universal Declaration of Human Rights (UDHR) states in Article 21(3) that: "The will of the people shall be the basis of the authority of government."[83] As a declaration, the UDHR is nonbinding; however, many academics and practitioners believe that its provisions constitute customary international law.[84] To the extent this assertion is true, all governments then must abide by sovereignty in the people regardless of whether their domestic law or constitutions expressly adopt the concept.

Sovereignty in the people also receives support as a principle of customary international law to the extent sovereignty is treated as synonymous with self-determination,[85] which is an accepted principle of customary international law.[86] At its most basic, self-determination means the right to govern oneself;[87] sovereignty in the people then

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national power); XIANFA pmbl., arts. 1–2, (1982) (China) (designating China a sovereign state with all power stemming from the people); 1958 CONST. art. 3 (Fr.) (designating the people as a whole the sole and exclusive sovereigns of France); UNDANG-UNDANG DASAR REPUBLIK INDONESIA 1945 art. 1 (declaring the people sovereign); LIBYA CONST. (1969) art. 1 (declaring that sovereignty rests with the people); CONSTITUTION DE LA RÉPUBLIQUE DU MALI pmbl., art. 25 (declaring Mali a sovereign state governed by and for its people); Constitución Política de los Estados Unidos Mexicanos [C.P], art. 39, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (declaring the people the source of national sovereignty); KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] art. 3 (Russ.) (declaring the people sovereign); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA art. 5 (declaring the people the ultimate sovereigns).

83. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 21(3), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

84. *See* MILLS, *supra* note 11, at 39 (explaining that the UDHR is typically viewed as an embodiment of customary international law despite the fact that it is officially nonbinding). *But see* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 348 (1995) ("Despite the arguments of some that a 'right to democracy' may be emerging as a norm of international customary law, it is apparent that many states have not accepted article 21's guarantee of the right to participate in the political life of one's country." (emphasis omitted) (footnote omitted)).

85. *See* JOHN HOFFMAN, SOVEREIGNTY 97 (1998) (discussing the role of sovereignty in international law and its link to self-determination); Srinivas Aravamudan, *Sovereignty: Between Embodiment and Detranscendentalization*, 41 TEX. INT'L L.J. 427, 430 (2006) (discussing the historical interplay between self-determination and sovereignty); Kelly, *supra* note 2, at 390 (discussing the relationship between sovereignty and self-determination).

86. *See* Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 62 (2008) (discussing the development of the principle of self-determination in international law).

87. *See* Joy M. Purcell, *A Right To Leave, but Nowhere To Go: Reconciling an Emigrant's Right To Leave with the Sovereign's Right To Exclude*, 39 U. MIAMI INTER-AM. L. REV. 177, 182 (2007) (discussing the origin and definition of the right to self-determination).

would grant the people the right to govern themselves. More broadly, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights define self-determination as the right of peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[88]

If the people are sovereign, then the benefits of sovereignty belong to them. The people then can choose how to exercise that sovereignty. In practice, they transfer their rights as sovereign to representatives that serve as the government.[89] The government then conducts the state's domestic and international affairs and receives the benefits of sovereignty as the people's representative.[90] Governments, however, do not inherently deserve the rights and protections of sovereignty; rather, they receive them only if the people choose to grant them. Governments then must act based on the will and common good of their constituencies. Any government that controls the state against the wishes of the people does not receive sovereign authority. It may have the power to enforce its will against the people, but the illegitimate government is not entitled to sovereign rights.

The theoretical underpinnings of this understanding of sovereignty in the people derive from centuries-old thinkers such as John Locke and Jean-Jacques Rousseau. Locke theorized about sovereignty in the people, or popular sovereignty, in his Second Treatise of Civil Government (1690).[91] He started by describing the

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88. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, art. 1, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966). These provisions typically spark the debate over who constitutes a "people." There seems to be at least a general assumption that the individuals that form a majority of a particular political community within a state are a "people" deserving of self-determination. The debate, thus, usually centers on which minority communities are entitled to a degree of political autonomy from the majority group.

89. This stands in direct contrast to the notion of the state as the sovereign or of the government as the representative of the state.

90. W. Michael Reisman describes this mechanism:

> Political legitimacy henceforth was to derive from popular support; governmental authority was based on the consent of the people in the territory in which a government purported to exercise power. At first only for those states in the vanguard of modern politics, later for more and more states, the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty.

W. Michael Reisman, Editorial Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990).

91. *See generally* JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT (Thomas Hollis ed., 1764) (describing the proper origins and boundaries of civil government).

formation of a political community to counter the violence that can occur when individuals pursue their interests without regard for others and without a superior body to protect them.[92] To protect against that chaos, individuals consent to a social contract in which they agree to follow the laws of a government that will act based on the common good of the community.[93] Individuals agree to turn over their natural rights as individuals to a government to better protect their interests. The majority of the political community determines the common good the government protects.[94]

Locke expected the government, now holding sovereign authority, to regulate relationships between individuals and protect their rights to life, liberty, and property.[95] He described these as natural rights that transcend claims of sovereignty.[96] The government is not permitted to deprive individuals of any of these rights;[97] if it does, the people have a right to revolt against the government or to secede from the territory under its control.[98] Through the social contract, the people give the government the authority to act for their common good; if the government uses its authority to violate natural rights, the authority is revoked.[99]

Rousseau developed the concept of sovereignty in the people along similar lines.[100] Like Locke, Rousseau believed that individuals reach a social contract for their self-preservation.[101] They place their natural rights in government hands to protect their interests and the common good; these rights are returned to the people if the government violates the social contract.[102] Rousseau believed that

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92. *See id.* § 6 (describing the transition from the state of nature to a more ordered civilization).

93. *See id.* § 96 (describing the operation of a voluntarily formed community).

94. *See id.* § 95 (describing the voluntary formation of a community and the decision-making rules of such a community).

95. *See* Stacy, *supra* note 48, at 2034 (discussing Locke's view of sovereignty). According to Locke, the government is bound by the trust of the people and "the law of God and nature." *See* LOCKE, *supra* note 91, § 142 (discussing the restraints on government).

96. *See* LOCKE, *supra* note 91, § 135 (describing unalterable limits on governmental power).

97. *See id.* § 139 (describing absolute limitations on government power).

98. *See* Stacy, *supra* note 48, at 2034 (describing the methods citizens may permissibly use to restrain an overreaching government).

99. *See* LOCKE, *supra* note 91, § 149 (describing circumstances in which people can revoke their government's power).

100. *See* Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 328 (1991) (noting Rousseau's thoughts on sovereignty).

101. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT bk. 1, ch. 6 (G.D.H. Cole trans., 1762), *available at* http://www.constitution.org/jjr/socon.htm (describing the nature and formation of the social contract).

102. *See id.* (describing the nature, formation, and dissolution of the social contract).

individuals must relinquish some of their natural liberty, which is determined by their individual strength to pursue their own interests, when forming a political community.[103] However, he considered the rights individuals receive in return, including the right to justice, to be greater than those surrendered.[104] The will of the people as a collective determines these greater rights, which are intended to be shared equally.[105] According to Rousseau, when the government uses its strength to override the will of the people, it becomes the master, not the sovereign.[106]

Under Rousseau's theory, the people vest their sovereign authority in a legislature that is chosen by the people.[107] As the people's representative, the legislature has the absolute authority of the traditional concept of sovereignty.[108] Rousseau did not foresee any potential conflict of interest between the people and the legislature:

> The sovereign legislature thus was identified by Rousseau with the general will of the people. As such, the legislature could never enact a law which it could not break, and since the subordinates of state authority are also constituent parts of the *volonté générale* [general will], those subjects and the general will can never have conflicting interests.[109]

Both theorists saw the social contract as a mechanism for organizing the domestic affairs of the political community—an agreement between individuals to establish a government that must abide by the will of the majority and act on the basis of the common

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103. *See id.* ch. 8 (discussing what an individual gains and sacrifices in the process of forming a community).

104. *See id.* (describing the nature of the net gain men realize by forming communities).

105. *See id.* (describing the nature and limitations of the gains realized by forming communities).

106. *See id.* bk. 2, ch. 1 (discussing the consequences of a government overstepping its authority).

107. *See* van der Vyver, *supra* note 100, at 329 (describing the formation and nature of the state's legislative authority).

108. *See* ROUSSEAU, *supra* note 101, bk. 1, ch. 7 (describing the nature and limits of the state's authority).

109. van der Vyver, *supra* note 100, at 330 (footnotes omitted). Rousseau had stated:

> These clauses, properly understood, may be reduced to one—the total alienation of each associate, together with all his rights, to the whole community; for, in the first place, as each gives himself absolutely, the conditions are the same for all; and, this being so, no one has any interest in making them burdensome to others.

ROUSSEAU, *supra* note 101.

good of that community.[110] Individuals relinquish their rights to the government for their protection and the government receives sovereign authority. Individuals, however, always retain the power to revoke the social contract when the government violates those rights. As with traditional rules of international relations in which states must consent to limit their sovereignty, domestic relations depend on the consent of the sovereign individuals to limit their sovereignty. The works of Locke and Rousseau greatly influenced the French and American revolutions and are credited with establishing the basis for democracy and human rights.[111] These two philosophers and the movements that followed them began to shift the title of sovereign to the people.[112]

Relying on Locke and Rousseau's concept of a social contract and supported by constitutional and international legal guarantees of sovereignty in the people, governments do not have the power to act independently of their people. They serve as the representatives of the people, not the state, which is merely a territorial unit in which a political community lives. As representatives of the people, the government is tasked with protecting the political community from domestic and international threats to its security and the common good.[113] As Part III.A describes, a government can claim sovereign rights only when it achieves its purpose. As Part III.B explores, dependent on the people for its authority, a government no longer can simply invoke the rights of sovereignty against international criticism and action when abusing human rights.

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110. As will be described in Part IV, majority rule can be highly problematic and is no longer considered acceptable as notions of human rights and self-determination have evolved since the times of Locke and Rousseau.

111. *See* Cindy G. Buys, *Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation*, 21 BYU J. PUB. L. 1, 18 (2007) (describing the influence of Locke's ideas on the American Revolution and noting the modern implications); Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 883–84 (2006) (describing the pervasiveness of the notion of popular sovereignty and linking it to the concept of human rights); Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees*, 24 CARDOZO ARTS & ENT. L.J. 1073, 1114–15, 1117 (2007) (discussing the influence of Locke's ideas on the modern conception of democracy); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1332–33 (2001) (discussing some of the details of Rousseau's democracy).

112. *See* Buys, *supra* note 111 (discussing the impact of Locke's thinking on the idea of sovereignty); d'Aspremont, *supra* note 111 (discussing the impact of Locke and Rousseau on governmental legitimacy).

113. *See* MILLS, *supra* note 11, at 27, 37 (arguing that states exist for the security and protection of their citizens). This line of thinking also derives from the work of Thomas Hobbes. *See* Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1687 (1995) (discussing the role of the state in the writings of Hobbes).

B. *Retaining Sovereign Rights*

When the people grant sovereign authority to a government, the authority the government receives depends on its efforts to achieve the security and common good of the people.[114] To retain its authority to represent the people and therefore claim sovereign rights, the government must meet two requirements: (1) it must hold domestic legitimacy;[115] and (2) it must fulfill duties necessary for abiding by the will of the people and acting in accordance with the common good.[116] The first condition, described more fully in Part III.B.1, ensures that the people have authorized the government as the sovereign representative. The power of the government to gain control over a population must not be confused with the consent of the people to relinquish their sovereign power to the government.

The second condition, described more fully in Part III.B.2, serves multiple purposes. According to the ICISS, recognizing government responsibility to the people has three important impacts:

> First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community . . . . And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.[117]

Conditioning entitlement to sovereign rights on the fulfillment of duties to the people ensures governmental accountability to the sovereign people.

If a government fails to achieve either or both of these conditions of sovereignty, then it loses some or all of its right to claim sovereign authority and the rights of sovereignty. When a government claims sovereignty to shield its behavior, the international community first must ask on whose behalf that claim is made. International intervention on behalf of the people ultimately bolsters sovereignty since the people constitute the true sovereigns.[118] Refusal to intervene, to the advantage of the government and disadvantage of

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114. *See, e.g.*, MILLS, *supra* note 11, at 38 (discussing the idea that people create government to foster their chosen way of life and thus have the ability to dismantle their government if it steps outside the bounds they have set for it, or if it otherwise fails to carry out its duties).

115. *See* d'Aspremont, *supra* note 111, at 878 (discussing the importance of domestic governmental legitimacy to international affairs).

116. *See* Sourgens, *supra* note 2, at 467 (discussing the implications of conditioning sovereignty on respect for human rights).

117. ICISS REPORT, *supra* note 48, ¶ 2.15.

118. *See* MATTHEW S. WEINERT, DEMOCRATIC SOVEREIGNTY AUTHORITY, LEGITIMACY, AND STATE IN A GLOBALIZING AGE 73 (2007) (discussing the relationship between international intervention and sovereignty).

the people, undermines sovereignty by allowing the power of the government to override the will and common good of the true sovereign.

1. Legitimacy

Two different types of legitimacy inform the determination of a government's entitlement to claim sovereign rights—internal and external. Internal legitimacy concerns whether a government receives domestic support, as the people's representative, for its actions.[119] External legitimacy describes whether the international community of states recognizes a government as legitimate, which in turn determines whether it will respect the government's sovereignty.[120] Sovereignty in the people, as argued here, demands that a government maintain internal legitimacy in order to claim sovereign authority. If the government fails to achieve internal legitimacy, the international community should deny external legitimacy and refuse sovereign rights to that government.[121]

The concept of internal legitimacy flows from sovereignty in the people. Since the American and French revolutions, when sovereignty in the people was institutionalized, the legitimacy of a government has depended on whether the people have supported it.[122] Determining legitimacy in practice proves far more complicated, as there is no accepted formula for measuring popular support. As Jean d'Aspremont describes:

> The highly controversial character of governments' legitimacy stems from the subjectivity of its evaluation. Indeed, there are no objective criteria to determine governments' legitimacy. That means that each state enjoys a comfortable leeway when asked to recognize the power of an entity that claims to be another state's representative in their bilateral intercourse. Each state evaluates foreign governments' legitimacy through the criteria that it chooses.[123]

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119. *See* d'Aspremont, *supra* note 111, at 882–83 (discussing and explaining internal and external legitimacy of governments).

120. *See id.* (explaining external legitimacy and its relationship with internal legitimacy).

121. Unfortunately, external legitimacy is rarely decided on the basis of a state's behavior towards its citizenry. Instead, in most cases, once a country attains statehood, it achieves external legitimacy and the full benefits of sovereignty automatically. *See id.* (describing how external legitimacy depends on whether a state meets the four elements necessary for statehood.); Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 275 (1992) (discussing the actual interplay between internal and external legitimacy in the real world).

122. *See* Reisman, *supra* note 90 (discussing the development of the idea of popular sovereignty and its institutionalization in international law).

123. d'Aspremont, *supra* note 111, at 878–79 (emphasis omitted) (footnote omitted).

The international community seems to rely most heavily on a test of periodic, free and fair elections to determine a government's legitimacy.[124] The UDHR and the ICCPR treat those elections as a universal right.[125] For many scholars, only democratic governments can achieve legitimacy and therefore benefit from sovereign rights.[126] Testing legitimacy by whether a government is elected raises the issue of what democracy consists of. Does democracy require nothing more than free and fair elections to change a government, which is procedural democracy?[127] For some, the answer is yes. As one commentator proclaimed: "[I]n circumstances in which free elections are internationally supervised and the results are internationally endorsed as free and fair and the people's choice is clear, the world community does not need to speculate on what constitutes popular sovereignty in that country."[128] Others argue that democracy requires more. It also requires democracy in the exercise of government

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124. *See* Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 42 (2004) (quoting UDHR, *supra* note 83) (discussing the role free elections play in governmental legitimacy and sovereignty); Rachel Ricker, *Two (or Five, or Ten) Heads Are Better than One: The Need for an Integrated Effort to International Election Monitoring*, 39 VAND. J. TRANSNAT'L L. 1373, 1400 (2006) (discussing the importance of impartial elections to governmental legitimacy); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1099 & n.349 (2007) (characterizing a "good govern[ment]" as democratic, with free and fair elections). According to the EU *Handbook for European Union Election Observation*, free and fair elections require regular elections in which there is: equal opportunity to run for office and to vote without discrimination; a secret ballot; freedom of expression, association, and assembly to allow all parties to air their platform; equal access for candidates and parties to state resources; and an independent and accountable election administration. *See* EUROPEAN COMMISSION, HANDBOOK FOR EUROPEAN UNION ELECTION OBSERVATION 14–15 (2d ed. 2008).

125. *See* d'Aspremont, *supra* note 111, at 893 (discussing the idea that democracy depends on elections, and citing the UDHR and ICCPR). *See generally* Martin Nettesheim, *Developing a Theory of Democracy for the European Union*, 23 BERKELEY J. INT'L L. 358, 368–69 (2005) (discussing various conceptions of democracy). Article 21(3) of the UDHR requires periodic, free elections to ensure that the people authorize the government. *See* UDHR, *supra* note 83 (mandating elections and detailing characteristics those elections must possess). ICCPR Article 25 guarantees a right of all people to participate in free, fair, and universal elections of their governments. *See* ICCPR, *supra* note 88, art. 25 (requiring use of impartial elections).

126. *See e.g.*, d'Aspremont, *supra* note 111, at 884–85 ("[T]he idea that democracy is the only acceptable type of regime has gained broad support, even monopolizing the political discourse (despite a lingering disagreement about its accurate meaning). This evolution has been underpinned by the common belief that democracy bolsters peace and prosperity, and even quells terrorism." (footnotes omitted)).

127. There is a substantive requirement for a free and fair election, but the point being made here is whether free and fair elections alone should determine a government's legitimacy. *See supra* note 124 (discussing the requirements that attach to legitimate elections).

128. Reisman, *supra* note 90, at 871; *see also* d'Aspremont, *supra* note 111, at 891 (discussing the focus on procedure in evaluations of democratic processes).

functions. This type of democracy, known as substantive democracy, demands a basic respect for human rights and equality, as well as tolerance in political decision making once the elections are complete.[129] Representative governments must make their decisions democratically, formulating the common good to include the interests of all members of the political community, rather than permitting the majority alone to make those decisions.[130] Substantive democracy ensures both that the government is chosen based on the will of the people, the procedural aspect, and that it acts in accordance with the will and common good of all the people, the substantive aspect.[131]

This Article adopts substantive democracy as the appropriate litmus test for determining legitimacy as it most broadly reflects the meaning of sovereignty in the people. Free and fair elections, alone, are not enough to ensure that the government will act according to the people's will or their vision of the common good. A far wider range of human rights must be protected to achieve these goals, which is accounted for in the concept of substantive democracy. Part III.B.2 describes the rights that must be protected and enforced to fulfill substantive democracy and therefore achieve domestic legitimacy. It also discusses additional duties that go beyond those required for representative governmental decision making, which are necessary for ensuring sovereignty in the people.

2. Sovereign Duties

Meeting the criteria for legitimacy is not enough for a government to claim sovereign rights. A government may claim them only once it has met its responsibilities to the people. These duties are not merely domestic but also create international responsibilities, since international recognition of sovereign rights of a government should depend on them.[132] As Cohan describes, "In the era of international human rights, it seems the international community

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129. *See, e.g.*, Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 39 (2002) (discussing the requirements of substantive democracy); d'Aspremont, *supra* note 111, at 881–82 (discussing the importance of the legitimacy of exercise of government functions).

130. *See* Gidon Sapir, *How Should a Court Deal with a Primary Question that the Legislature Seeks To Avoid? The Israeli Controversy over Who Is a Jew as an Illustration*, 39 VAND. J. TRANSNAT'L L. 1233, 1280 (2006) (discussing different definitions of democracy and their impact on the powers of the majority and the condition of the people as a whole).

131. *See, e.g.*, Barak, *supra* note 129 (arguing that a formal constitution is required to maintain a real democracy); d'Aspremont, *supra* note 111, at 881–82 (distinguishing between the legitimacy of origin and the legitimacy of exercise).

132. Sourgens, *supra* note 2, at 468; Haass, *supra* note 40.

has become a party to the social contract between citizens and their government."[133]

The duties required of governments to retain sovereign authority overlap with the substantive requirements for democracy and legitimacy,[134] but potentially also include wider responsibilities to the people.[135] Even if they are identical, it remains important to distinguish the requirements of legitimacy from sovereign duties. It ensures that the international community will look beyond free and fair elections to determine whether the government is protecting the people's will and common good beyond the electoral process. Without separate requirements, illiberal democracies in which governments are elected but do not adopt democratic decision making could inappropriately benefit from sovereign rights as the elected representatives of the people.

The next question is how to determine what duties should be required for governments to claim sovereign rights. At a minimum, governments have a duty to protect the human rights of their citizens: "[S]ince the social purpose of the state is to enable its citizens to live, then it makes sense to recognize that social purpose as a right for each person. The state may hold these rights in trust, but cannot violate these rights for *raison d'etat*."[136] Proponents of conditional sovereignty consistently require governments to adhere to basic or fundamental human rights, but they rarely define those rights.[137] This is likely because the determination of basic or fundamental rights is subjective and controversial. Many academics and practitioners argue that human rights are interdependent and indivisible, making it impossible to establish a hierarchy of rights.[138] Others fear that a hierarchy of rights will preference rights based on

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133. Cohan, *supra* note 17, at 943.

134. Legitimacy and sovereign duties both include democratic rights. For example, both require governments to guarantee equality and free and fair elections.

135. For example, states may use torture against suspected domestic terrorists with the support of the population terrified of terrorist crimes. The government utilizing torture could be wholly legitimate in the eyes of its population if it fulfills its democratic responsibilities and the targets of torture are not determined by discrimination. The act of torture is illegal in all circumstances under customary international law regardless of whether the general population supports it. The use of torture, thus, would violate the government's sovereign duties even as it retains its legitimacy.

136. K. Mills, *Sovereignty Eclipsed?: The Legitimacy of Humanitarian Access and Intervention*, J. HUMANITARIAN ASSISTANCE (July 4, 1997), http://sites.tufts.edu/jha/archives/111.

137. *See, e.g.*, ICISS REPORT, *supra* note 48, ¶ 1.35 (noting that the internal responsibility of sovereignty is "to respect the dignity and basic rights of all the people within the state").

138. Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights*, 12 EUR. J. INT'L L. 917, 918 (2001).

particular, rather than universal, political experiences or favor a dominant political culture.[139]

While ideally the duties of the sovereign include protecting and promoting all human rights, it is unrealistic and not necessarily appropriate to deny sovereign rights when not all human rights are met. No government is likely to achieve the ideal, and it seems unfair to refuse sovereign rights to governments substantially following the will and fulfilling the common good of the people. That conclusion leads back to the dilemma of essentially determining a hierarchy of rights. Establishing objective criteria for ascertaining fundamental rights and corresponding duties is extremely difficult. This Article offers some guidance as to which rights a government must enforce to benefit from sovereign rights; they derive from the meaning of sovereignty in the people and from the rights the international community has already recognized as fundamental. The rights listed here, however, are not fully inclusive of those that create sovereign duties; instead, they provide a preliminary basis for determining them.

At a minimum, legitimacy requires access to democratic rights. From a procedural perspective, in addition to the right to vote in periodic, free and fair elections, the people must be given rights that allow them to make informed decisions when choosing their representatives, including freedom of association, expression, and press. Substantive democracy further requires governments to ensure representative decision making, once elected, to accomplish true self-determination; thus the right to equality must be viewed as a core democratic right.[140] Where there are minority groups historically disadvantaged within the state, equality may demand minority protections or affirmative action measures to ensure that all of the population has an equal opportunity to participate in the determination of the government and its policies.[141] Legitimacy also turns on the government's accountability to the people, which establishes a right to accountability.

International law provides further guidance in the decision over which rights must be met by the government in order for it to fulfill its sovereign duties. Customary international law, nonderogable rights, *jus cogens*, responsibility to protect, and international criminal law offer a partial list of the fundamental rights. These sources of law

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139. This subpart addresses these concerns shortly.

140. Nettesheim, *supra* note 125, at 373.

141. The concept of sovereignty in the people theorized by Locke and Rousseau accepted majority rule, seemingly never anticipating the risk of tyranny of the majority. Many years of experience show that majority rule can easily turn into majority domination and lead to internal strife, necessitating the development of sovereignty in the people to include minority rights. This is consistent with protecting the political community from disorganization and internal strife.

reflect the consensus of the international community as to which rights must be guaranteed in practice regardless of consent and can already be enforced by the international community regardless of sovereignty claims. However, they cannot serve as the only sources, as the international law system currently protects the power of governments to determine what they are willing to abide by, which undermines the concept of sovereignty in the people.

Determining which human rights have achieved customary international law status is no less daunting of a task than determining which rights are fundamental or basic. Customary international law derives "from a general and consistent practice of states followed by them from a sense of legal obligation."[142] Determining consistent and general state practice is complex since all countries violate human rights (although the extent of violations varies) while promising to abide by them.[143] Hurst Hannum published a fairly comprehensive examination of the scope of acceptance of the UDHR as customary international law in the mid-1990s. According to his research, equality rights, including equal treatment under the law and nondiscrimination protected in Articles 1, 2, 6 and 7, have achieved customary law status.[144] Article 3's protection of the right to life constitutes customary law, as does the prohibition against extrajudicial murder and enforced disappearances.[145] The prohibitions on slavery and on cruel, degrading, and inhuman treatment and punishment in Articles 4 and 5 have achieved customary law status.[146] Rules regarding the treatment of the criminally accused, particularly the right to be free from torture, the right to be free from arbitrary arrest and detention, and the right to a fair trial (protected in Articles 9, 10 and 11, respectively) also qualify as customary law. This list is not necessarily comprehensive, but rather establishes a minimum of which rights in the UDHR have achieved customary law status as of when Hannum conducted his research. There may be other rights that over the last seventeen years have achieved the status of customary international law, not to mention rights listed in other international declarations, treaties, and conventions.

Nonderogable rights provide another source of human rights that governments may have a duty to protect in order to receive the

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142. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

143. *See* Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147, 151 (1995) (arguing that a state is bound by a community-supported human right even if it disagrees with that right and violates it).

144. Hannum, *supra* note 84, at 342.

145. *Id.* at 343.

146. *Id.* at 344.

benefit of sovereign rights. These rights cannot be abrogated for any reason, including during a state of emergency, war, or any threat to the state.[147] The fact that an existential threat to the state does not permit violations of these rights indicates their fundamental nature.[148] There are two sources of nonderogable rights: customary international law and treaty law. Within customary international law, *jus cogens* norms are considered binding and nonderogable.[149] These rights have special status as a higher type of law; their violation is considered impermissible in all cases. Prohibitions on slavery, torture, and genocide fall within this category.[150] Violations of *jus cogens* norms create obligations *erga omnes* that require the international community of states to take action to prevent or stop their violation.[151] This obligation comports with the concept of sovereignty in the people espoused in this Article.

Within treaty law, Article 4 of the ICCPR declares the following rights nonderogable: (1) the right to life; (2) the prohibition of genocide; (3) the prohibition of torture, cruel, inhuman, and degrading treatment and punishment; (4) the prohibition of slavery; (5) the prohibition on imprisonment for failing to meet a contractual obligation; (6) the prohibition of punishment for an act that was not a crime at the time of its commission; (7) the right of every person to be recognized as a person before the law; and (8) the right to freedom of thought, conscience, and religion.[152] Many of these rights already have been listed as customary international law, a few rising to the level of *jus cogens* norms.

The doctrine of responsibility to protect, which was adopted unanimously by the UN General Assembly, provides another source of duties a government owes its constituency in order to benefit from sovereign rights. The doctrine establishes that each state has a duty to prevent war crimes, crimes against humanity, genocide, and ethnic cleansing; if any state fails to fulfill this duty, it becomes the responsibility of the international community.[153] The crimes that arise from violation of this duty are defined primarily in the four

147. Koji, *supra* note 138, at 924.

148. *Id.*

149. MILLS, *supra* note 11, at 40.

150. *Id.*

151. David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of* Jus Cogens*: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 229–30 (2005).

152. *See* ICCPR, *supra* note 88, art. 4 (outlining the various rights that may not be suspended by states party, even in the midst of a state of emergency).

153. Responsibility to protect is markedly similar in application to the substance-infused concept of sovereignty in the people advocated here. *See Synopsis* to ICISS REPORT, *supra* note 48, at XI ("Where a population is suffering serious harm . . . the principle of non-intervention yields to the international responsibility to protect.").

Geneva Conventions and the Rome Statute of the International Criminal Court (ICC).[154] The Rome Statute serves as a source of duties independent of the responsibility to protect. The crimes listed within it are universal, which means they can be prosecuted by any state against the leadership of another state or by the ICC against signatories to the Rome Statute.[155]

Notably missing from this list of fundamental human rights so far are socioeconomic rights. Despite vigorous arguments in favor of establishing socioeconomic rights as customary law,[156] these rights often provoke controversy. They tend to be broad rights that when enforced could violate the separation of powers between the courts and legislature and cost significant amounts of money to implement.[157] Some scholars view them merely as benefits or aspirations rather than rights.[158] Despite this debate, some socioeconomic rights are so fundamental to survival and therefore to the exercise of self-determination or the people's will, that their protection and promotion must be considered a duty that governments must discharge to invoke sovereign rights.[159] Included among the duties are access to basic healthcare, food, water, shelter and education.[160]

To prevent poorer countries from losing their claim to sovereign rights for no other reason than they lack the resources to fulfill these duties—which would be grossly unfair to the people—violations of socioeconomic rights must be intended to oppress some or all of the people or must be done with little regard to the severe harm these violations will cause them. For example, a government that has insufficient food to feed its population during a famine does not violate its duty to the people; if the same government, however, refuses aid that could alleviate starvation, it would not be entitled to

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154. ICISS REPORT, *supra* note 48, at ¶¶ 3.30–.31.

155. In limited circumstances, the UN Security Council can refer a nonparty state to the court when acting under its UN Charter, Chapter VII obligations. *See* Rome Statute of the International Criminal Court, art. 13(b), U.N. Doc. A/CONF.183/9 (July 17, 1998) (amended 1999).

156. *See, e.g.*, Comm. on Econ., Soc. & Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, Rep. on its 26th Sess., Aug. 13–31, 2001, ¶ 12, U.N. Doc. E/C.12/1/Add.69 (Aug. 31, 2001) (rejecting Israel's "distinction between human rights and humanitarian law").

157. *See* BRIAN OREND, HUMAN RIGHTS: CONCEPT AND CONTEXT 30–31 (2002) (discussing some of the costs associated with human rights).

158. *Id.*

159. *See* Alanna Chang, *South Africa: The Up Down, an Application of a Downstream Model To Enforce Positive Socio-Economic Rights*, 21 EMORY INT'L L. REV. 621, 667 (2007) (noting that the drafters of South Africa's constitution recognized the importance of socioeconomic rights).

160. *See* OREND, *supra* note 157, at 31 (discussing the social costs of providing water, education, and basic healthcare as economic and social rights); Chang, *supra* note 159, at 638 (listing food and shelter as basic entitlements).

sovereign rights. A government that denies girls and women education would similarly violate its duty to the people, whereas a government with insufficient resources to guarantee access to education to its entire population would not. The question is whether the government deliberately undertook a policy to violate these rights to the severe detriment of the people.

National constitutions provide the final source of obligations a government owes its constituency before claiming sovereign rights. A constitution may provide the best insight into the will and common good of the people or the rights they consider most fundamental.[161] It could also reflect the will of an authoritarian government, making some state constitutions less appropriate sources. Regardless, if a government bases its claim of legitimacy on the power it receives from a constitution, then it inherently recognizes that it is subject to the limitations and responsibilities written into that constitution.[162]

The list of fundamental human rights catalogued here outline the bare minimum a government has a duty to protect in order to attain sovereign rights. The list is very conservative, as it predominantly reflects international agreement on fundamental rights. It in no way should be treated as fully inclusive of all rights and duties owed to the people; instead, it offers a starting point for developing sovereign duties.

3. The Question of Cultural Relativism

The primary challenge to this list of duties required for a government to claim sovereign rights is likely to be that it risks cultural imperialism by relying on international law. Critics of international human rights law often argue that it amounts to little more than a paternalistic attempt to foist Western values on cultures that prioritize or interpret rights differently.[163] They argue that the

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161. *See* Philpott, *supra* note 4, at 18 (noting that "domestic constitutions and international agreements define the scope of all rulers' and citizens' legitimate authority").

162. *See* MILLS, *supra* note 11, at 38 (noting that any claim to legal power will correspondingly have specific limits that must also be followed).

163. Hal Blanchard, *Constitutional Revisionism in the PRC: "Seeking Truth from Facts,"* 17 FLA. J. INT'L L. 365, 397 (2005) ("[T]he very idea of human rights has come to be regarded by many Chinese as a heavy-handed and moralistic slogan allowing no room for differences in history, traditions and culture."); Sharon K. Hom, Commentary, *Re-Positioning Human Rights Discourse on "Asian" Perspectives*, 3 BUFF. J. INT'L L. 209, 209 (1996) (noting "a suspicion that assertions of Western universal human rights are pretexts for intervention in the domestic affairs of other countries"); Thio Li-ann, *"Pragmatism and Realism Do Not Mean Abdication": A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law*, 8 SING. Y.B. INT'L L. & CONTRIBUTORS 41, 50–51 (2004) (describing Singapore's approach to human rights as guided by the cultural relativist tradition, which, in contrast to many Western nations, considers human rights in the context of a culture

choice of rights protected under international law and deemed universal depends on Western cultural preferences, values, and socioeconomic conditions. Instead, these critics believe that prioritization of human rights should depend on context, particularly the culture and history of the people claiming those rights. If each culture prioritizes and interprets rights differently, then there is no one set of human rights considered fundamental.[164]

This position adopts cultural relativism, which is often invoked by countries that preference communitarian values and group rights over individual rights to promote community harmony.[165] They believe that individuals owe a duty of care to the community and should not simply receive individual entitlements.[166] For these relativists, promoting individual rights over communitarian or group rights could undermine the social fabric of society.[167]

The concern with relying on cultural and communitarian values to form the duties of governments is that they may impose a view of the common good and pretend a collective will of the people rather than reflect a true consensus. Cultures and religions are not monolithic; nor are they free of the power struggles for influence that exist within any community of people.[168] Because not all individuals have equal power within a group, not all members have the opportunity to determine the group's values.[169] Using communitarian values to prevent individuals from exercising their individual rights results in the same paternalism cultural relativists claim pervades

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rather than as one set of dogmatic rights); Gracie Ming Zhao, *Challenging Traditions: Human Rights and Trafficking of Women in China*, 6 J.L. & SOC. CHALLENGES 167, 169 (2004) (discussing the differences in the perception of human rights in developing countries versus developed countries).

164. Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 532 (2001) (describing the difficulty in creating one set of human rights given the cultural differences that exist around the world).

165. *See, e.g.*, Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095, 1097–98 (2000) (noting the variety of positions held by cultural relativists); Seth R. Harris, *Asian Human Rights: Forming a Regional Covenant*, 1 ASIAN-PAC. L. & POL'Y J. 1, 14 (2000) (describing how Indonesia prioritizes economic rights over rights of the individual); Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 93–94 (1996) (discussing the differences "over the scope and priorities of the international human rights agenda"); Hallie Ludsin, *Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*, 21 BERKELEY J. INT'L L. 62, 70 (2003) (arguing that customary law governs South Africa's citizens).

166. Ludsin, *supra* note 165.

167. Ghai, *supra* note 165.

168. *See, e.g.*, Higgins, *supra* note 165, at 111–13 (discussing the inconsistencies found in cultural relativism).

169. *Id.* at 111–12.

the concept of universal human rights.[170] In contrast, the individual rights that form the basis of governmental duties are intended to create the best opportunity for individuals to exercise their autonomy, which in turns lets them express themselves as individuals and as part of a group.[171]

The concept of sovereignty in the people does not reject group or communitarian rights; instead, it demands that the government govern according to the will and common good of all the people or risk losing its sovereign rights. Group rights can promote self-determination by protecting the benefits members gain from their community[172] and, as briefly mentioned in Part III.B.2, may be necessary to ensure full democratic participation of minority groups.[173] The caveat, however, is that group rights are inappropriate when used against group members or against minority groups to restrict autonomy, equality, and other fundamental rights.

Another point countering a potential claim of cultural relativism in the list of duties for governments is that the rights chosen protect the values of "justice, equality, and fairness"[174]—values found in all cultures and religions.[175] As with sovereignty, governments often resort to cultural relativism to shield themselves from criticism of human rights abuses.[176] Claims of cultural relativism need to be

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170. *See, e.g.*, Sloane, *supra* note 164, at 590–92 (analyzing the legitimacy of coercion in enforcing international human rights).

171. *See* William M. Carter, Jr., *Book Review: The Mote in Thy Brother's Eye*, 20 BERKELEY J. INT'L L. 496, 499 (2002) (reviewing MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (2001) (arguing that protecting an individual's autonomy is critical "to the success of the human rights movement").

172. Group rights are rights that "derive[ ] from a person's membership in a group rather than her status as an individual; these rights can belong to the group or to the individual as part of his/her membership in the group." HALLIE LUDSIN, WOMEN AND THE DRAFT CONSTITUTION OF PALESTINE 110 (Women's Ctr. for Legal Aid & Counseling ed., 2011).

173. *See, e.g.*, Helen Quane, *Rights in Conflict? The Rationale and Implications of Using Human Rights in Conflict Prevention Strategies*, 47 VA. J. INT'L L. 463, 496 (2007) (describing how protection of individuals from discrimination or providing equality does not prevent involuntary assimilation of minority groups into the majority society); Sloane, *supra* note 164, at 540–54 (noting that cultural pluralism requires some forms of minority-group protection against the politically dominant culture).

174. *See, e.g.*, Ghai, *supra* note 165 (arguing that cultural relativists support universalism based on their own cultural and religious values).

175. *See, e.g., id.* (noting that Easterners claim that "justice, equality, and fairness" are foundations of their rights).

176. *See, e.g.*, Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L 1, 5 (2005) (recognizing that regimes often use cultural relativism arguments "to avoid responsibility for human rights violations"); Katie L. Zaunbrecher, Comment, *When Culture Hurts: Dispelling the Myth of Cultural Justification for Gender-Based Human Rights Violations*, 33 HOUS. J. INT'L L. 679, 687 (2011) (exploring "[t]he tension between the universality of international human rights law and the cultural defense").

parsed to determine whether they are a crude attempt to justify human rights violations or whether any of the rights identified as fundamental in this Article in fact undermine the values of any culture or religion.

Cultural relativism is also invoked by underdeveloped societies that challenge universal human rights on the basis they exclude socioeconomic rights.[177] These critics argue that developed countries, which have a less urgent need for socioeconomic rights, dominate the debate over which rights qualify as fundamental,[178] although survival and a decent quality of life are of greatest concern to most people.[179] As described above, sovereignty in the people, as conceived of here, requires governments to guarantee socioeconomic rights to qualify for sovereign rights, which dispenses with this aspect of cultural relativism.

C. *How Much Sovereignty Is Lost?*

A government that fails to achieve legitimacy and to meet its duties to the people loses some or all of its authority to act on their behalf. Sovereignty itself is not lost, since that belongs to the people. Nor does the territory lose its claim to statehood since, at least in most cases, it will continue to meet the four criteria for recognition as a state. Instead, the government loses its entitlement to claim the sovereign rights that derive from serving as the legitimate representative of the people within a state, particularly the right to be free from interference in domestic affairs.

The first question this conception of conditional sovereignty raises is to what extent sovereign rights are lost by a violation of duties?[180] The answer depends on the severity of the violations. The loss of sovereign rights should be proportionate to the degree to which governments violate these duties and the harm the violations cause. A dictatorial regime that already fails the legitimacy test and that commits gross violations of human rights loses all of its sovereign

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177. *See, e.g.*, Higgins, *supra* note 165 ("[N]on-Western states have argued that the very hierarchy of human rights established in those instruments privileges civil and political rights over economic, social and cultural rights in a way that is biased toward both Western political traditions and the wealth of Western states . . . ."); Zhao, *supra* note 163 (noting that African and Asian countries as well as the precolonial states followed cultural relativism).

178. Higgins, *supra* note 165.

179. *See, e.g.*, Zhao, *supra* note 163 (recognizing that people in developing countries are most concerned with socioeconomic rights).

180. While a government must be legitimate as well as meet its duties to its constituency to receive sovereign rights, it is hard to imagine a situation in which an illegitimate government is fulfilling its duties to the people. For this reason, the question of whether and how much sovereignty is lost likely depends on the duties requirement.

rights. A representative government that violates its duties to the people on a much smaller scale retains sovereign authority in most areas and therefore most of its sovereign rights, but not the right to demand noninterference in relation to those specific violations.

The proportionality requirement for determining the amount of sovereign rights lost as a result of violating sovereign duties is identical to the proportionality requirement for determining the appropriate level of intervention. As the harm to the people grows in severity, so does the amount of permissible intervention. The international community can "intervene" through criticism; conditions on aid, trade, and diplomatic relations; political and economic sanctions; international investigations; prosecution; political and financial support to opposition or insurgent groups; and, as a last resort, military action.[181] A factor in the proportionality test for determining appropriate intervention is whether the proposed intervention will cause more harm than good. For example, cutting off international aid or limiting trade for lesser abuses of human rights could cause disproportionate harm to the people and increase their disadvantages and suffering. The more severe the harm, the less likely intervention will have a disproportionately negative impact on the population compared to the human rights abuses. Testing whether the loss of sovereignty and corresponding intervention is proportional to the severity of the human rights abuses corresponds with current international practice that, for example, permits military intervention only when a threat to international peace exists or in the face of human rights atrocities.[182] The understanding of sovereignty in the people described in this Article explains, or for some justifies, that practice rather than supplants it.

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181. *See, e.g.*, Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, Doc. No. 10198/1/04 REV 1 (June 7, 2004), *available at* http://register.consilium.europa.eu/pdf/en/04/st10/st10198-re01.en04.pdf (describing a policy framework for sanctions); Robin Geiss, *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects*, 18 HARV. HUM. RTS. J. 167, 174 & n.41 (2005) (noting that the principle of proportionality binds UN Security Council action); Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 232 (2008) (discussing the report by the ICISS); *International Sanctions*, GOV'T OFFS. SWED., http://www.sweden.gov.se/sb/d/9279 (last updated Oct. 17, 2011) (detailing Sweden's policies on international sanctions); Anna Segall, *Economic Sanctions: Legal and Policy Constraints*, INT'L COMMITTEE RED CROSS (Dec. 31, 1999), http://www.icrc.org/eng/resources/documents/misc/57jq73.htm (discussing the UN Security Council's use of economic sanctions).

182. *See, e.g.*, U.N. Charter art. 42 (declaring the actions available to UN members if Article 41 measures prove inadequate); Yvonne C. Lodico, *The Justification for Humanitarian Intervention: Will the Continent Matter?*, 35 INT'L LAW. 1027, 1037 (2001) (discussing the "[j]ustification[s] for an international intervention"); *see also* Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 55 & n.321 (2001) (noting that few courts have addressed the proportionality requirements of sanctions).

More complex is the question of what threshold the violations must pass before a government loses some or all of its sovereign authority and corresponding rights. No government is perfect and every government will commit injustices, so the threshold must be reasonable or else no government will be entitled to claim sovereign rights, no matter how much it represents the will and common good of the people. At a minimum, the violation of duties toward the people must be systemic before any portion of sovereign rights is lost. It seems unfair to the people as a whole to have its government lose its sovereign entitlements over more isolated incidents.[183]

In addition, the state must lack effective domestic accountability to correct government failures and to hold political leaders and institutions responsible for any violations of duties to the people. Accountability requires meaningful action in a relatively short period of time and with relative ease and predictability.[184] If real accountability exists, systemic violations of duties will be corrected domestically and without the need for international intervention. This requirement recognizes that the government holds the primary responsibility for meeting its sovereign duties and that international intervention is appropriate only when the government shirks its responsibility to the people.[185]

The next element of the threshold test for loss of sovereign rights is the severity of harm. Loss of sovereign rights will be overly harsh in the face of minor harm; only significant harm will justify these consequences.[186] The proportionality test that determines the amount

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183. Overall context, however, must be considered before assuming any incidents are isolated. If context shows that seemingly isolated incidents create severe harm in the aggregate, then the threshold may be met after all.

184. Government decisions and behavior lack accountability, for example, if there is no independent body capable of ensuring that those decisions or behavior comply with the rule of law, or if the government employs stalling tactics to avoid judgment on those decisions or the behavior. *See, e.g.*, Joel M. Ngugi, *Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 540–41 (2005) (noting that transparency, access to justice, and judicial independence are three conditions "essential to the actualization of the rule of law").

185. *See, e.g.*, Gareth Evans, President, Int'l Crisis Grp., Presentation to the Panel Discussion on the Responsibility To Protect: Ensuring Effective Protection of Populations Under Threat of Genocide and Crimes Against Humanity, United Nations, N.Y.: Gareth Evans Offers Five Thoughts for Policy Makers on R2P (Apr. 13, 2007), *transcript available at* http://www.crisisgroup.org/en/publication-type/speeches/2007/evans-responsibility-to-protect-in-2007-five-thoughts-for-policy-makers.aspx (describing how the responsibility to protect first falls on the domestic government and how intervention is only appropriate if that government is "unable or unwilling to exercise that responsibility that any responsibility shifted to the wider international community").

186. It is irrelevant to the analysis of the threshold for a loss of sovereignty whether the government violates one duty or all of its duties as the issue is the severity of the harm caused by each violation or the violations in the aggregate.

of sovereignty lost and the appropriate level of intervention will take care of this aspect of the threshold test. If the breach of duties does not warrant international intervention under the proportionality test, then the severity of harm does not pass the threshold test for intervention. So far, however, violations of the duties listed above are likely to cause severe harm to some or all of the people, which means nearly any systemic violation of duties will pass the threshold test. To the extent the list of duties is developed to include protections of other human rights, the test for severity of harm may be more than rhetorical.

While severity of harm plays a role in determining whether intervention is appropriate, this understanding of sovereignty in the people should not be confused with the doctrine of responsibility to protect. Sovereign rights can be lost for abuses that do not reach the level of harm that triggers the international community's duty to protect the people of another state. The duties that must be fulfilled by a government to achieve the benefits of sovereignty are far more comprehensive than the duties placed on a government by the responsibility to protect. The difference is that the international community will not be obligated to intervene in the face of other violations of duties, but instead have the discretion to do so without violating sovereignty in the people.

Finally, even if all of these other tests are met, another question that must be asked is whether the people whose rights are being violated wish for intervention. Given the severity of harm that results from the violations of duties necessary for retaining sovereign rights, to some extent it can be assumed intervention will be welcome. When that assumption is demonstrably false, then the international community may need to refrain from intervention to avoid acting out of paternalism.[187]

In conclusion, a government loses its sovereign rights when it fails to achieve legitimacy and violates the duties necessary to serve as the people's representative. The threshold for determining whether a state loses some or all of its sovereign rights is whether (1) the violations of duties are systemic, (2) the state lacks domestic accountability for the violations, and (3) the violations cause significant harm. The determination of the last element could depend in part on whether intervention or loss of sovereignty will do more harm than good to the people and whether the people wish for intervention. The loss of sovereign rights may be restricted to only partial areas of government control or cover all claims to sovereign

187. It is possible to imagine the situation where "the people" whose rights are being violated fear that international intervention will result in a severe backlash. Whether to defer to "the will" of the people will depend on the severity of the risk they face.

rights. The amount of sovereignty lost and the amount of permissible intervention should be proportionate to the harm caused by the violation of the conditions for retaining sovereign authority.

D. *Who Decides?*

The question of who decides whether and how much sovereignty is lost is likely to be a source of contention for those considering the concept of sovereignty in the people as espoused here. The question reflects two fears. The first is that this conception of sovereignty in the people will allow states to freely intervene in each other's domestic politics, wholly undermining the overall purpose of sovereignty. The purpose of this concept is to provide governments with the rationale for overriding sovereignty claims when they have the political will to challenge human rights violations; it is not intended to change international relations practices. The vast majority of options for intervention are nonmilitary, which means they do not breach territorial integrity or constitute "acts of aggression" in the context of the UN Charter and the Rome Statute of the ICC.[188] They range from public censure; to limiting or cutting aid, trade, or diplomatic ties; to political or economic sanctions; to investigations and prosecutions of abuses.[189] These nonmilitary measures, when applied bilaterally or against the actions of people or entities under the jurisdiction of the intervening state, also constitute acts of sovereignty by that state because it chooses how to conduct its international relations.[190] Whether to censure a country, to permit a diplomatic mission to work within its jurisdiction, to conduct trade or give aid, or to impose sanctions on citizens or legal persons within its territory for transacting with a disfavored state all fall well within the sovereign powers of a state.[191]

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188. As of yet, there is no universally accepted or applied definition of "acts of aggression." With that said, the focus of the discussion of the definition for a crime of aggression for the ICC was on prohibiting "being in a position effectively to exercise control over or to direct the political or military action of a State." Rep. of the Preparatory Comm'n for the Int'l Criminal Court, 10th Sess., July 1–12, 2002, U.N. Doc. PCNICC/2002/2/Add.2 3 (July 24, 2002).

189. *See, e.g.*, Sloane, *supra* note 164, at 590–92 (analyzing the legitimacy of coercion in enforcing international human rights).

190. *See, e.g.*, Hossein Askari et al., *Measuring Vulnerability to U.S. Foreign Economic Sanctions*, 40 BUS. ECON. 41, 42 (2005) (describing economic sanctions as a matter of "foreign policy"); Cleveland, *supra* note 182, at 53 (describing how "because economic assistance is voluntary and given at the donor country's discretion, the use of foreign assistance to alter a foreign state's behavior may not be subject" to the norm of nonintervention).

191. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 104–05 (June 27) (concluding that economic sanctions do not violate the principle of nonintervention in the domestic affairs of another state).

The fact that decisions on nonmilitary intervention are likely matters of government policy suggests that it is unnecessary to look at them as a breach of sovereignty of the targeted countries. Abusive governments would deny this suggestion, which makes a theory to counter the attempt to shield human rights violations behind sovereignty important. Further, developing countries have raised serious concerns with economic sanctions because they can cause severe harm, and as a result, act as a particularly potent form of coercive power.[192] The UN General Assembly adopted a resolution to urge states party to mandate that only UN agencies have the power to impose economic sanctions.[193] The theory of sovereignty in the people addresses concerns about the harm caused by intervention, including through economic sanctions, by requiring states to test whether the effects of their intervention are likely to be proportionate to the harm from the rights violations and whether the intervention is likely to do more harm than good. It takes a different approach to alleviating the fears of developing countries.

The more difficult question of who decides whether sovereign rights are lost arises when there is the possibility of aggressive action by an intervening state. These aggressive actions range from dropping aid within the territory of another state without its consent, to funding armed groups and agitators, to engaging in military activities in another state's territory. The question of who should decide whether aggressive or military intervention is appropriate under the concept of sovereignty in the people is part of an existing, highly contentious debate on whether these actions can be unilateral, multilateral, or must be undertaken only with the consent of the UN Security Council.[194] The debate implicates this conception of sovereignty in the people; however, it is beyond the scope of this

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192. U.N. Secretary-General, *Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries: Rep. of the Secretary-General*, U.N. Doc. A/66/138 (July 14, 2011).

193. *Id.* at 3.

194. *See, e.g.*, Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107, 108 (2006) (contending that unilateral humanitarian intervention should be legalized); Nico Krisch, *Review Essay: Legality, Morality and the Dilemma of Humanitarian Intervention After Kosovo*, 13 EUR. J. INT'L L. 323, 323 (2002) (reviewing five humanitarian intervention works); Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1276 (2010) (arguing that policy makers should consider responding to human rights abuses without the use of military force); Daphné Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE HUM. RTS. & DEV. L.J. 45, 45 (2003) (arguing that the current regime "governing unilateral humanitarian intervention provides an adequate legal framework for such intervention"); Fernando R. Tesón, *The Vexing Problem of Authority in Humanitarian Intervention: A Proposal*, 24 WIS. INT'L L.J. 761, 763 (2006) (proposing that a Court of Human Security oversee all responses to humanitarian crises rather than the Security Council).

Article to determine who should be permitted to order an aggressive intervention into another state. Rather, the concept simply explains why, in certain circumstances, sovereign rights do not bar this intervention.

The second fear that this Article's conception of sovereignty in the people raises with respect to who will decide whether and to what extent sovereign rights are lost is whether this concept will permit stronger countries to interfere with weaker countries for their own benefit.[195] Justifiable intervention can easily be invoked by more powerful states in their self-interest, while weaker nations are more likely to be on the receiving end of condemnation and intervention, unable to influence the human rights practices of stronger states.[196] This concern also raises the specter of selective enforcement of human rights or selective intervention. Rather than applying human rights standards uniformly, factors such as race, ethnicity, religion, and location of the abusive government also could play a role in the decision whether to intervene to stop human rights abuses.

While the fear of selective enforcement of sovereignty in the people is legitimate, it should not be permitted to serve as a pretext for avoiding criticisms of human rights violations or for negating the concept of sovereignty in the people. The problem of selective enforcement is not an inherent problem in the concept, but rather a reflection of current politics. In fact, state-centric conceptions of sovereignty that allow governments to hide their abuses from international scrutiny deserve at least partial blame for inconsistent responses to human rights violations.[197] Selective enforcement undermines the purpose of sovereignty in the people; however, as one commentator discussed with respect to the responsibility to protect,

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195. *See* Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1778 (2000) (describing how in the past, "the doctrine of humanitarian intervention was at times misused by strong states as a pretext for vigilante activity and for the occupation of weaker and politically disobedient countries"); Priyankar Upadhyaya, *Human Security, Humanitarian Intervention, and Third World Concerns*, 33 DENV. J. INT'L L. & POL'Y 71, 85 (2004) (discussing how some third-world analysts consider humanitarian intervention to be discriminatory because it invariably only applies to "powerless third world countries").

196. *See, e.g.*, Cohan, *supra* note 17, at 924–25 ("[S]ome states are weaker than others in their ability to participate in, influence, or dominate international legal processes."); Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 INT'L LEGAL THEORY 1, 10–11 (2001) ("'Humanitarian intervention' is a high-sounding and convenient tool for maintaining, and yet concealing, [a strong state's] dominance and their supremacy.").

197. Treating the state as sovereign permits governments, even those that do not represent their populations, to design the international enforcement mechanisms. Consistent with government interest and with the belief that states must choose to be bound by international law, these bodies rarely are given the power to act meaningfully in response to human rights abuses and depend almost wholly on government permission to submit to enforcement processes. State-centric sovereignty, thus, correlates directly with weak human rights enforcement.

"the quest for the universal and uniform application of a new principle should not lead to its abandonment, especially when it can save hapless individuals from a grim plight."[198]

E. *Libya: Nascent Support for a Substantive Sovereignty in the People*

There is little doubt that an autocratic government inherently violates the concept of sovereignty in the people. A dictatorship that does not permit free and fair elections and violates most human rights cannot qualify for sovereign rights. This is a basic premise of this Article. What bears discussing here is how the international community effectively applied the concept of sovereignty in the people to the Libyan protest movement that erupted as part of the Arab Spring when adopting UN Security Council Resolutions 1970 and 1973. As Part III.E.1 explains, the process leading up to international intervention in Libya to prevent Muammar Qadaffi's forces from slaughtering civilians recognized that Qaddafi's legitimacy depended on the support of the people; the Security Council was willing to consider action in response to the call of the people. Part III.E.2 then asserts that international intervention was expressly justified on the basis that Qaddafi had violated his duties to the people as required by the responsibility to protect. Taking this reasoning together, international intervention in Libya lends nascent support for the basic tenets of a substance-infused concept of sovereignty in the people and shows its potential force.

1. Background

Libya's Arab Spring began on February 15, 2011, with protests in the city of Benghazi that spread quickly through eastern Libya and Tripoli.[199] Qaddafi reacted to the protests by killing and arresting demonstrators.[200] Thousands continued to protest despite the

198. Sumit Ganguly, *The Morality of Responsibility*, ASIAN AGE (Feb. 22, 2012), http://www.asianage.com/columnists/morality-responsibility-577.

199. INT'L CRISIS GRP., POPULAR PROTEST IN NORTH AFRICA AND THE MIDDLE EAST (V): MAKING SENSE OF LIBYA, MIDDLE EAST/NORTH AFRICA REPORT N.°107, at 1 (2011). The protests apparently began after a lawyer working for the families of victims of the Abu Salim prison killings in 1996 was arrested. *Libya: Arrests, Assaults in Advance of Planned Protests*, HUM. RTS. WATCH (Feb. 17, 2011), http://www.hrw.org/news/2011/02/16/libya-arrests-assaults-advance-planned-protests [hereinafter *Libya: Arrests*].

200. *Libya: Arrests*, *supra* note 199; *Libya: Security Forces Fire on 'Day of Anger' Demonstrations*, HUM. RTS. WATCH (Feb. 18, 2011), http://www.hrw.org/news/2011/02/17/libya-security-forces-fire-day-anger-demonstrations; *Libya: Security Forces Kill 84 over Three Days*, HUM. RTS. WATCH (Feb. 19, 2011), http://www.hrw.org/news/2011/02/18/libya-security-forces-kill-84-over-three-days; *Middle East and North Africa in Turmoil*, WASH. POST, http://www.washingtonpost.com/wp-srv/special/

government's harsh response that within the first four days left approximately 233 dead and many injured.[201] By February 18, the demonstrations turned into a full-fledged rebellion, with protestors pushing security forces out of parts of Benghazi and the city of Bayda.[202] Qaddafi responded in a speech on February 22 by calling for "house by house" searches for the "cockroaches" opposing the regime,[203] which was interpreted as "giv[ing] the green light" to loyalists to kill protestors and opponents.[204]

In response to the government's violent crackdown, on February 21, 2011, Libya's Deputy Ambassador to the United Nations, Ibrahim Dabbashi, declared that he was breaking from the Qaddafi government but would continue to represent the Libyan people in his official capacity. Dabbashi expressly stated that he was not resigning:[205] "The Libyan mission will be in the service of the Libyan people rather than in service of the Libyan regime or of one person."[206] Similarly, Ali Adjali, Libya's Ambassador to the United States, stated: "I'm (not) resigning Moammar Gadhafi's government, but I am with the people. I am representing the people in the street, the people who've been killed, the people who've been destroyed. Their life is in danger."[207] Qaddafi pulled their diplomatic credentials,

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world/middle-east-protests/ (last updated Oct. 23, 2011) (click "Libya" to view statistics for that country).

201. *Libya: Governments Should Demand End to Unlawful Killings*, HUM. RTS. WATCH (Feb. 20, 2011), http://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings.

202. *Map of the Rebellion in Libya, Day by Day*, N.Y. TIMES (Apr. 29, 2011), http://www.nytimes.com/interactive/2011/02/25/world/middleeast/map-of-how-the-protests-unfolded-in-libya.html.

203. Thomas G. Weiss, *RtoP Alive and Well After Libya*, *in* ETHICS & INTERNATIONAL AFFAIRS 1, 1 (2011). His reference to protestors and rebels as "cockroaches" struck a chord internationally as "eerily echoing the term used in 1994 by Rwanda's murderous regime." *Id.*

204. Kareem Fahim & David D. Kirkpatrick, *Qaddafi's Grip on the Capital Tightens as Revolt Grows*, N.Y. TIMES (Feb. 22, 2011), http://www.nytimes.com/2011/02/23/world/africa/23libya.html?pagewanted=all&_r=0.

205. Edith M. Lederer, *Moammar Gadhafi Should Step Down: Libyan UN Diplomats*, ASSOCIATED PRESS/HUFFINGTON POST (Feb. 21, 2011), http://www.huffingtonpost.com/2011/02/21/moammar-gadhafi-should-st_n_826267.html. Libya's Ambassador in Washington, Ali Adjali, reportedly made a similar statement that he was not resigning, but rather remaining to represent the people, not Qaddafi. *Id.*

206. Jihad Taki, *Libyan Ambassador to UN Urges International Community to Stop Genocide*, GLOBAL ARAB NETWORK (Feb. 21, 2011), http://www.english.globalarabnetwork.com/201102219941/Libya-Politics/libyan-ambassador-to-un-urges-international-community-to-stop-genocide.html; *see also* Colin Moynihan, *Libya's UN Diplomats Break with Qaddafi*, N.Y. TIMES (Feb. 21, 2011), http://www.nytimes.com/2011/02/22/world/africa/22nations.html?_r=0 (quoting Dabbashi: "We state clearly that the Libyan Mission is a mission for the Libyan people . . . it is not for the regime").

207. Lederer, *supra* note 205.

but the United Nations granted the Libyan UN mission "courtesy passes allowing unlimited access to U.N. headquarters."[208]

Acting as a UN diplomatic representative, on February 21 Dabbashi sent a letter to the UN Security Council requesting an urgent meeting to address the safety of Libyan civilians,[209] and in particular seeking the installation of a no-fly zone to prevent Qaddafi from attacking civilians and protection for Libya's oil installations.[210] Based on this request, the Security Council met the next day and denounced Qaddafi's violent crackdown, calling on him to fulfill his "responsibility to protect" Libya's citizens.[211]

The Security Council met again on February 25 to discuss a draft resolution in response to unfolding government suppression in Libya. The Security Council adopted Resolution 1970 on February 26, which referred the events in Libya for an investigation by the ICC, established an arms embargo, and instituted an asset freeze and travel ban on certain members of the Qaddafi government.[212] During discussions, the Libyan Ambassador to the United Nations, Abdurrahman Mohamed Shalgham, initially a committed Qaddafi supporter even as Dabbashi and other Libyan diplomats broke with the official government, denounced Libya's dictator and made an impassioned plea for intervention to prevent further bloodshed.[213] He also submitted a letter to the Security Council in support of a resolution allowing for international intervention on behalf of the Libyan people.[214]

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208. Anita Snow, *UN Diplomat Works Against Gadhafi*, FOX NEWS (April 27, 2011), http://www.foxnews.com/world/2011/04/27/ap-interview-diplomat-works-gadhafi/.

209. Letter Dated 21 February 2011 from the Chargé d'Affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2011/102 (Feb. 22, 2011); *U.N. Security Council Discusses Libya Crisis*, REUTERS AFRICA (Feb. 22, 2011), http://af.reuters.com/article/libyaNews/idAFN2227673120110222.

210. *Insights on Libya*, WHAT'S IN BLUE (Feb. 21, 2011, 11:40 AM), http://whatsinblue.org/2011/02/insights-on-libya-1.php.

211. Press Release, Security Council, Security Council Press Statement on Libya, U.N. Press Release SC/10180 (Feb. 22, 2011).

212. U.N. Security Council, 66th Sess., 6491st mtg. at 2–3, U.N. Doc. S/PV.691 (Feb. 26, 2011); S.C. Res. 1970, ¶ 4–21, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

213. U.N. Security Council, 66th Sess., 6490th mtg. at 4–5, U.N. Doc. S/PV.6490 (Feb. 25, 2011).

214. Matthew Russell Lee, *As Libya's Shalgam Supports Referral to ICC, Spin of France & NGO, Human Rights*, INNER CITY PRESS (Feb. 26, 2011), http://www.innercitypress.com/unuk7libya022611.html ("With reference to the Draft Resolution on Libya before the Security Council, I have the honour to confirm that the Libyan Delegation to the United Nations supports the measures proposed in the draft resolution to hold to account those responsible for the armed attacks against Libyan Civilians . . . .").

The National Transitional Council of Libya formed on February 26 as the rebel political leadership fighting Qaddafi and his forces.[215] The rebels were making significant advances throughout eastern Libya while Qaddafi forces used air attacks to drive them back.[216] Throughout early March, there were reports of government supporters firing on unarmed protestors and, in Tripoli, of Qaddafi loyalists searching for people in photographs taken during protests to detain or kill them.[217] On March 10, France became the first country to officially recognize the rebel forces as Libya's "legitimate representative," a move supported by the European Parliament.[218]

By March 12, Qaddafi's forces had succeeded in winning back control of some areas captured by rebel forces, leading the Arab League to ask the UN Security Council to establish a no-fly zone over Libya.[219] Many feared that Qaddafi would succeed in crushing the rebellion and that the reprisals would be severe. By March 16, the United States began pushing for military support of the rebel forces, believing a no-fly zone would be insufficient to support the rebel movement.[220] On March 17, the Security Council adopted Resolution 1973, which demanded a ceasefire, created a no-fly zone, permitted UN members to take "all necessary measures" short of occupation to protect Libya's civilian population, and increased sanctions against Qaddafi and his minions.[221] Acting on the basis of the Resolution, on March 20 the United States, the United Kingdom, and France attacked Qaddafi forces that were assaulting rebel-held areas.[222] On March 21, Libya's Foreign Minister, part of the Qaddafi government, requested an emergency meeting to stop what he described as French and American "military aggression" taken in accordance to Resolution

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215. *Libya Opposition Launches Council*, AL JAZEERA (Feb. 27, 2011), http://www.aljazeera.com/news/africa/2011/02/201122717595522185 3.html.

216. Kareem Fahim & David D. Kirkpatrick, *Libyan Government Presses Assault in East and West*, N.Y. TIMES (Mar. 7, 2011), http://www.nytimes.com/2011/03/08/world/africa/08libya.html?pagewanted=all.

217. David D. Kirkpatrick, *Terror Quiets Libyan Capital as Rebels Battle in the East*, N.Y. TIMES (Mar. 3, 2011), http://www.nytimes.com/2011/03/04/world/africa/04libya.html?pagewanted=all.

218. *Libya: France Recognises Rebels as Government*, BBC NEWS EUR. (Mar. 10, 2011), http://www.bbc.co.uk/news/world-africa-12699183.

219. Ethan Bronner & David E. Sanger, *Arab League Endorses No-Flight Zone over Libya*, N.Y. TIMES (Mar. 12, 2011), http://www.nytimes.com/2011/03/13/world/middleeast/13libya.html?pagewanted=all&_r=0.

220. Mark Landler & Dan Bilefsky, *Specter of Rebel Rout Helps Shift U.S. Policy on Libya*, N.Y. TIMES (Mar. 16, 2011), http://www.nytimes.com/2011/03/17/world/africa/17diplomacy.html?_r=0.

221. S.C. Res. 1973, ¶¶ 1–18, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

222. *Libya: US, UK and France Attack Gaddafi Forces*, BBC NEWS AFR. (Mar. 20, 2011), http://www.bbc.co.uk/news/world-africa-12796972.

1973.[223] The United Nations did not act on this request. On October 23, the rebels declared victory over Qaddafi and his forces.[224]

2. Legitimacy

The Security Council's decisions along the path to adopting Resolutions 1970 and 1973 provide budding support for a substance-infused concept of sovereignty in the people, which prevents governments from claiming the sovereign right to be free from international intervention when they fail to retain domestic legitimacy and violate fundamental duties owed to the people. From the very beginning, the Security Council treated the Libyan protests as a direct repudiation of Qaddafi's legitimacy. It accepted Dabbashi's request for a Security Council meeting on Libya although he had defected from the Qaddafi government and Qaddafi had formally revoked his credentials as a Libyan diplomat. The Provisional Rules of Procedure of the Security Council state that the president can call a meeting if there is a dispute under Article 35 or Article 11(2) that is brought to it by a state party.[225] By convening a meeting at Dabbashi's request, the Security Council implicitly recognized him as Libya's legitimate representative; the source of Dabbashi's authority was no longer Qaddafi, but the people. Similarly, when the Security Council met to discuss draft resolution 1970, the Security Council invited Ambassador Shalgham to the meeting under Rule of Procedure 37, which permits the Security Council to invite a member-state that is not a member of the Security Council to meetings to discuss a resolution affecting it.[226] The Security Council expressly acknowledged Shalgham as the "representative of the Libyan Aram Jamahiriya," despite having formally broken with the ruler in control of the government.[227] Again, the source of his authority as Libya's representative was the people—not Qaddafi, who had revoked Shalgham's diplomatic credentials.

The international community specifically justified support for Resolutions 1970 and 1973 as a response to a call by the people to

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223. Edith M. Lederer, *UN Rejects Emergency Meeting Sought by Libya*, GUARDIAN (Mar. 22, 2011), http://www.guardian.co.uk/world/feedarticle/9557569.

224. Adam Nossiter & Kareem Fahim, *Revolution Won, Top Libyan Official Vows a New and More Pious State*, N.Y. TIMES (Oct. 23, 2011), http://www.nytimes.com/2011/10/24/world/africa/revolution-won-top-libyan-official-vows-a-new-and-more-pious-state.html?pagewanted=all.

225. Provisional Rules of Procedure of the Security Council, r. 3, U.N. Doc. S/96/Rev.7 (Dec. 1982) [hereinafter Provisional Rules]; *see also* U.N. Charter arts. 11(2), 35.

226. U.N. Security Council, 66th Sess., 6490th mtg., *supra* note 213; Provisional Rules, *supra* note 225, r. 37.

227. U.N. Security Council, 66th Sess., 6490th mtg., *supra* note 213, ¶ 4 ("I now give the floor to the representative of the Libyan Arab Jamarhiriya.").

return sovereignty to them. The British Ambassador to the United Nations described Resolution 1970 as "a powerful signal of the determination of the international community to stand with the people of Libya and defend their right to determine their own future."[228] South Africa's representative described how "[t]he Libyan people . . . have been calling for an end to this indiscriminate use of force" as "echo[ed]" by Libyan diplomats.[229] Resolution 1970 took particular note of the letter Shalgham wrote to the Security Council stating support for the resolution's measures;[230] reference to the letter implied that Shalgham's support represented the people's support.[231]

The adoption of Resolution 1973 also was justified on the basis that it reflected the wishes of the people. The U.S. representative to the Security Council considered it a "respon[se] to the Libyan people's cry for help."[232] The British representative noted that "[t]he central purpose of the resolution is clear: to end the violence, to protect civilians and to allow the people of Libya to determine their own future."[233] The Portuguese representative described how "[f]or the international community, the regime that has ruled Libya for more than 40 years has come to an end by the will of the Libyan People."[234] The rejection of Qaddafi as the legitimate Libyan leader is most apparent in the decision to refuse Qaddafi's request for a Security Council meeting,[235] which India's UN ambassador explained reflected that the Security Council "didn't want to get into a discussion of who represents whom."[236]

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228. U.N. Security Council, 66th Sess., 6491st mtg., *supra* note 212, at 2.

229. *Id.* The U.S. representative stated: "The protests in Libya are being driven by the people of Libya. This is about people's ability to shape their own future, wherever they may be. . . . The Security Council has acted today to support the Libyan people's universal rights." *Id.* at 3–4 (asserting that, "As President Obama said today, when a leader's only means of staying in power is to use mass violence against its own people, he has lost the legitimacy to rule and needs to do what is right for his country, by leaving now.").

230. S.C. Res. 1970, *supra* note 212.

231. *But see* Ronda Hauben, *The Role of the UN Security Council in Unleashing an Illegal War Against Libya*, GLOBALRESEARCH (July 20, 2011), http://www.globalresearch.ca/the-role-of-the-un-security-council-in-unleashing-an-illegal-war-against-libya (wondering whether a "more complex process" than a single letter caused the decision to approve Resolution 1970). Shalgham's letter has been credited as decisive in the unanimous passage of the Resolution. *See* Irwin Cotler & Jared Genser, Op-Ed., *Libya and the Responsibility To Protect*, N.Y. TIMES, Feb. 28, 2011, http://www.nytimes.com/2011/03/01/opinion/01iht-edcotler01.html (describing the resolution and noting that it was unanimous).

232. U.N. Security Council, 66th Sess., 6498th mtg. at 4, U.N. Doc. S/PV.6498 (Mar. 17, 2011).

233. *Id.*

234. *Id.* at 8–9.

235. Lederer, *supra* note 205.

236. Lederer, *supra* note 223.

As the processes leading to Resolutions 1970 and 1973 show, Security Council members recognized that the Qaddafi government controlled Libya[237]—or by the time of Resolution 1973, substantial parts of Libya—but they also recognized that Qaddafi was not the legitimate representative of the people.[238] This exemplifies an important principle of a substance-infused concept of sovereignty in the people: the government may be treated as the legitimate representative of the people only if it maintains domestic legitimacy. If the people do not authorize the ruler to lead the country, the ruler may be able to control the country, but cannot be treated as the true representative of the sovereign entitled to sovereign rights.

3. Failure to Fulfill Duties

In addition to Qaddafi's express loss of legitimacy, the international community based its decision to intervene in Libya's domestic affairs on Qaddafi's failure to refrain from crimes against humanity in violation of his duties under the doctrine of responsibility to protect.[239] In the run-up to Resolution 1970, Qaddafi fired upon unarmed protestors and called upon his loyalists to slaughter his opposition. In Resolution 1970, the Security Council specifically noted "the gross and systematic violation of human rights, including the repression of peaceful demonstrators . . . the deaths of civilians, and . . . the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government"[240] that "may amount to crimes against humanity."[241] The Security Council then imposed an arms embargo, targeted the Qaddafi leadership with sanctions, and referred them to the ICC for an investigation into crimes against humanity.

When Resolution 1970 failed to achieve its goal of protecting the people and it appeared that Qaddafi might succeed at decimating the rebel forces, the international community revisited its options for protecting the people and their sovereignty.[242] Resolution 1973 condemned Libya for "the gross and systematic violation of human

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237. Security Council members described Qaddafi's government as the "Libyan Government," "Libyan authorities," the "regime," and the "leadership." U.N. Security Council, 66th Sess., 6491st mtg., *supra* note 212, at 3–4.

238. *Id.*

239. The legal basis for Resolution 1970 was the doctrine of responsibility to protect , along with the Security Council's Chapter VII powers under the UN Charter. *See* S.C. Res. 1970, *supra* note 212 ("*Recalling* the Libyan authorities' responsibility to protect its population . . . ."). As described in Part III.C, responsibility to protect places a duty on every state to "protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity." G.A. Res. 60/1, *supra* note 57, at ¶ 138–139.

240. S.C. Res. 1970, *supra* note 212.

241. *Id.*

242. *See supra* Part III.E.3.

rights, including arbitrary detentions, enforced disappearances, torture and summary executions" that possibly constituted crimes against humanity. Reflecting the escalation of Qaddafi's violence against civilians, the international community stripped the Libyan leadership of the last vestiges of its sovereign rights and permitted military action on behalf of the civilian population.[243]

The Security Council's actions in the processes of adopting Resolutions 1970 and 1973 effectively adopted the approach advocated here to justify international intervention. It recognized that control over territory could not be equated with legitimacy when it treated the Libyan diplomatic mission as the representative of the people even after it defected from the Qaddafi regime that still controlled Libya's territory. It denied the government international legitimacy on the basis that it lacked domestic legitimacy. By basing international intervention on the responsibility to protect, the Security Council applied the concept that a government owes its citizens duties that, if unfulfilled, strip the government of the sovereign right to be free from international intervention in its domestic affairs. The international response to Qaddafi in the end days of the Libyan dictatorship illustrates both the logic of sovereignty in the people and how effective it can be when infused with substance.

IV. THE PEOPLE

Part IV asks two important questions likely to raise theoretical and practical concerns about the implementation of a substance-infused concept of sovereignty in the people: (1) who are the people; and (2) can democracies, which presumably represent the people, violate sovereignty in the people? These two questions reflect concerns regarding tyranny of the majority and parse out the differences in types of democracy. They reflect the importance of a nuanced approach to understanding the will and common good of the people, as well as what constitutes appropriate representation of the people. Part IV.A examines the first question, concluding that minority groups must be accounted for within the phrase *the people*. Part IV.B tackles whether and how democracies lose sovereign entitlements, relying on examples from Afghanistan, India, Sri Lanka, and France to illustrate its points.

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243. S.C. Res. 1973, *supra* note 221, ¶ 4.

A. *Who Are the People?*

So far, the description of the meaning of sovereignty in the people has assumed a unified voice for the people and that the individuals who comprise the people share a will and vision of the common good. In many countries, unity is little more than an illusion—thus, the seemingly common outbreak of violence and civil war.[244] This reality raises the issues of who constitutes the people and how should their diverse interests be reconciled to achieve sovereignty in the people?

Beginning with the first issue, the people are individuals in the aggregate. These individuals typically form groups based on perceptions of common needs and interests and on identity factors such as race, culture, language, ties to a territory, ethnicity, and religion, among other characteristics.[245] How individuals choose to identify themselves typically represents societal divisions and is complicated by overlapping identities and socioeconomic and other factors that create differing needs and interests within the group. Any cluster of individuals can define itself as a group deserving of a voice as part of the people.[246] Majority groups typically claim to represent the will and common good of the whole of the political community, while minority groups demand a voice in that determination. This contestation often simply perpetuates the need to identify oneself as part of a group.

Under classical democratic theory and in line with Rousseau, the will of the people is expressed through elections in which the majority determines the outcome and the elected government determines how to achieve the common good.[247] Majority rule was adopted as a "political solution" to the difficulty of implementing democracy.[248] It is expected to reflect the interests of a "fluid" majority; who constitutes the majority changes with the issues, so no set of individuals or groups are consistently excluded from decision

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244. *See, e.g.*, MILLS, *supra* note 11, at 81 (explaining why claims for self-determination by different groups in the same country frequently come into conflict with one another).

245. *See, e.g.*, Daniele Archibugi, *The Self-determination of Peoples*, 10 CONSTELLATIONS 488, 491 (2003) (noting that "nothing can stop" any community which recognizes itself in a given identity from defining itself according to that identity).

246. *See id.* (explaining that a people will attempt to define itself along language, religion, race, and shared faith even though these methods may fail to provide solid methods for defining the boundaries of that people).

247. *See, e.g.*, Rosenfeld, *supra* note 111, at 1332 (describing the clashing interests of the individual and the common good).

248. Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601, 636–37 (2003).

making.[249] Experience shows, however, that majority rule can lead to tyranny of the majority—or "the majority's ability to abuse its authority without compromise"—making this classical approach to determining the will and common good of the people inappropriate.[250]

To ensure that the will of the people truly represents all of the people, minority groups need to be given the opportunity for fair and effective representation.[251] They must be able to elect representatives, and their needs and concerns must inform the vision of a common good rather than simply being overridden by the majority. Failure to account for minority-group needs and interests is a risk factor for armed conflict: "When minorities are denied a say in political affairs, conflict often results because a political voice is the key to the enjoyment of all other rights."[252] It is also a risk factor for mass atrocities such as genocide.[253] Events in Sri Lanka, Sudan, and Rwanda, among others, illustrate this point.[254] Recognition of the importance of minority representation thus comports with the

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249. *Id.* at 643–44 (quoting LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 3 (1995)).

250. *See, e.g.*, WEINERT, *supra* note 118, at 61, 63 ("Governments may, under the guise of popular majority vote, deprive minorities of essential political rights and civil liberties.").

251. This answer begs the question of who constitutes the people to the extent that it does not explain which minority groups deserve representation. Factors such as size of the group and the stability and sustainability of the shared identity are likely to play into the determination, along with the context of the group's treatment within the state. Minority Rights Group International claims that the internationally accepted definition of *minority* is "straightforward": "[I]t is a group of people who believe they have a common identity, based on culture/ethnicity, language or religion, which is different from that of a majority group around them." CLIVE BALDWIN, CHRIS CHAPMAN & ZOE GRAY, MINORITY RIGHTS: THE KEY TO CONFLICT PREVENTION 4 (2007). The Vienna Commission, which was responsible for producing a draft convention for the protection of minorities for the European Union, suggested the following definition of minority: "A group which is smaller in number than the rest of the population . . . whose members, although nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language." Lyra Porras Garzon, *Group Rights vs. Individual Rights?*, ISIS INT'L (Sept. 15, 2006), http://www.isiswomen.org/index.php?option=com_content&task=view&id=281&Itemid=135 (citing Council of Eur., *Proposal for a European Convention for the Protection of Minorities*, 3d Sess., Doc. No. 7228 (Jan. 31, 1995)).

252. Baldwin, Chapman & Gray, *supra* note 251, at 12.

253. *See* OFFICE OF THE UN SPECIAL ADVISOR ON THE PREVENTION OF GENOCIDE, ANALYSIS FRAMEWORK 1–2 (2009) (including a record of discrimination and other human rights violations committed against a group under factors to be analyzed to determine whether there may be a risk of genocide in a given situation).

254. *See, e.g.*, KARL CORDELL & STEFAN WOLFF, ETHNIC CONFLICT: CAUSES, CONSEQUENCES AND RESPONSES 194 (2009) (referencing a "proliferation of ethnic conflict since the end of the Cold War"). Minority Rights Group International found that 71 percent of ongoing conflicts had "an ethnic dimension," suggesting that "[w]here minority rights go consistently ignored, a descent into conflict is always a risk." *Conflict*, MINORITY RTS. GROUP INT'L, www.minorityrights.org/6857/thematic-focus/conflict.html (last visited Oct. 18, 2012).

underlying purpose of the concept of sovereignty: to organize domestic affairs so as to protect the security and common good of the political community. Meaningful representation demands the removal of any barrier to effective participation of all groups in governance and an electoral system and human rights conditions that promote a more inclusive determination of the will of the people and their common good.

This ideal of representative government is complicated when minority groups refuse the assimilation inherent in the process. Some groups argue that there is no one people within their state's territorial boundaries but multiple peoples who have the right to be governed according to their differing wills.[255] These groups generally show less concern with inclusion in the development of a unified will and vision of the common good and more interest in the survival of their particular linguistic, cultural, religious, or ethnic characteristics.[256] They typically demand a state design that permits limited self-rule and allows for equal representation with the majority.[257] Examples of such designs range from accommodation for group rights through legal pluralism and protection of their ethnic, cultural, or religious institutions to territorial autonomy through devolution of power, federalism, and semi-autonomous zones. These types of power-sharing arrangements may forestall or wholly prevent internal conflict,[258] although some believe that the accommodations increase societal divisions, preventing the healthy development of a national identity.[259] The claims need to be addressed in order for a government to retain legitimacy.

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255. *See* Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307, 338 (2002) (discussing the theory that sovereignty is based on the consent of the governed, and suggesting that minority groups within a state should have their own ability to withhold this consent).

256. *See* Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT'L L.J. 453, 457 (2003) (describing the different degrees of self-determination, with one degree being the claim of right by indigenous groups within the democracy to use their own languages and engage in their own cultural practices).

257. *See, e.g.*, MILLS, *supra* note 11, at 34 (hypothesizing about possible outcomes after the devolution of large central government); Nettesheim, *supra* note 125, at 367 (noting how the idea of representative holders of public office representing the common good "seems to be receding").

258. *See, e.g.*, Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 752 (1995) (reviewing YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994)) (explaining how internal self-determination can ameliorate tensions between majority and minority groups through the creation of "inclusive political processes" that allow entire populations to chart their own destinies).

259. *E.g.*, Baldwin, Chapman & Gray, *supra* note 251, at 2 ("Too often, separating groups along ethnic, religious or linguistic lines has been seen as a way of upholding minority rights and keeping peace between groups. While such solutions might be an easy option in the aftermath of conflicts, long term these divisions can

These alternatives to majority rule may not be accepted by the majority or may not satisfy the demands of a minority group, which leads to the next important question: what if one group in a society is demanding secession as part of its right to self-determination? In theory, a healthy, functioning democracy that represents all groups in society and that does not enforce the will of the majority alone should weaken the desire for a separate state. Consistent with this theory, the UN General Assembly has adopted declarations maintaining a state's right to territorial integrity only when the government is truly representative and provides real equality for minority groups;[260] the stronger the violation of the minority group's rights, the stronger its claim for secession.[261] The phrase *minority group* in this context is intended to refer to an ethnic, racial, linguistic, or religious group, rather than any self-proclaimed minority group.[262] The international community of states is extremely reluctant to consider secession as an option for ensuring self-determination for fear that it will encourage other groups to make similar demands. The secession discussion is tangential to the topic of this Article, as secessionists demand a new state with a new political community, rather than representation within the people for purposes of sovereignty in an existing state.

One important concern for the application of this theory of sovereignty is whether fringe members of minority groups will be able hijack the concept of sovereignty to undermine the democratic government. For example, a South African farmer recently complained to the UN Special Advisor on the Prevention of Genocide that the South African government was conducting genocide against its Afrikaner population.[263] The complaint alleges that 36,500 white farmers have been murdered since 1990, while official statistics place that number at 3,020.[264] The farmer sought a UN investigation of his

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entrench old hatreds and wounds."); Dr. Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 672–74 (2006) (noting that there remains "much uncertainty" surrounding the impact of different governance choices in post-conflict environments).

260. Christine Bell & Kathleen Cavanaugh, *'Constructive Ambiguity' or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement*, 22 FORDHAM INT'L L.J. 1345, 1349–50 (1999); Raday, *supra* note 245, at 456.

261. Bell & Cavanaugh, *supra* note 260, at 1349–50; *see also* Raday, *supra* note 245, at 456 (describing the right of self-determination as a right "either of previously colonized peoples or of peoples tied by common ethnic, religious, or linguistic bonds in a State whose government fails to represent them").

262. Makau Mutua, *The Iraq Paradox: Minority and Group Rights in a Viable Constitution*, 54 BUFF. L. REV. 927, 929 (2006) (defining minority groups as small, nondominant groups in a state that "possess ethnic, religious or linguistic characteristics differing from those of the rest of the population").

263. Emma Hurd, *White Farmer Accuses South Africa of Genocide*, SKY NEWS (Aug. 25, 2010), http://news.sky.com/story/801348/white-farmer-accuses-south-africa-of-genocide.

264. *Id.*

claim, which raises sovereign rights issues.[265] Whether the United Nations can conduct an international investigation into South Africa depends on whether it meets the test for losing sovereignty. Does it retain legitimacy, even among the Afrikaner population? Is the government fulfilling its duties to the people? If there are human rights violations, which the number of deaths of white farmers suggests, is the government responsible through behavior that would appear to be encouraging it? Is there accountability for these crimes? This assessment will weed out fringe claims, such as to genocide,[266] but could potentially locate a real source of concern for the community: whether white farmers face a disproportionate risk for political violence.

This discussion about who constitutes the people and how their will and common good are determined, while simplistic, is important for understanding the contours of sovereignty in the people. To prevent tyranny of the majority, which risks conflict and mass atrocities, minority groups must be represented in the formation of the will and common good of the people. Thus, the government must retain legitimacy among and fulfill its duties to *all* the people to benefit from sovereign rights.

B. *Can a Democratic Government Lose Its Sovereign Rights?*

One of the more contentious assertions of this Article is that a democratic government can lose sovereign rights just as a dictatorship can. Because, by definition, people living in democracies choose their representatives and can change them through elections, the international community is more likely to be reluctant to intervene in the domestic affairs of democracies. Yet, as the remainder of this subpart shows, procedural democracies and even liberal democracies can fail to meet the duties necessary to retain full sovereign rights.

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265. Jenni O'Grady, *Govt Says Genocide Claims 'Ludicrous,'* MAIL & GUARDIAN (Aug. 24, 2010), http://mg.co.za/article/2010-08-24-govt-says-genocide-claims-ludicrous.

266. Genocide has a very specific legal meaning. It is defined as

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a) Killing members of the group;
>
> b) Causing serious bodily or mental harm to members of the group;
>
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> d) Imposing measures intended to prevent births within the group;
>
> e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide art 2., Dec. 9, 1949, Sen. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277.

1. Illiberal Democracies

An illiberal democracy is a democracy by procedure only; the people elect the government, but they have little influence on government policy.[267] The lack of influence means the government does not accord the full human rights necessary to achieve substantive democracy.[268] The failure to protect and promote full human rights is likely to violate both the legitimacy and duties requirements for the exercise of sovereign rights. By themselves, free and fair elections do not insulate governments from a loss of sovereign rights, although certainly they are a factor in the test for legitimacy and whether the government is fulfilling its duties to the people.

Sri Lanka provides an example of a procedural democracy in which the government, once elected, regularly violates the rights of its people.[269] The government stands accused of extrajudicial killings, particularly of political opposition members, human rights activists, and journalists. For example, the Committee to Protect Journalists ranks Sri Lanka fourth of the countries with the world's worst record for killing journalists with impunity;[270] this impunity leads the Sri Lankan media to censor itself.[271] The Sri Lankan government also is notorious for torturing persons accused of crimes.[272] The UN Committee Against Torture, in particular, expressed concern with the practice "where the victims were allegedly randomly selected by police to be arrested and detained for what appears to be an unsubstantiated charge and subsequently subjected to torture or ill-

267. *See* d'Aspremont, *supra* note 111, at 913 (describing an illiberal democracy as "a democratically elected government exercising its power in violation of the substantive elements of democracy").

268. *See id.* (including violation of the substantive elements of democracy within the umbrella of "blatant violations of human rights"); *supra* Part III.B.1 (describing substantive democracy).

269. See U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: SRI LANKA (2011) for a description of problems in presidential and parliamentary elections that affected their fairness.

270. COMM. TO PROTECT JOURNALISTS, GETTING AWAY WITH MURDER (2011); *see also The Price of Truth: For Reporters, a Moment of Fear*, ECONOMIST, Sept. 3, 2009 (describing a twenty-year sentence on terrorism charges for a journalist critical of army behavior toward Tamils in the North).

271. U.S. DEP'T OF STATE, *supra* note 269, at 16.

272. *See* Comm. Against Torture, Concluding Observations, 47th Sess., Oct. 31–Nov. 25, 2011, ¶ 6, U.N. Doc. CAT/C/LKA/CO/3-4 (Dec. 8, 2011) [hereinafter Concluding Observations] ("[T]he committee remains seriously concerned about the continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings."); U.S. DEP'T OF STATE, *supra* note 269, at 6–7 (discussing reports of torture).

treatment to obtain a confession for those charges."[273] The government has been blamed for enforced disappearances, including of human rights activists and journalists;[274] approximately 475 disappearances were reported to the UN Working Group on Enforced or Involuntary Disappearances between 2006 and 2010.[275] As with the murder of journalists, these human rights violations are committed with full impunity, as soldiers and government officials go unpunished despite evidence showing their participation or complicity in these crimes.[276]

In the wake of a military win in a nearly three-decades-long civil war between the majority-Sinhala government and the Liberation Tigers of the Tamil Eelam (LTTE), which claimed to represent the minority Tamil population,[277] Tamils[278] complain of serious security

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273. *See* Concluding Observations, *supra* note 272, ¶ 11 (expressing concern over several reports of individuals being detained on unsubstantiated charges and tortured to obtain confessions).

274. Rep. of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, ¶ 63 (Mar. 31, 2011) [hereinafter Expert Panel Report] ("Between 2006 and the end of the war, 66 humanitarian workers were either disappeared or killed.").

275. Concluding Observations, *supra* note 272, ¶ 9.

276. *See, e.g.*, Expert Panel Report, *supra* note 274, ¶ 37 (discussing an environment of impunity that "created[d] an enabling environment for human rights violations"); *Sri Lanka: No Justice in Massacre of Aid Workers*, HUM. RTS. WATCH (Aug. 3, 2011), http://www.hrw.org/news/2011/08/03/sri-lanka-no-justice-massacre-aid-workers (relating the case of seventeen aid workers likely killed by government security forces to an overarching "lack of will to prosecute soldiers and police for rights abuses"). In its Concluding Observations, the UN Committee Against Torture reported:

> The Committee expresses its concern at reports that human rights defenders, defence lawyers and other civil society actors, including political activists, trade unionists and independent media journalists have been singled out as targets of intimidation, harassment, including death threats and physical attacks and politically motivated charges. It regrets that, in many cases, those allegedly responsible for acts of intimidation and reprisal appear to enjoy impunity.

Concluding Observations, *supra* note 272, ¶ 13; *see also id.* ¶ 18 (describing the Committee's concern with the "prevailing climate of impunity").

277. *See* INT'L CRISIS GRP., ASIA REP. NO. 209, RECONCILIATION IN SRI LANKA: HARDER THAN EVER 3, 11 (2011) (discussing the decades-long war and stating that many Tamils saw the LTTE as the only organization standing up for Tamil interests against the majority-Sinhalese government). The New York Times describes the LTTE as "a group that took up arms to defend the Tamil minority from government discrimination but eventually became a ruthless insurgency best known for its use of child soldiers and suicide bombers." *Sri Lanka*, N.Y. TIMES, http://topics.nytimes.com/top/news/international/countriesandterritories/srilanka/index.html (last updated Nov. 14, 2012).

278. It is important to note two categories of Tamils in Sri Lanka to avoid confusion. The Tamil population that is the subject of the conflict in the north and east of Sri Lanka has been living in Sri Lanka for thousands of years. INT'L CRISIS GRP., *supra* note 277, at 3. They are to be contrasted with Tamils of Indian origin brought to Sri Lanka by the British to work in tea plantations, who, while marginalized, did not participate in the decades-long conflict. *Id.* at 3, 5.

fears.[279] In particular, they express concern with the government's mission to root out all possible LTTE supporters.[280] While most of the 300,000 Tamils initially detained in internationally funded "internment" camps have been released for resettlement,[281] it is believed that up to 3,000 Tamils are being detained incommunicado for "rehabilitation" in undisclosed facilities.[282]

Reportedly, the Sri Lankan military has taken over 7,000 of the 18,800 square kilometers of land occupied by Tamils in Sri Lanka's Northern Province, and there is one soldier for every ten inhabitants in Jaffna, its provincial capital.[283] The militarization is intended to assert government control and prevent the organization of Tamil opposition.[284] Many Tamils also fear that their land is being taken as part of a government-sponsored "Sinhalisation" process, which

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279. The answer to the question of how much sovereignty the Sri Lankan government should lose or should have lost as a result of human rights abuses depends on the time period under consideration. The three most relevant periods for analysis are: the civil-war period, the immediate post-war period while the majority of the Tamil population was interned, and the present. Each period presents different government human rights abuses, making the analysis complicated but rich. The discussion here is focused solely on the current human rights picture, while the remaining two periods will be discussed further below.

280. *See* U.S. DEP'T OF STATE, *supra* note 269, at 1 ("In an effort to prevent any violent separatist resurgence, the government continued to search for and detain persons it suspected of being LTTE sympathizers or operatives.").

281. While the Sri Lankan government denies that these Tamils were being interned, the Tamil refugees were not free to leave the camps but needed permission from the government. *See* Ravi Nessman, *Nobody In or Out: Sri Lanka Interns Tamil War Refugees with Help of Foreign Aid*, ASSOCIATED PRESS (July 18, 2009) (stating that the refugees are held in the camps until the government has decided that they can return to certain areas). The government initially intended to house Tamils in these camps, which they named "welfare villages," for up to three years. Ravi Nessman, *Sri Lanka Plans To House War Refugees for 3 Years*, ASSOCIATED PRESS (Feb. 12, 2009), http://www.foxnews.com/printer_friendly_wires/2009Feb11/0,4675,ASSriLankaCamps, 00.html. In the areas in which Tamils have been permitted to return, the government has not yet been able to replace the infrastructure or basic services destroyed during the war, which makes living conditions difficult at best. *See* INT'L CRISIS GRP., *supra* note 277, at 14 (stating that those in one area "are living in makeshift shelters, with little in the way of jobs, other livelihood opportunities or access to basic infrastructure," and that those in another area suffer from "food insecurity and poverty").

282. INT'L CRISIS GRP., *supra* note 277, at 17.

283. M.A. Sumanthiran, *Situation in North-Eastern Sri Lanka: A Series of Serious Concerns* ¶ 2.1 (Oct. 21, 2011), *available at* dbsjeyaraj.com/dbsj/archives/2759; *see also* BHAVANI FONSEKA & MIRAK RAHEEM, CENTRE FOR POLICY ALTS., LAND IN THE NORTHERN PROVINCE: POST-WAR POLITICS, POLICY AND PRACTICES 15 (2011) (stating that "a significant number of properties still remain under military occupation" in the North). The government contests how much land has been claimed by the military; however, there are reasons to question its estimations. *See id.* at 151–52 (stating that "there is a reluctance to acknowledge the full scope of the restrictions," and giving the example that in the month of September 2011, the Navy acquired more than twice as many properties as the government's report stated the Navy occupied).

284. *See, e.g.*, INT'L CRISIS GRP., *supra* note 277, at 12–14 (describing the government's efforts to disenfranchise the Tamils, including the government's control of resettlement areas).

appears to be an attempt to reduce the concentration of Tamils in the Northern and Eastern Provinces by giving land to the Sinhalese majority.[285] The government further has linked with Tamil paramilitary groups in the Eastern Province who violently control the predominantly Tamil population there. These paramilitary groups regularly engage in "extrajudicial killings, abductions, extortion, prostitution and child trafficking."[286] They are permitted full impunity in exchange for loyalty to the government.[287] The human rights picture for Tamils in northern and eastern Sri Lanka, thus, is bleak. In fact, so bad are the government abuses that the United Kingdom ranks Sri Lanka as "amongst those [twenty-six countries] where we have the most serious wide-ranging human rights concerns."[288]

In order for the Sri Lankan government to retain its sovereign rights—in particular, the right to be free from foreign intervention—it must be the legitimate representative of and fulfill its mandatory duties to the people. There is little doubt that the government retains at least some domestic legitimacy.[289] It was democratically elected by the majority of the population and receives much support from the Sinhalese population for how it conducted the war against the LTTE.[290] To claim it has full domestic legitimacy within the majority of the population, however, is highly problematic given the extent to which the government violates the rights of anyone who dissents from or opposes its regime.

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285. FONSEKA & RAHEEM, *supra* note 283, at 139–40.

286. INT'L CRISIS GRP., *supra* note 277, at 4; *see also* U.S. DEP'T OF STATE, *supra* note 269, at 3 (stating that individuals suspected of involvement in paramilitary groups, including breakaway LTTE eastern commanders, killed and assaulted civilians).

287. INT'L CRISIS GRP., *supra* note 277, at 20.

288. FOREIGN & COMMONWEALTH OFFICE, HUMAN RIGHTS AND DEMOCRACY: THE 2010 FOREIGN & COMMONWEALTH OFFICE REPORT 119 (2010) (U.K.), *available at* http://www.official-documents.gov.uk/document/cm80/8017/8017.pdf.

289. The Centre for Policy Alternatives in Sri Lanka conducted a poll to determine the population's thoughts on democracy in Sri Lanka. It found that 58.8 percent of Sri Lankans feel that current President Mahinda Rajapaksa has run a more democratic country that his predecessors. When broken down by social groups, 69.9 percent of Sinhalese polled supported this view compared to 23.6 percent of Tamil respondents and 13.1 percent of "Up country Tamils," meaning Tamils of Indian origin who live in nonconflict regions of Sri Lanka, and 21.9 percent of Muslims, showing that the poll numbers reflect the majority view. CENTRE FOR POLICY ALTS., SURVEY ON DEMOCRACY IN POST-WAR SRI LANKA 25 (2011). Rajapaksa has an 82.6 percent approval rating among Sinhalese polled but only a 15.9 percent approval rating among Tamils. *See id.* at 25–26 (reporting 82.6 percent in Southern Province, 15.9 percent in Northern Province). Furthermore, while 50 percent of Sinhala respondents consider themselves completely free to express political opinions, only 15.8 percent of Tamils, 38.8 percent of Up-country Tamils, and 16.9 percent of Muslims agreed. *Id.* at 33 graph 6.1.

290. *Summary* to BRUCE VAUGHN, CONG. RESEARCH SERV., RL 31707, SRI LANKA: BACKGROUND AND U.S. RELATIONS (2011).

More complex is the determination of whether the Tamil population views the government as legitimate. The civil war ended in 2009 with a decisive military victory during which it appears the government (and the LTTE) committed war crimes and crimes against humanity.[291] The very existence of a civil war negates the domestic legitimacy of the government, at least with respect to the rebel group, a point considered more fully below. The fact that the government crushed the LTTE insurgents does not return domestic legitimacy to it. Rather, how the government treats the Tamil population now, whether the government is currently addressing Tamil needs and concerns, and whether there has been any accountability for any crimes committed by the government during the course of the war and after determine its domestic legitimacy.

The very brief summary above shows that Sri Lankan Tamils suffer regular violations of the freedom of association, the right to equality, and the right to be protected against arbitrary detention, along with heightened security fears, which likely prevents the Sri Lankan government from regaining legitimacy within this community. A recent poll shows that the majority of Tamils living in former conflict areas feel that the government has done little or nothing to address the root causes of the conflict,[292] which suggests that the government is not addressing the needs and concerns of the Tamil population. Additionally, the International Crisis Group reports that "most of the government's policies have increased ethnic

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291. While these allegations were against both sides, the question of sovereign rights relates solely to government behavior. For this reason, this Article considers only the violations of duties to the people by the government. *See Executive Summary* to Expert Panel Report, *supra* note 274, at ii (discussing the report's framework to "assess[ ] the domestic policy, measures and institutions, which are relevant to the approach to accountability taken by the Government of Sri Lanka"). The Panel also accuses the LTTE of these crimes; however, the LTTE's behavior is not a consideration in determining the sovereign rights of the government.

292. *See* CENTRE FOR POLICY ALTS., *supra* note 289, at 39 graph 7.3 (reporting 32.3 percent "Has Done Little," 30.8 percent "Has done a little, but not enough"). At the same time, however, just over half the Tamil population shows some trust in the government. *See id.* at 42–43 tbl.8.1 (indicating over 50 percent of Tamils reported "some trust" in the central/national government, provincial government, and local government). The United Nations' Secretary-General's Panel of Experts described how "triumphalism on the part of the Government, expressed through its discourse on having developed the means and will to defeat 'terrorism'" has effectively "end[ed] Tamil aspirations for political autonomy and recognition." *Executive Summary* to Expert Panel Report, *supra* note 274, at vi. The International Crisis Group has also reported:

> A central pillar of the government's strategy since 2005 has been to recast the civil war as another front in the global "war on terror" and deny its ethno-political context . . . . [I]t has been an excuse for the government to reject the need for any meaningful power sharing or state reforms designed to address the political marginalisation of minorities.

INT'L CRISIS GRP., *supra* note 277, at 11.

polarisation between and within groups and closed space for reform."[293] As to the last consideration—accountability for crimes against humanity and war crimes—the UN-sponsored Panel of Experts reported that the Sri Lankan government's "notion of accountability" does not accord with international standards[294] and that currently Sri Lanka lacks "an environment conducive to accountability."[295] Each of these factors undermines nearly any claim to legitimacy of the government among the Tamil population.

There is also little doubt that the Sri Lankan government is running afoul of its duties to the people and that the problems are systemic and result in severe harm. There are three separate targets of human rights violations: (1) political dissenters, (2) minority groups,[296] and (3) purported criminals. Given that Sri Lanka retains the choice in leadership, the government can claim its sovereign rights except as applied to these three areas.

The extent of the loss of sovereign entitlements in these areas then depends on the severity of harm that results from the human rights violations. Looked at separately, each type of human rights violation likely would trigger a different degree of loss of sovereign rights. For example, violation of the right of a criminally accused to be free from torture would likely justify international criticism but not sanctions or conditions on international relations because of the likely overly harsh effects of either action. The efforts to censor political opposition by killing, disappearing, torturing, and detaining human rights activists and journalists would likely weigh more heavily in a proportionality test, which would permit greater intervention. There is little doubt that conditions on international relations would be appropriate here. The weight of harm increases enormously when looking at the Tamil population, as the government not only lacks legitimacy among this population but also abuses the rights of Tamils, sowing seeds of discord. Again, this should escalate the level of permissible intervention. Weighing together the harm to all three targets of rights violations, nearly any intervention short of military intervention likely could be justified, including criminal prosecution of the Sri Lankan leadership under universal jurisdiction.[297] Military intervention surely would cause more harm

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293. INT'L CRISIS GRP., *supra* note 277, at 10.

294. *Executive Summary* to Expert Panel Report, *supra* note 274, at iv.

295. *Id.* at vi.

296. It is important to note that Sri Lanka has a significant Muslim and Indian Tamil minority that also suffers regularly from discrimination. *See* INT'L CRISIS GRP., *supra* note 277, at 3, 5–6, 8–10 (discussing discrimination of the Up-country (Indian) Tamils and the Muslims).

297. Canada has threatened to cut aid to Sri Lanka as a result of this lack of accountability. Lee Berthiaume, *Losing Canadian Aid Big Loss but Survivable: Sri Lankan Minister*, GLOBAL PEACE SUPPORT GRP. UK (Nov. 5, 2011, 1:27 AM),

than good to Sri Lankans already suffering from the effects of decades of war.

Illustrating how sovereignty in the people justifies current international relations rather than alters it, the European Union recently applied a similar analysis to the one advocated here when deciding to remove Sri Lanka from the list of countries that were rewarded trade concessions for increased human rights protections under its Generalized System of Preferences (GSP+) scheme.[298] The decision to revoke these concessions was based on a report commissioned by the European Union that found "[w]idespread police torture, abductions of journalists, politicised courts . . . uninvestigated disappearances," impunity, and arbitrary detention.[299] Prior to the revocation of GSP+, the European Union gave Sri Lanka the opportunity to commit to correcting the fifteen human rights and governance issues identified as violations of Sri Lanka's human rights commitments.[300] The Sri Lankan government characterized the EU action as a breach of Sri Lanka's sovereign right to be free from interference in domestic concerns when rejecting the EU conditions for GSP+.[301] Sri Lanka's Central Bank Governor Ajith

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http://www.globalpeacesupport.com/2011/11/losing-canadian-aid-big-loss-but-survivable-sri-lankan-minister/.

298. *EU Withdraws Sri Lanka's Special Trade Status*, CNN (July 6, 2010, 5:58 AM). Developing countries may be included in the GSP+ program if they can show a commitment to human rights and good governance.

299. *Sri Lanka and the EU: Losing Touch with Old Friends*, ECONOMIST, Sept. 3, 2009, http://www.economist.com/node/14384352.

300. Press Release, European Comm'n, EU Regrets Silence of Sri Lanka Regarding Preferential Import Regime, IP/10/888 (July 5, 2010), *available at* http://europa.eu/rapid/press-release_IP-10-888_en.htm#PR_metaPressRelease_bottom. The conditions specifically target violations of the ICCPR, the Convention Against Torture, and the Convention on the Rights of the Child, with a particular focus on conditions that lead to arbitrary detention and torture. Dilini Perera, *Sri Lanka Savaged*, SUNDAY LEADER (June 27, 2010), http://www.thesundayleader.lk/2010/06/27/sri-lanka-savaged/.

301. Perera, *supra* note 300. Sri Lanka also invoked sovereignty to reject international calls for an independent investigation into war crimes and crimes against humanity. Sri Lanka has vociferously rejected these demands, claiming that as a sovereign country responding to wholly domestic "terrorism," it is entitled to protection from international interference in its sovereign affairs. *See Nab Those Aiding and Abetting LTTE—Eksath Lanka Maha Sabha*, SUNDAY OBSERVER (Nov. 6, 2011), http://www.sundayobserver.lk/2011/11/06/new30.asp (quoting an official's statement that Sri Lanka and other small countries should "oppose this kind of arrogant meddling in their internal affairs," and arguing that Western countries are using human rights as an excuse for pursuing their own interests); *Sri Lanka Will Not Allow Foreign Interferences To Solve Country's Problems*, COLOMBOPAGE (Dec. 14, 2011, 8:26 PM), http://www.colombopage.com/archive_11B/Dec14_1323874615CH.php (reporting on statements made by Sri Lanka's External Affairs Minster that "Sri Lanka as a sovereign state will not allow any international mechanisms to interfere in the country's internal issues and cannot be pressured to bow down to any foreign interventions"). This position, unfortunately, has been supported by China, who many fear will become increasingly more influential in Sri Lanka if Western nations

Nivard Cabraal, for example, explained that "the government had no intention of giving in to some of the demands made by the EU because it was essential to safeguard Sri Lanka's sovereignty."[302] The European Union ignored Sri Lanka's vociferous calls to accord it sovereign rights when it formally revoked GSP+.

Another type of illiberal democracy arises from a constitution, which is considered an expression of the social contract that determines the common good based on a particular set of religious or cultural values.[303] One issue these democracies raise is what happens if the people predetermine a vision of the common good that binds them indefinitely without consideration of whether that vision might change? For example, Afghanistan adopted a constitution that not only requires the application of aspects of *shari'a* law within the country,[304] but also prohibits amendments to provisions protecting Islam and its role in governance.[305] The constitution prescribes that the common good must be determined by the Islamic vision of the "good life," rather than maintaining a neutral view that leaves open a wider range of choices for determining the content of the common good. The limitation on the constitutional amendments means that in the future, at least under this constitution, the people cannot choose to remove religion from governance. While Afghans exercised their will by adopting the restrictive constitutional provision, they have limited the future exercise of self-determination and their choices for what constitutes the common good.

The question then becomes whether the people can choose to forgo their current and future freedom to determine the common

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implement sanctions or conditions on international relations to pressure the government to submit to an independent investigation of the war. *See China Backs Lanka over Humanitarian Crimes Probe*, ZEENEWS.COM (Sept. 7, 2011), http://zeenews.india.com/news/south-asia/china-backs-lanka-over-humanitarian-crimes-probe_730400.html (reporting that China has backed Sri Lanka's claims to independence and sovereignty). Again, as conceived of here, sovereignty lies with the people, not the government, which means if it is to have any meaning, the government cannot hide behind the sovereignty shield.

302. *Lanka Won't Barter Sovereignty for GSP+: Cabraal*, DAILY MIRROR, Feb. 18, 2010, http://www.tisrilanka.org/?p=3677#.

303. *See generally* Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891, 898 (2005) (arguing that a constitution should secure liberty for others); Graham Walker, *The Mixed Constitution After Liberalism*, 4 CARDOZO J. INT'L & COMP. L. 311, 315–316 (1996) (describing systems that "assert that the state authority should openly prefer some substantive vision of the best kind life" and can be based on religion).

304. *See* Hallie Ludsin, *Relational Rights Masquerading as Individual Rights*, 15 DUKE J. GENDER L. & POL'Y 195, 208–09 (2008) (noting that religious personal-status law will likely be applied to all Afghans, based on three provisions of the constitution).

305. QĀNŪN-I ISĀSĪ-I AFGHĀNISTĀN [CONSTITUTION] art. 149 ("The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended.").

good. Phrased differently, it leads to the question: what happens if the will of the people conflicts with their best interests? Can the people lose their sovereignty for making choices for the present that may restrict their ability to act according to their will in the future? As Rousseau described, "Our will is always for our own good, but we do not always see what that is; the people is never corrupted, but it is often deceived, and on such occasions only does it seem to will what is bad."[306] Bearing this point in mind, the people never lose their sovereignty but, depending on the situation, the people may lose the benefits or rights of sovereignty. In an expression of their will, the people may make choices that are not in their best interests. Those choices are protected as an act of the sovereign as long as the actions do not violate their sovereign duties and the whole of the people views those choices as legitimate. Just as a government cannot violate these conditions for retaining its entitlement to claim sovereign rights, neither can the people.

For illiberal democracies based on a preference for a religious or cultural determination of the common good, the main question is whether their governments can fulfill their duties to all members of society and not just the majority. The concern in Afghanistan is whether minority religious groups and secular individuals will be able to exercise their rights or will be alienated from the state because of the preference of Islam and role of *shari'a* law in governance.[307] If those fears come to fruition, then the government, even though it is acting according to the rule of law as defined by the people, cannot claim its sovereign rights. As for the prohibition on amendment of provisions pertaining to Islam, as long as the constitution remains a valid expression of the will of all the people, then the government acting on behalf of the people retains its sovereign rights. If and when the people conclude that the constitution no longer reflects their will and vision of the common good, they must be free to change it, despite the expectation that the constitution is permanent.

2. Democracies in Conflict

This type of clash between the will of the people and their best interests occurs not only in illiberal democracies but also generally in conflict situations. During internal or external strife, the people often are willing to trade their human rights for measures that promise

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306. *Rousseau*, *supra* note 101, at 25.

307. *See, e.g.*, Mir Hermatullah Sadat, *The Implementation of Constitutional Human Rights in Afghanistan*, 11 HUM. RTS. BRIEF 48, 48–49 (2004) (noting that "[t]he new Constitution incorporates the ideals of democracy, freedom, and individual rights while maintaining a strong emphasis on Afghanistan's Islamic heritage" and that "nothing in the Constitution prevents the implementation of Sharia, or Islamic law").

more security.[308] The test for whether conflict societies run afoul of the legitimacy or duty requirements necessary for a government to claim sovereign rights depends on which rights the people exchange for security and whether certain groups within the people face human rights violations as a result. For example, repressive legislation permitting torture or curtailing nonderogable rights such as freedom of religion is not permissible even when it reflects the will of the people. Nor are restrictions on democratic rights, even if the majority of the people agree to them. More common is the tendency for government supporters to exchange the rights of dissenters, perceived as agitators, for greater security. Once tensions boil over into armed conflict, it is easy for government supporters to justify the nearly total loss of rights of the group demanding change. In any of these circumstances, the people lose some or all of their sovereign rights.

India provides an example of how an exchange of rights for security can limit the people's entitlement to sovereign rights when civil tensions run high. India's constitution expressly permits preventive detention, or extrajudicial detention, in anticipation of a threat against public order, but refuses detainees the due process rights necessary to protect against arbitrary detention.[309] As a reminder, the right to be free from arbitrary detention is considered customary international law and a duty the government is required to meet to qualify for full sovereign rights.[310] During the Constituent Assembly, drafters removed a requirement that detainees be granted due process rights from the draft constitution. They justified its removal on the basis of post-partition violence following the creation of Pakistan and a communist-led armed rebellion:

> On occasions like this sympathies of most of us go out to the high principles which in the past we proclaimed from housetops. But there are other friends who occupy seats of authority and responsibility throughout the country. They warn us that the aftermath of war and partition has unchained forces which if allowed to gain upper-hand will engulf the country in anarchy and ruin . . . . Many of us are not convinced that dire results would necessarily follow the adoption of the phrase "due process of law". But the difficulty is this, that even if we were- [sic] to stand for our own convictions there is no scope far experimenting in such matters.[311]

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308. Hallie Ludsin, *Putting the Cart Before the Horse: The Palestinian Constitutional Drafting Process*, 10 UCLA J. INT'L L. & FOREIGN AFF. 443, 482 (2005).

309. INDIA CONST. art. 22; *see also id.* sched. 7, list I, no. 9, sched. 7, list III, no. 3 (permitting detention of persons considered a threat to public order, state and national security, defense of India, foreign relations, and the supply of essential services). Article 22 expressly denies detainees a right to a lawyer and mandatory judicial review of the detention. *Id.* art. 22, §§ 1–2, 3(b).

310. *See supra* notes 132–62 and accompanying text.

311. *Constituent Assembly of India—Volume* IX (Sept. 16, 1949), http://parliamentofindia.nic.in/ls/debates/vol9p36a.htm (statement of B.M. Gupte, Representative, Bombay).

As a result of a permissive constitutional regime, India regularly engages in arbitrary detention. The National Security Act, for example, adopts a "subjective satisfaction" standard for determining the necessity of preventive detention, which India's Supreme Court has interpreted as restricting review of habeas corpus petitions to whether the executive followed constitutional and statutory procedure when ordering detention.[312] The UN Human Rights Committee has expressly stated that "court review of the lawfulness of detention . . . is not limited to mere formal compliance of the detention with domestic law"; instead, a full review, including of the substance, must be permitted.[313]

The National Security Act also permits the detention of anyone considered a threat to public order.[314] The judiciary has interpreted the term "public order" so broadly that nearly any ordinary crime can be considered a threat to it,[315] making arbitrary detention all too easy. International law requires governments to apply a proportionality test to ensure that the loss of rights inherent in preventive detention is proportionate to the anticipated harm from the threatened activity. India's judiciary, however, has been reticent to challenge executive determinations of what constitutes public order.[316] As a result, India has preventively detained "muggers, sexual harassers, robbers, bootleggers, blackmarketeers and smugglers, among many others," without any consideration of proportionality.[317]

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312. The only permissible substantive review is whether the detainee can show that the detaining authority failed to apply its mind when issuing the order. If there are no materials to support the order or no rational connection between those materials and the expected harm, a court can revoke a detention order.

313. Shafiq v. Australia, Views, Commc'n No. 1324/2004, ¶ 7.4, U.N. Doc. CCPR/C/88/D/1324/2004, (2006).

314. National Security Act, 1980, No. 65 of 1980, INDIA CODE, art. 3(2).

315. *The National Security Act: Where Is the Proportionality?*, HUM. RTS. FEATURES, Feb. 11, 2011, at 1 [hereinafter *Where is the Proportionality?*], http://www.hrdc.net/sahrdc/hrfeatures/HRF212.pdf ("[P]ersons are held under preventive detention regardless of the gravity of the crimes sought to be prevented or the seriousness of their effects on society.").

316. Kumar v. Delhi Administration (1982) 3 S.C.R. 707, 715 (India) ("Those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires.").

317. *Where is the Proportionality?*, *supra* note 315, at 1–23; *see also* Thongam (Ongbi) Sanatombi Devi v. District Magistrate, (2007) 4 G.L.T. 931, ¶¶ 4, 19 (India) (upholding the detention order of person thought to be "extracting money" and conducting "other illegal activity"); Kumar v. State of Uttar Pradesh (1998) 2 A.W.C. 925, ¶¶ 3, 13 (India) (upholding detention of a person accused of kidnapping for ransom); *Kumar*, 3 S.C.R. at 717–18 (upholding preventive detention of a mugger); Narain v. State of Uttar Pradesh, (1982) (India) Crim. L.J. 1413, ¶¶ 13, 20 (upholding detention order for a *dacoit* (bandit)); *UP Police Slap NSA Against Eve Teasers*, CNN-IBN (May 30, 2009, 9:00 AM), http://ibnlive.in.com/news/up-police-slap-nsa-against-eve-teasers/93733-3.html (describing how three men were detained for making

While India's population all too readily accepted the exchange of liberty rights for greater security, under the concept of sovereignty in the people as espoused here, the international community may refuse to fully grant India the sovereign right to be free from international intervention in its domestic affairs on this issue. Arbitrary detention is a systemic problem resulting in a severe deprivation of the fundamental right to liberty. The restriction on substantive review of detention orders coupled with weak jurisprudence deprives many detainees of an effective remedy for a rights violation and prevents accountability. Viewed in isolation, India's loss of sovereignty can only be partial, and international intervention proportionate to and targeted at the harm caused by preventive detention. In more concrete terms, criticism is likely to be the only appropriate form of intervention, as any other intervention would be likely to cause more harm to Indians than a policy of arbitrary detention.

Civil wars raise a different type of sovereignty analysis, as the issue is what happens when one group within the people violently rejects the government supported by the majority? Sri Lanka provides a particularly horrific example of this issue. Sri Lanka's nearly thirty-year civil war with the LTTE ended in 2009 amidst credible allegations of war crimes and crimes against humanity.[318] The government stands accused of repeatedly and unilaterally declaring no-fire zones, calling all Tamil civilians to take refuge there, and then bombing them.[319] The military allegedly bombed every hospital in the conflict area at least once.[320] The government reportedly underplayed the number of Tamil civilians trapped in the conflict zone to allow it the greatest freedom to attack while avoiding criticism for killing civilians.[321] It also allegedly sought to deprive the LTTE and the civilians under its control of food, medicine, and other essential supplies.[322] Of the 290,000 to 330,000 civilians believed to be in the conflict zone, there are credible estimates that up to 40,000 were killed in the last months of the war.[323] So bad were the

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inappropriate sexual comments to a girl and how proceedings were initiated against three youths for similar activity).

318. *See Executive Summary* to Expert Panel Report, *supra* note 274, at ii (discussing report's framework to "assess[ ] the domestic policy, measures and institutions, which are relevant to the approach to accountability taken by the Government of Sri Lanka"). The Panel also accuses the LTTE of these crimes; however, the LTTE's behavior is not a consideration in determining the sovereign rights of the government. See note 291 for an explanation of why this Article focuses solely on government conduct during the war.

319. See Expert Panel Report, *supra* note 274, ¶¶ 80–89, 100–102, 117–118 (detailing Sri Lanka Army shelling in no-fire zones).

320. *Executive Summary* to Expert Panel Report, *supra* note 274, at ii.

321. *Id.* at ii–iii; Expert Panel Report, *supra* note 274, ¶¶ 124–25.

322. *See* Expert Panel Report, *supra* note 274, ¶ 128 (stating that low estimates resulted in severe shortages of food and medical supplies).

323. *Id.* ¶¶ 133, 137.

violations of international humanitarian and human rights law that the UN Expert Panel that investigated the end of Sri Lanka's civil war concluded: "[T]he conduct of the war represented a grave assault on the entire regime of international law designed to protect individual dignity during both war and peace."[324]

There is little question that the Sri Lankan government was not only the legitimate representative of the majority of the people during its fight against the LTTE, but also that the majority supported its activities.[325] There is also no question that the government not only did not represent the Tamil population, but that it also breached its duties to this minority group sufficiently that the international community should have been forced to fulfill its responsibility to protect.[326] The systematic targeting of civilians in the government-proclaimed no-fly zone and at hospitals during the end of the war certainly would have justified military intervention, along with all other less invasive means of influencing Sri Lanka to protect civilians. Through complicated political games,[327] the Sri Lankan government managed to avoid anything more than criticism of its behavior, so that not only did it fail its minority population, but so did the international community.[328] The fact that the majority supported the government's actions did not legitimize its behavior and would not justify granting the government sovereign rights with respect to

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324. *Executive Summary* to Expert Panel Report, *supra* note 274, at ii.

325. *Summary* to VAUGHN, *supra* note 290.

326. *See Crisis in Sri Lanka*, INT'L COALITION RESP. PROTECT, www.responsibilitytoprotect.org/index.php/crises/crisis-in-sri-lanka (last visited Oct. 18, 2012) (describing the extent of civilian death and ethnic-minority displacement, and expressing disappointment in the lack of international response to the numerous calls for coordinated action).

327. Explanations for why countries refrained from taking any action to fulfill their responsibility to protect range from Sri Lanka being able to exploit the post-9/11 climate to characterize its action as a legitimate part of the war on terror, to fear that if the United Nations or other international NGOs were too openly critical of the government, they would not be able to remain to help the civilians after the war, to a fear of failure as anything short of military intervention was likely to be unsuccessful as Sri Lanka would turn to China, Pakistan, Israel, and others to make up for any cut off of aid or benefits . *See* Expert Panel Report, *supra* note 274, ¶ 56 (discussing diplomatic efforts to get support as part of the "war on terror" and to increase collaboration with India); INT'L CRISIS GRP., ASIA REP. NO. 206, INDIA AND SRI LANKA AFTER THE LTTE 14 (2011) ("Global shifts in economic and political power have allowed Sri Lanka not only to play China off against India but also to turn to others—such as Pakistan, Iran and Libya—for support."); Jason Burke, *Sri Lanka Unlikely To Face War Crimes Investigation*, GUARDIAN (Apr. 26, 2011, 6:09 AM), http://www.guardian.co.uk/world/2011/apr/26/un-sri-lanka-possible-war-crimes (stating that "Sri Lanka's allies, particularly China and Russia, consistently protected the government" against criticism regarding war crimes and civilian casualties, and that China and Russia "are now likely to block any moves to continue investigations").

328. *See* INT'L CRISIS GRP., ASIA REP. NO. 191, WAR CRIMES IN SRI LANKA 29–30 (2010) ("UN agencies in Sri Lanka allowed themselves to be bullied by the government and accepted a reduced role in protecting civilians . . . .").

the Tamil community, although it was entitled to those rights with respect to the Sinhalese population. Popular support for extreme violations of the human rights of minorities does not justify them or restrict international intervention into domestic affairs.

3. Liberal Democracies

Liberal democracies also can face challenges to their entitlement to claim sovereign rights for the same reasons as illiberal democracies. Liberal democracies are associated with free and fair elections, protection for and promotion of the rule of law, protection for basic human rights, and neutrality toward the determination of the common good.[329] Despite these promising characteristics, they can violate the two criteria for retaining sovereign rights when the will of the people, exercised by a majority of the population, supports the violation of sovereign duties toward some members of the political community.[330] Picking up the discussion from Part III, democracies risk creating a tyranny of the majority that excludes minority groups from meaningful representation in the determination of the will and common good of the people. Liberal democracies that suppress or oppress their minority groups run afoul of both requirements for retaining their sovereign rights.

France's current ban on the *burqa*—traditional Muslim clothing consisting of a loose robe that also veils a woman's face—illustrates this point. The ban violates France's duty to protect the rights to freedom of expression, association, religion, equality, and equal protection of the law of Muslim women who are prevented from expressing their religious identity and from making personal decisions on how to dress.[331] The ban has been justified on three grounds: (1) religious neutrality, (2) protection of Muslim women from patriarchy, and (3) security. None of these justifications can withstand closer scrutiny, highlighting the French government's violation of its duties to Muslim women.

Laicite is the French term for secularism that forms official policy to achieve religious neutrality, including through the removal

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329. Roger I. Zakheim, Note, *Israel in the Human Rights Era: Finding a Moral Justification for the Jewish State*, 36 N.Y.U. J. INT'L L. & POL. 1005, 1011 (2004) (citations omitted).

330. *See* WEINERT, *supra* note 118, at 193 (citation omitted) ("I argue against majority-based conceptions of democracy . . . . Democracy, to be coherent, must be predicated on an objective valuation of human life and dignity, a valuation, moreover, armed with an equally objective core of democratic goods.").

331. Much of the argument here was first made in *Reining in France's Ethnocentrism*, HUM. RTS. FEATURES, June 1, 2011, http://www.hrdc.net/sahrdc/hrfeatures/HRF215.pdf, a document that the author helped draft.

of religious symbols from public spaces.[332] The *burqa* ban is part of this policy that effectively hides any appearance of difference among its citizens,[333] which includes restrictions on women wearing headscarves at citizenship naturalization ceremonies or in public schools.[334] The larger driving force behind the ban, however, appears to be the belief that the government needs to protect Muslim women from the patriarchal control of their families. Then-President Nicolas Sarkozy asserted that "[t]he burqa is not a religious sign, it is a sign of the subjugation, of the submission of women. I want to say solemnly that it will not be welcome on our territory."[335] He characterized the policy, which became law, as protecting women's freedom and dignity.[336] In doing so, he assumed that Muslim women do not choose how to dress for themselves. He effectively replaced what he considered religious patriarchy with the patriarchy of the state. As a last effort to justify its discrimination against Muslim women, the government claims that the *burqa* hinders security efforts as it could permit a terrorist to hide in plain sight.[337] This motivation is highly suspect given that no similar ban has been required for beards, baggy clothes, or a motorcycle helmet, which could have the same effect.[338]

Read together, these "justifications suggest either that women cannot or should not be allowed to make decisions for themselves on something as personal as how to dress in public or that Muslim women who wear a *burqa* are particularly dangerous."[339] Bans on Muslim women's dress have been perceived as "reinforce[ing] the problem of discrimination or exclusion of Muslim women generally in everyday life."[340] There reportedly have been incidents of ordinary

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332. *See* Maurice Barbier, *Pour une Définition de la Laïcité Française* [*Towards a Definition of French Secularism*], 134 DÉBAT 129 (2005) (Fr.), *translated at* http://www.diplomatie.gouv.fr/fr/IMG/pdf/0205-Barbier-GB.pdf (Gregory Elliott, trans.) (stating that the main focus of secularism is "the exclusion of religion from the public sphere" and stressing the importance of a new law restricting religious symbols in schools).

333. *Reining in France's Ethnocentrism*, *supra* note 331, at 1–2.

334. Comm. on the Elimination of Racial Discrimination, 1675th Mtg., at 10, U.N. Doc. CERD/C/SR.1675 (Feb. 28, 2005).

335. Estelle Shirbon, *Sarkozy Says Burqas Have No Place in France*, REUTERS (June 22, 2009, 12:07 PM), http://www.reuters.com/article/2009/06/22/us-france-sarkozy-burqas-idUSTRE55L2YV20090622.

336. *Id.*

337. *See* Catherine Strawn, *French Parliament Debates Burqa Ban*, ASSOCIATED PRESS (July 8, 2009), http://www.thefrisky.com/2009-07-08/french-parliament-debates-burqa-ban/ ("[T]he veils threaten security . . . because they conceal the wearer's identity.").

338. *Reining in France's Ethnocentrism*, *supra* note 331, at 2.

339. *Id.*

340. European Comm. Against Racism and Intolerance [ECRI], *ECRI Rep. on France (Fourth Monitoring Cycle)*, ¶ 89, U.N. Doc. CRI(2010)16 (June 15, 2010), *available at* http://www.unhcr.org/refworld/docid/4c1873142.html.

citizens attempting to pull veils off women and bus drivers and shop owners refusing the patronage of veiled women.[341] As one Muslim woman articulated:

> My quality of life has seriously deteriorated since the ban. In my head, I have to prepare for war every time I step outside . . . . The politicians claimed they were liberating us; what they've done is to exclude us from the social sphere. Before this law, I never asked myself whether I'd be able to make it to a cafe or collect documents from a town hall. One politician in favour of the ban said niqabs were "walking prisons". Well, that's exactly where we've been stuck by this law.[342]

As this description of the impact of the *burqa* ban shows, the French government has lost its legitimacy on the issue of religious freedom and equality in the eyes of the target population of the law. On this issue, it also has failed to meet the duties required to access the sovereign right to be free from international intervention in domestic affairs. The bigger question is whether the rights violations pass the threshold test to justify international intervention as described in Part III.C. The violation of Muslim women's rights is certainly systemic and the harm caused is severe, as these women are increasingly isolated and at times physically attacked. Thus intervention is likely appropriate but would need to target the particular area of rights violations. The intervention would likely be restricted to criticism because most other options could not be limited effectively to target only the particular harm caused by the *burqa* ban and the outcome would not be proportionate with France's loss of sovereign rights. This approach provides retroactive justification for U.S. President Barack Obama's criticism of the ban in which he stated: "[I]t is important for Western countries to avoid impeding Muslim citizens from practicing religion as they see fit—for instance, by dictating what clothes a Muslim woman should wear. We cannot disguise hostility towards any religion behind the pretence of liberalism."[343]

Part IV.A's discussion highlights that while democracy currently helps determine the legitimacy of a government and democratic rights form part of its duties to the sovereign people, being a democracy will not always protect the people or its elected representative from the loss of sovereign rights. Illiberal and liberal democracies alike can run afoul of the two conditions required for

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341. Angelique Chrisafis, *France's Burqa Ban: Women Are 'Effectively Under House Arrest,'* GUARDIAN (Sept. 19, 2011, 4:00 PM), http://www.guardian.co.uk/world/2011/sep/19/battle-for-the-burqa.

342. *Id.* (quoting an Afghan French woman who has experienced overt discrimination) (first level of internal quotation marks omitted).

343. Barack Obama, President, Remarks at Cairo University (June 4, 2009), *available at* http://www.usnews.com/news/obama/articles/2009/06/04/president-obamas-speech-to-the-muslim-world-at-cairo-university.

entitlement to sovereign rights, even when the state's actions conform to the will of the people and their vision for the common good. While the people never lose their sovereign identity, they cannot deprive themselves or others of fundamental rights; nor can they use their electoral power to deprive a minority group of its rights. The people are allowed to make choices that appear to be against their interests when exercising sovereignty in the people, but they cannot use their sovereign power in violation of the purposes of sovereignty in the people.

V. CONCLUSION

Sovereignty is difficult to define, subject to numerous challenges and qualifiers, and provokes open and widespread debate. Treating sovereignty as a system for organizing domestic and international politics to protect the security and common good of the individuals who form a political community allows this Article to side-step much of the unnecessary contentiousness of the topic while responding pragmatically to governmental attempts to shield human rights abuses from international rebuke by hiding behind sovereign rights. For some, the concept of sovereignty has grown obsolete or is inappropriate as a result of global interdependence, continuing strife around the world, and the expectation that states will accord greater respect to human rights and humanitarian norms at the expense of sovereign rights. Pragmatically, sovereignty remains the international community's basis for determining whether and when to intervene to stop human rights abuses in another country. For this reason, sovereignty continues to be a relevant concept in the effort to protect human rights.

Governments that attempt to use sovereign rights to tell the international community to "mind its own business" when committing domestic abuses misunderstand who is entitled to claim these rights. Sovereignty lies with the people, as proclaimed by most state constitutions and as protected by international law, including possibly customary international law. Sovereignty in the people means that the people are entitled to receive the benefits of sovereign rights, not the government. The people may choose to authorize a government as their representative, passing sovereign authority and rights to it. The government, however, may exercise those rights only on behalf of the people—never at their expense.

A government must meet two conditions to claim entitlement to sovereign rights: (1) it must be legitimate and (2) it must fulfill its duties as sovereign representative. A government retains legitimacy if the people support it and it fairly represents the will and common good of all the people, not just the majority. Only if a government receives this internal legitimacy should foreign states provide it with

external legitimacy and support. A government also is required to fulfill its democratic and human rights-based duties to retain its sovereign authority. Strong debates over the definition of fundamental human rights complicates the determination of those duties, which are likely to be subject to claims of cultural imperialism and paternalism. Customary law, nonderogable rights, the doctrine of responsibility to protect, international criminal law, and state constitutions, at this stage, are the easiest sources for avoiding these complaints but create only a narrow and conservative list of rights that form part of the government's sovereign duties. The rights described as duties in Part III.B.2 require further development to account for the concerns of all the world's people and not just those of the developed countries or of governments working to retain their power.

A government that fails to meet the legitimacy requirement or fulfill its sovereign duties by committing systematic human rights violations with impunity loses some or all of its sovereign rights. The amount of sovereignty lost is proportionate to the severity of the human rights abuses. Once some or all sovereignty is lost, foreign states are permitted to intervene on behalf of the people to help them reclaim sovereign authority from their abusive governments. Intervention bolsters sovereignty as long as it is undertaken on behalf of the people with their consent, is proportionate to the amount of sovereignty lost, and does more good than harm to the people.

This leads to the two most contentious points of this Article, which are the logical conclusions to sovereignty in the people: (1) a government can lose sovereign entitlements for violations of human rights that do not rise to the level of mass atrocities, and (2) like all other forms of government, democratic governments risk losing their sovereign rights for failure to meet the two conditions of sovereign authority. The first point is contentious because governments as well as historically disadvantaged political communities fear that revoking sovereign rights for anything less than mass atrocities allows for unfettered interference in their states. The determination of when a government loses some or all of its sovereignty and when and to what extent a government can intervene, as advocated here, is based on standards of fairness and proportionality consistent with current international practice. This Article's conception of sovereignty in the people justifies current government practice; it does not supplant it.[344] It further explains how current practices, when implemented

344. *See generally* Council of the European Union (EU) No. 15114/05 of 2 Dec. 2005, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy (explaining the European Union's practices and procedures regarding the implementation of sanctions).

under strict proportionality requirements, do not violate sovereignty.[345]

Democratic governments are likely to protest this Article's second conclusion, arguing that elected governments always reflect the will of the people and therefore retain the authority to claim sovereign rights. Free and fair elections, however, do not guarantee that a government will meet the legitimacy requirement or fulfill its duties to the people. The government must act in accordance with the will of the people and their vision of the common good once elections are completed. This requirement is much more complex than it first appears because the will and common good must be informed by the needs and interests of all the people and not simply the majority. Minority groups must have a voice in this determination or democracy will oppress them, negating legitimacy and causing the government to fail at its duties at least with respect to some portion of the population. This does not mean the people cannot act against their own best interests; instead, they cannot act in violation of sovereign duties when attempting to claim sovereign rights. The people are not permitted to do what the government cannot do.

Sovereignty in the people conceptually ensures the people always remain the government's source of power and that sovereign authority, representation, and rights are always exercised on behalf of the people. More problematic is turning this concept into consistent practice.

345. *But see, e.g.*, Cohan, *supra* note 17, at 954 ("Humanitarian intervention is a clear intrusion into the offending state [sic] sovereignty, for it not only seeks to impose top-down standards that may abrogate a state [sic] domestic policies, but it also may entail military occupation or even a regime change.").

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