

INTERNATIONAL LAW, INTERNATIONAL RELATIONS THEORY, AND PREEMPTIVE WAR: THE VITALITY OF SOVEREIGN EQUALITY TODAY

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I

INTRODUCTION

The norm of sovereign equality in international law is so resolutely canonical¹ that its precise meaning, origins, and justifications are rarely examined.² Whatever the general merits of the norm, its retention seems fairly open to question when one sovereign state appears supremely unequal among 191 sovereign states³ in terms of mili-

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1. Article 2(1) of the United Nations (U.N.) Charter is the most famous present codification of sovereign equality: “The Organization is based on the principle of the sovereign equality of all its Members.” U.N. CHARTER art. 2, para. 1.

2. Although the subject of sovereignty has attracted much recent discussion, the concept of sovereign equality has been understudied. There are some notable exceptions. See EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920); P.H. KOIJMANS, *THE DOCTRINE OF THE LEGAL EQUALITY OF STATES: AN INQUIRY INTO THE FOUNDATIONS OF INTERNATIONAL LAW* (1964); P.J. Baker, *The Doctrine of Legal Equality of States*, 4 BRIT. Y.B. INT’L L. 1 (1923-24); Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT’L L. 599 (1998). More recently, the topic of sovereign equality has been raised in a characteristically thoughtful editorial comment by Professor Vagts on the subject of “hegemonic international law.” See Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT’L L. 843, 844-45 (2001). The “Janus-faced” features of hegemonic international law were skillfully dissected by Professor Alvarez with respect to its manifestation in U.N. Security Council actions. See Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 874 (2003). Neither comment, however, seriously explored the origin of, and justifications for, the sovereign equality norm itself.

3. The number is based on membership in the U.N., which currently stands at 191 nations. UNITED NATIONS, *GROWTH IN UNITED NATIONS MEMBERSHIP, 1945-2004*, at <http://www.un.org/Overview/growth.htm>. With the accession to membership in 2002 of Switzerland, the paradigmatic “permanently neutral state,” U.N. membership seems an accurate measure of the number of sovereign states in the world, with acknowledgement that the number does not include a couple of politically charged cases (e.g., Taiwan or a Palestinian state), which are beyond the scope of this Article. As the website notes, there were only fifty-one member states when the original U.N. Charter was signed in 1945. *Id.*

tary power. The value of the norm under this condition is particularly dubious from the supreme state's point of view.

This Article will attempt the "hard" case of a theoretical defense of the norm of sovereign equality from the supreme state's perspective and, harder still, defend it within the context of the state's use of force in preemptive self-defense. If a defense of the norm can be made when the supreme state's self-preservation is at stake, then it is hard to see how any case can be made against it. For the purposes of this Article, I will assume that the United States of America is a "supreme state" in the narrow sense of its capacity for the exercise of military force in international affairs today.⁴

Defending sovereign equality even in theory is more difficult than one would expect because arguments based on history or the inherent value of the norm are not so persuasive. But a defense can be made successfully on pragmatic grounds relating to the nature of the principal threat to the present supreme state—the use of weapons of mass destruction by non-state terrorist groups against civilian populations. From the perspective of the United States as supreme state, sovereign equality is justified because it enables the maximally effective response to this type of threat.

This Article proceeds in three parts. The first sets forth definitions and the Article's scope. The second part describes the late eighteenth-century origins of the norm of sovereign equality, and the standard but ultimately unsatisfactory normative justifications for it. The third part argues that sovereign equality is nonetheless justified by supreme state pragmatism with respect to its self-defense.

II

DEFINITIONS AND SCOPE

Sovereign equality is the concept that every sovereign state possesses the same legal rights as any other sovereign state at international law. The package of sovereign rights includes the rights to recognize and be recognized by other sovereign states, to send and receive embassies, to make treaties with other states, to join international organizations like the United Nations (U.N.) as full members,⁵ and to litigate in the In-

4. The assumption of American supremacy or unipolarity appears open to question as this Article goes to press in late 2004. American dominance in terms of economic or "soft" power has long seemed debatable, but even as to "hard" power, the postwar insurgency in Iraq has revealed the limitations of conventional military power in achieving United States security objectives in the twenty-first century. For candid assessments of the presumption of American supremacy and its accompanying dangers, see *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* (Michael Byers & Georg Nolte, eds. 2003); *MICHAEL HIRSCH, AT WAR WITH OURSELVES: WHY AMERICA IS SQUANDERING ITS CHANCE TO BUILD A BETTER WORLD* (2003); *CLYDE PRESTOWITZ, ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS* (2003).

5. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 201 & cmts. a, e, h (1987) (defining a state as, among other things, an entity with the capacity to engage in international relations with other states).

ternational Court of Justice.⁶ This Article is not concerned with sovereign equality as to peacetime rights;⁷ rather, its subject is sovereign equality in the right to make war.

Under the U.N. Charter ordaining the post-World War II international legal framework for the sovereign right to wage war, each of the 191 sovereign states has an equal right to make war for one of two reasons. First, a state may wage war in “individual or collective self-defense if an armed attack occurs[.]”⁸ Second, a state may wage war if the U.N. Security Council determines “the existence of any threat to the peace, breach of the peace, or act of aggression”⁹ and authorizes war as “necessary to maintain or restore international peace and security.”¹⁰

This Article asks the following question: If one state has disproportionately more military power than all others, why should international law not recognize this imbalance of power by suspending the sovereign equality norm as to the supreme state’s right to wage war in preemptive self-defense, but keeping the old, more restrictive rule for the use of force by all other states and in all non-military contexts?¹¹ A significant precedent for relaxing sovereign equality in the military realm lies in the U.N. Charter itself. The Charter’s prescribed process for Security Council authorizations of military force require not a majority vote of all 191 member states, but rather the affirmative votes of only nine Council members, absent a veto by one of the five permanent members (China, France, Great Britain, Russia, and the United States).¹² The 182 other sovereign states can only wage war for self-defense or on the direction of nine members of the Security Council should they authorize war. This prior suspension of sovereign equality was premised on an approximation of the balance of military power

6. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 34, para. 1 (“Only states may be parties in cases before the Court.”).

7. Traces of sovereign inequality are detectable in international legal regimes notwithstanding the general norm of sovereign equality. There are only five permanent members of the Security Council of the United Nations with veto power, and non-permanent members are selected according to material support of the U.N., U.N. CHARTER arts. 23, 27. Voting rights at the International Monetary Fund and the World Bank are similarly calibrated to privilege powerful states. See Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, arts. 12(5)(a)-(b), 2 U.N.T.S. 39, 86, amended by 726 U.N.T.S. 266; Articles of the Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, art. 5(3)(a), 2 U.N.T.S. 39, 162, amended by 606 U.N.T.S. 294. The manifestations of sovereign inequality are also evident in customary international law, in which the requirements of state practice and even *opinio juris* are most likely to be met by the conduct of only the most powerful sovereign states, which have the most “practice” in world affairs. See Michael Byers, *Introduction: Power, Obligation and Customary International Law*, 11 DUKE J. COMP. & INT’L L. 81, 83-87 (2001); Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT’L L. 89, 107-08 (2001). In addition to these exceptions to legal sovereign equality at the top, the original U.N. Charter envisioned a category of non-self-governing territories beneath the level of equal sovereign states, to be managed by trusteeships of U.N. members. See U.N. CHARTER arts. 73-91. The category has largely vanished as membership has been extended to virtually all political entities, including those that the Charter’s framers might have considered subjects for trusteeship in 1945. See U.N. CHARTER art. 78 (“The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.”).

8. U.N. CHARTER art. 51. The right of self-defense has a sunset provision: “until the Security Council has taken measures necessary to maintain international peace and security.”

9. U.N. CHARTER art. 39.

10. U.N. CHARTER art. 42.

11. In issue areas such as trade relations, the power of the United States is not as dominant as in the conventional military sphere. See Vagts, *supra* note 2, at 845.

12. See U.N. CHARTER art. 27.

among the victorious allied nations in 1945; why shouldn't a similar recalibration be done in 2004, in light of the overwhelming military power of one supreme state?

In asking the question, I am theorizing about what international law ought to be given a particular set of facts (the military supremacy of one state) and the purpose we envision for international law (governing the right to wage war). In light of this theoretical focus, how the contemplated modification might be effected as a formal legal matter is unimportant.¹³ In other words, this Article is purposefully "constructivist" in presuming that the norm of sovereign equality can be re-imagined with a unique exception for the supreme state's right to wage war in preemptive self-defense.¹⁴ The only question, then, is whether it should be. The answer necessarily turns on the reasons for creating the norm and the values it presently serves.

III

SOVEREIGN EQUALITY'S ORIGINS AND JUSTIFICATIONS

A. The Historical Basis for Sovereign Equality

The norm of sovereign equality at international law was adopted and universalized by late eighteenth-century international legal theorists with a specific normative agenda.¹⁵ The most prominent of these was Emmerich de Vattel, a Swiss philosopher with enormous influence on intellectuals and policymakers of the Enlightenment period. In 1758 Vattel famously declared:

A dwarf is as much a man as a giant; a small republic is as much a sovereign state as the most powerful kingdom. From a necessary consequence of this equality, what is permitted to one nation is permitted to all[,] and what is not permitted to one is not permitted to any other.¹⁶

13. One way would be to do nothing to the formal legal framework: if the supreme state acts in preemptive self-defense, one could simply construe the U.N. Charter's Article 51 self-defense exception to allow it as a matter of custom. The problem with this move is that in light of the preexisting sovereign equality norm, all sovereign states might believe themselves entitled to the more robust right to war, and this would lead to more frequent preemptive attacks and an increasingly unstable world order. It seems, then, that a better way would be to draft a formal amendment to make clear that what is going on is a limited exception to the sovereign equality norm for the supreme state alone. In the present context, this could be done in one of two ways: (1) by amending Article 51 to authorize "individual or self-defense if an armed attack occurs . . . which, in the case of the United States only, may include the preemptive, proportionate use of military force"; or (2) by amending Article 27(3) setting forth the relevant Security Council voting rule (nine of fifteen yeas; no veto by the permanent five) to provide something like "provided, however, that the Council will authorize the United States to take proportional action in preemptive self-defense on a simple majority vote."

14. See Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INTERNATIONAL ORGANIZATION 391 (1992). Professor Wendt's article deploys constructivism to question the conception of an anarchic world-system of unitary states ultimately reliant on self-help in the absence of a central coercive authority. His theoretical approach is equally hospitable to the argument that the world might be characterized by a replacement conception of a two-tier hierarchy (the supreme state in one tier and all other states in the lower tier) rather than a cooperative society of sovereign equals.

15. The descriptive condition of rough equality among Western European sovereign powers originated earlier, with the Peace of Westphalia in 1648.

16. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 52-53 (Northampton, Mass., Simeon Butler, 4th Am. ed. 1820) (1758) (Preliminaries, §§ 18-19). See also STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 14 (1999) ("The concept of the equality of states was introduced into international law by Vattel[.].").

The specific terms of Vattel's analogy to human equality, "a small republic is as much a sovereign state as the most powerful kingdom," underscored an important but neglected normative point central to his project. In a world in which the most powerful states were monarchies,¹⁷ an indefeasible norm of sovereign equality would have a distinctive view in favor of republican states. As a general matter, republics were not only less populous, smaller, and younger than the powerful monarchies in Great Britain, France, and Spain; most republics, like Holland and the United States, were former provinces or colonies to which some of those monarchs had colorable claims of legal title. For this reason, Vattel was particularly attractive to the American founding generation¹⁸ who eagerly embraced his vision of sovereign equality in their self-professed project of constructing, in James Madison's words, a "compound" or "extended" republic.¹⁹

Vattel had a preference for republican states because, first, as a personal matter, Vattel was a citizen of Neufchatel, formally a principality under the King of Prussia but a part of the thriving Swiss confederation of republics.²⁰ Second, as a normative matter, it followed from Vattel's premise—"that men form a political society, and submit to laws solely for their own advantage and safety"²¹—that the republican form of government was best for safeguarding individual rights, although the choice of that form was solely up to the constituent population.²² A third justification for republican states was proposed by another, more famous late eighteenth-century Enlightenment thinker. Immanuel Kant articulated an international relations theory validating the republican form of government in hypothesizing that a proliferation of republics would

17. The most powerful Western European monarchy in 1758 was France, then under the ineffectual rule of Louis XV of the House of Bourbon. His defeat in the Seven Years' War in 1763 signaled the ascendancy of Great Britain as the preeminent Western European power. To be sure, Britain was also a monarchy, but its constitutional system in which Parliament was supreme was viewed by Enlightenment thinkers like Vattel as preferable to the aristocracy-dominated rule of France under Louis XV. Consider this telling comparison:

The English furnish us with an example . . . highly worthy of attention. . . . The nobles and the representatives of the people form a band of confidence between the monarch and the nation, and concur with him in every thing that concerns the public welfare; ease him in part of the burden of government; confirm his power, and render him an obedience the more perfect, as it is voluntary. Every good citizen sees the strength of the state is really the welfare of all, and not that of a single person. . . .

There is another nation illustrious by its valour and its victories. It has a multitude of nobility distinguished by their bravery; its dominions which are of vast extent might render it respectable throughout all Europe, and in a short time it might be in a most flourishing situation. But its constitution opposes this, and the attachment of the nobles to the constitution is such, that there is no room to expect a proper remedy will ever be applied.

VATTEL, *supra* note 16, at 63-64 (Book I, § 24).

18. I have elsewhere discussed the profound impact of Vattel on the American founders. See Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1061-66 (2002).

19. See THE FEDERALIST NO. 51, at 351, 353 (James Madison) (Jacob E. Cooke, ed. 1961).

20. See VATTEL, *supra* note 16, at 59 (Book I, §9). Neufchatel's legal relationship to the Prussian monarchy was the likely reason why Vattel was careful not to criticize or impeach the legitimacy of the monarchical form of government in a direct way.

21. *Id.* at 69 (Book I, §39).

22. "We may conclude . . . that if there arises any dispute in a state on the fundamental laws, the public administration, or on the prerogatives of the different powers of which it is composed, it is the business of the nation alone, to judge and determine them in conformity to its political constitution." *Id.* (Book I, §36).

ensure “perpetual peace” in the world.²³ Both the individual right-enforcement and peacekeeping visions of the republic were premised on the belief that where citizens participate in government, they act to protect their own rights, specifically in choosing when it is worth risking their lives.

Thus, Vattel’s statement that “a small republic is as much a sovereign state as the most powerful kingdom” was a statement with potential revolutionary overtones. The kings of other nations would be naturally inclined to stamp out republics for fear that their example might lead to republican movements within their borders. Sovereign equality was a powerful counter-norm to this natural instinct, providing newly formed republics the breathing space to incubate in a world largely populated by monarchies.

State autonomy, or the norm of domestic non-intervention,²⁴ was an important corollary to Vattel’s conception of sovereign equality in the service of republican preservation. A republican state in which a foreign sovereign decides the domestic scope of individual peacetime rights and when to go to war would not protect the interests of its citizens. Without a norm of non-intervention, the republic might become form without substance. At the same time, a facially neutral norm of non-intervention would protect republics by reassuring monarchies fearing republican influence in their domestic realms.

A second, subterranean corollary of Vattel’s project to build up sovereign equality as a bulwark for fledgling republics was the sublimation of individual rights at the international level, particularly as against one’s own state. Prior to the late eighteenth century, international law had loosely recognized the *lex mercatoria*—a body of law governing interactions among individuals engaged in commerce on the international plane.²⁵ Vattel and international legal theorists who followed him tended to submerge the *lex mercatoria* and enshrine in its place the axiom that only the sovereign state has rights or duties under international law.²⁶ A key move in this endeavor was the mercantilist proposition that “[t]he goods even of the individuals in their totality ought to be considered as the goods of the nation, in regard to other states.”²⁷ Thus, in lieu of direct individual rights at international law, Vattel and similarly-minded Enlightenment thinkers substituted the doctrine of espousal— an aggrieved individual’s only

23. See IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS 112-15 (Ted Humphrey, trans., Hackett Publ’n Co. 1983) (1795); see also Lee, *supra* note 18, at 1035-37.

24. See VATTEL, *supra* note 16, at 69 (Book I, §37) (“If any intrude into the domestic affairs of another nation, and attempt to influence its deliberations, they do it an injury.”).

25. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 264 (1765) (“[T]he affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of.”).

26. See, e.g., WHEATON’S ELEMENTS OF INTERNATIONAL LAW 34 (5th English ed. 1916) (“[T]he subjects of international law are, properly speaking, only States,— for they alone are vested with international personality.”).

27. Vattel’s presumption of a lack of direct individual rights at international law is evident from the following illustrative passage: “Whoever uses a citizen ill, indirectly offends the state, which ought to protect this citizen, and his sovereign should revenge the injuries, punish the aggressor, and if possible, oblige him to make entire satisfaction; since otherwise the citizen would not obtain the great end of the civil association, which is safety.” VATTEL, *supra* note 16, at 225 (Book II, §81) (emphasis added).

right of recourse for an international transgression was to get his sovereign to “espouse” his claim and assert it on the international level.²⁸

Vattel’s pro-republican sovereign equality project moved him to sublimate preexisting notions of individual rights at international law for three reasons. First, if the proper “subjects” of international law included sub-state individual actors in some contexts, then international law was not the elegant and compelling concept of rules governing relations within a small, civilized society of equal, irreducible, and autonomous sovereign states. Second, beyond the aesthetic appeal of a purely state-based regime of international law, if individuals were believed to have direct rights against foreign individuals as the *lex mercatoria* presumed, adjudication of such rights would likely occur on terms set by the most powerful states (France and Britain in the late eighteenth century), and thus to the detriment of smaller republics. It is no coincidence that the *lex mercatoria* itself originated in the context of the Roman imperial world order. Third, if international law were to recognize direct individual rights against other states or against one’s own state (*e.g.*, for violations of fundamental political rights), there would logically be more cause for controversies among states, most importantly for the cause of republican government in a monarchical state.

If, as I have surmised, the norm of sovereign equality was itself invented to ensure the propagation of republican states and ultimately the republican goals of individual rights and collective peace, then what value does it retain at international law in a world in which a republican state is the supreme state? In theory, such a state should assert republican values on a global scale as a matter of self-interest,²⁹ both to protect individual rights of domestic sanctity as a universal matter and to foster perpetual peace. To the extent the supreme state does not share these (or other) desired goals, the international lawyer, setting aside self-interest in an autonomous professional discipline, should not object to abandoning sovereign equality, but rather should work to influence domestic preferences in the supreme state to promote his or her vision of international law’s projects. The norm of sovereign equality might now impede, not assist (as intended), such projects of the supreme republican state by protecting non-republican governments. If history, then, offers no enduring reason for sovereign equality and indeed may supply a reason to abandon it in the circumstance in which a supreme state is republican in form, we must turn to other normative justifications.

B. Normative Justifications for Sovereign Equality

In this regard, three possible defenses of the equality of sovereign rights at international law come readily to mind: (1) the analogy to human equality; (2) the value of system stability; and (3) the process value of multilateralism, which can be divided into sub-goals of democracy and accuracy.

28. *Id.* at 222 (Book II, §71).

29. Classical Athens is a useful historical analogy. Athens sought to promote throughout its empire its democratic form of government, often in the face of oligarchic regimes. *See, e.g.*, RUSSELL MEIGGS, *THE ATHENIAN EMPIRE* 208-216, 405 (1972); THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 402 (Rex Warner, trans., 1954) (*circa* 400 B.C.). *Id.* app. I at 610 (“Above all, Athens intervened to impose or support democratic governments (though a few oligarchies were tolerated, notably in Chios, as well as tribal chieftainships in non-Greek communities).”).

1. Human Equality

To understand the power of the human analogy that Vattel invoked, consider the ease with which “state” may be substituted for “person” in the following standard formulation of the equality norm: Equality means that each person (state) is an autonomous actor and therefore entitled to the same fundamental rights as any other person (state), and to interfere with or undermine another person’s (state’s) autonomy is to undermine that equality. Indeed, in Richard Tuck’s view, the analogy came into existence the other way around. Tuck argues that Thomas Hobbes theorized the autonomous person in the state of nature who consents to the Leviathan based on his study and observation of city- and nation-state behavior in ancient Greece and contemporaneous Europe.³⁰

Nonetheless, it *should* matter whether the subject of equality is the individual or the sovereign state. Equality works as a norm for people because we believe that human beings are equal in a fundamental way that deserves legal and moral recognition. By contrast, the sovereign state is only a human artifact—a juridical, not a natural, person, and the value of sovereign equality must be found in something other than intrinsic human worth. This is especially true given that sovereign equality is in direct tension with human equality and its underlying affirmation of the equal worth of individuals, since states will necessarily have vastly differing numbers of persons.

If the direct analogy to human equality is inapt, perhaps equality of sovereign rights can be defended on the basis of the right of human beings to join together in forming autonomous sovereign communities. There are, however, two problems with this justification. On the one hand, the foundation stories of most sovereign states bear little resemblance to the ideal of persons voluntarily banding together to form a community that ought to be accorded recognition in international law. More commonly than not, state formation is the result of historical accidents—royal marriages and births, Viking wanderlust, decolonization along boundaries set by formal colonial powers, victories or defeats in wars, or, at a universal level of cynical abstraction, campaigns by elites to organize and control coercive power within territories and thereby to extort from everyone else.³¹

On the other hand, international law has been notably ambivalent about the principle of national self-determination, which is the purest form of the “community” justification for the legal equality of sovereign states. The principle’s high-water mark was reached in 1974, when the U.N. General Assembly adopted by consensus a Definition of Aggression resolution.³² Article 7 of the Definition indicated that foreign support for wars of self-determination was a lawful reason to go to war and therefore not “aggression”:

30. RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 8-9 (1999) (“The international arena, seen in this light, is thus a near-perfect example of the operation of the fundamental principles of the natural rights theorists[.]”).

31. See Charles Tilly, *War Making and State Making as Organized Crime*, in *BRINGING THE STATE BACK IN* 169-86 (Peter B. Evans et al. eds., 1985) (analogizing war-making and state-making to organized crime).

32. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/9619 (1974) *revised by* U.N. Doc. A/9619/Corr. 1 (1974).

Nothing in this Definition . . . could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right . . . particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter³³

The doctrine of self-determination has been suppressed since the end of the Cold War because it now poses a threat to allies and trading partners, not enemies and fading colonial powers. For example, in an important symposium of prominent international law scholars on the 1999 NATO intervention in Kosovo, everyone chose to frame the issue in terms of humanitarian intervention without prior sanction by the U.N. Security Council, not in terms of external assistance to a war of Kosovar Albanian self-determination.³⁴ A colorable argument could have been made that intervention against Serbian forces in Kosovo did not implicate “the threat or use of force against the territorial integrity or political independence of any state”³⁵ prohibited in Article 2(4) of the U.N. Charter because the Kosovar Albanians had been promised (albeit vaguely) their own state under the former Yugoslavia. Serbia’s “territorial integrity or political independence”³⁶ was therefore not threatened, and NATO, upon Kosovar Albanian pleas for help, did not need U.N. Security Council pre-authorization for its intervention, at least according to the terms of the U.N. Charter interpreted with the gloss of the General Assembly’s 1974 definition of Aggression.

But an unrestrained commitment to the self-determination principle risks constant war in a world of many ethnic groups and nationalities whose homes do not line up neatly with the borders of existing sovereign states. For example, the reason for not framing the intervention in Kosovo as a war of self-determination is obvious in light of its ramifications for neighboring Russia, troubled by its own conflicts with restless ethnic groups. It seems, then, that the community justification for sovereign equality is both inapt, given the circumstances of state formation, and imprudent, given the potential for worldwide instability that would result from privileging the self-determination principle.

2. Stability in the World Order

What about the value of stability itself? The claim here would be that a world in which all 191 sovereign states are recognized as entitled to an equal right to wage war under international law is more likely to be a world without war than a world in which one or some states are recognized as having a greater legal right to war than others.

Such a claim that stability benefits arise from sovereign equality is similarly belied by history and theory. As a historical matter, the U.N. Charter’s legal regime for U.N.-authorized warmaking privileges the votes of nine members of the U.N. Security Council and particularly its five permanent members. This indicates that the U.N.’s

33. *Id.* at 12-13.

34. See Jonathan I. Charney et al., *Editorial Comments: NATO’s Kosovo Intervention*, 93 AM. J. INT’L L. 824, 824-862 (1999)

35. U.N. CHARTER art. 2, para. 4.

36. *Id.*

founding generation thought stability would be served, not disserved, by pronounced sovereign inequality with respect to decisions to wage world war.

But even as a theoretical matter, it is difficult to see how a norm of equal right to wage war can skew toward peace the warmaking calculus of powerful states in a world of material inequality lacking centralized governance. In such a world, there is no way to enforce sovereign equality against the most powerful states should they perceive it in their self-interests to exercise their rights to wage war in a manner not authorized by existing law. The United States invasion of Iraq in 2003 is a case in point. Of course, the United States made legal arguments to justify the war, but many considered those arguments to be specious, and, more importantly, international institutions could not provide meaningful sanctions even if the United States had not posed an international legal argument. In other words, in the absence of a credible, coercive enforcement authority, it is impossible to say that any stability benefit is a function of the norm of sovereign equality as opposed to material circumstances such as the balance of power.

To understand how difficult it is to prove that stability results from sovereign equality *per se* and not a system-level structural variable like the balance of power among the most powerful states, consider a counterfactual world of 191 states with material equality in addition to an equal right to wage war in the absence of a centralized governance institution. This would be an extremely unstable world with epidemic wars resulting from the multiple, overlapping threats posed by each state against each other. Indeed, the empirical record seems to support the neorealist hypothesis that structural bipolarity in the world balance is more stable than multipolarity: the Cold War produced no major-power direct conflicts by contrast to the prior centuries of multipolar balances.³⁷ This notwithstanding that multipolarity represents a greater degree of material equality in the world order and therefore a closer approximation of the norm of sovereign equality.

3. The Values of Multilateralism

Human equality and world-system stability thus appear unpersuasive as normative justifications for sovereign equality in the right to wage war. Harder to dismiss in the presence of other powerful (if not supreme) states is the proposition that revoking sovereign equality will diminish multilateral participation in the determination of international outcomes of interest to the supreme state and the world at large. The specific argument in the warmaking context is that absent the norm of sovereign equality, other states will lack any right to influence or limit the supreme state's decision whether to exercise its special right to wage war. The resultant unilateral determinations will not only be undemocratic; they stand a greater risk of inaccuracy. While the supreme state will still be able to enforce its norms and desired outcomes, over the long term there may be greater enforcement costs when other sovereign states are denied the satisfaction of input (a sovereign democracy deficit), and inaccurate de-

37. See KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 192 (1979) ("International politics is necessarily a small-number system. The advantages of having a few more great powers [are] at best slight. We have found instead that the advantages of subtracting a few and arriving at two are decisive.").

cisions to wage war may degrade the supreme state's power by putting it to less-than-efficient uses.

In response to the sovereign democracy argument, it is worthwhile to point out at the start that meaningful participation by other sovereign states is possible even without formal legal equality. The influence in the United Nations of non-permanent members of the Security Council like Germany and Japan is illustrative. In international politics, some measure of informal power will continue to be wielded by those with material power, regardless of formal legal inequality. And, as a general matter, the value of democracy as among sovereign states, not persons, suffers from the same poverty of justification as the value of equality when the subject is a state and not a person.

Of all the theorized justifications for sovereign equality, the pragmatic argument that recognizing the supreme state's special right to wage war unilaterally creates a greater risk of inaccurate, inefficient outcomes without the input of other states seems the most persuasive. The term "inefficient outcomes" denotes supreme state action that diminishes rather than maintains or increases the supreme state's own power as well as world order and wealth. Of course, as stated earlier, it may be the case that other states with significant power will still have influence over supreme state actions even without legal sovereign equality. But it seems fair to say that the supreme state will take advantage of its greater freedom of action once the sovereign equality norm is relaxed. The example that comes readily to mind today is, once again, the United States' 2003 decision to wage war in Iraq, partly in preemptive defense of its own perceived self-security over the objection of other leading sovereign states.

At the same time, in the specific realm of self-defense, any pragmatic efficiency benefit from a sovereign equality norm-enforced consideration of other states' opinions depends on the supreme state's incapacity for obtaining the information necessary to make an accurate judgment on its own and the extent to which its security interests are shared by other states. It is reasonable to assume that a supreme state will expend considerable resources to gather intelligence regarding threats to its security. If the supreme state, by virtue of its supremacy in military power and associated threat-assessment intelligence capabilities, can obtain perfect information, it does not need input from other states. And even if the supreme state has imperfect information, it is questionable what value might be added by incorporating the intelligence of other states if the supreme state has unique security interests. At bottom, then, the efficiency benefits of the sovereign equality norm are persuasive in theory, but with respect to the supreme state's security interests, they will necessarily depend on the transparency and uniqueness of the threats it faces.

IV

PREEMPTIVE WAR AND THE SUPREME (REPUBLICAN) STATE

Let us consider, then, the theoretical ramifications of a special rule at international law permitting the supreme state, and the supreme state alone, to make war for preemptive self-defense.³⁸

The touchstone of a preemptive justification for war is a staple premise of modern international relations (IR) theory. That premise is uncertainty about others' intentions. In IR jargon, this uncertainty is commonly called the "security dilemma,"³⁹ which is nothing more than "fear" of death. In a nutshell, the idea is that when it comes to self-defense, a nation will typically presume the worst of intentions on the part of its enemies, because the cost of guessing wrong is the nation's own survival. In Thomas Hobbes's memorable and foundational articulation: "though there had never been any time, wherein particular men were in a condition of warre one against another; yet, in all times, Kings, and Persons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another . . ."⁴⁰

Preemptive war as a policy outcome, then, might best be characterized as a subjectively reasonable recourse to war in anticipatory⁴¹ self-defense. All IR theorists agree that the security dilemma pertains as a descriptive matter today, but they debate its severity and the prospects for mitigation through international institutions and norms. Some, called constructivists, think the security dilemma can be cured altogether; others think it can be substantially reduced by international institutions; realists are skeptical of even that.⁴²

38. For background literature on the laws of war, see generally STANIMIR A. ALEXANDROV, *SELF-DEFENCE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* (1996); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (1988); THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2000); HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* (1992); MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977). For recent discussions of the laws governing preemptive war and the United States' 2003 war in Iraq, see *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553 (2003); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173 (2004). For a fascinating account of the problem of preemptive war throughout the history of Western thought, see Tuck, *supra* note 30, at 18-31.

39. See ROBERT JERVIS, *PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS* 66, 75-76 (1976); Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POLITICS 167, 169-70 (1978).

40. THOMAS HOBBS, *LEVIATHAN* 90 (Richard Tuck ed., 1996) (1651).

41. Some international lawyers place importance on the difference between wars or attacks of preemptive as opposed to anticipatory self-defense. The distinction is immaterial as to the discussion based on the concept of the security dilemma.

42. For background discussions of modern IR theory as applied to international law and national security, see generally *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* (Robert J. Beck et al. eds., 1996); *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter J. Katzenstein, ed., 1996).

A. International Law and the Security Dilemma

International law can be understood as one form of international institution.⁴³ Stephen Krasner uses the term “international regime” to signify what I mean by “international institution” in this functional usage. He defines “regimes” as “sets of implicit or explicit principles, norms, rules, and decisionmaking procedures around which actors’ expectations converge in a given area of international relations.”⁴⁴ Realists (whom I analyze here as the hard case) therefore dismiss a causal role for international law in security affairs⁴⁵—it cannot ameliorate the security dilemma, or affect or condition a state’s military behavior in any significant way. Dean Acheson put it this way, in dismissing the need to articulate a legal justification for U.S. actions during the Cuban missile crisis:

The power, position, and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. . . . The survival of states is not a matter of law.⁴⁶

And yet the laws of war⁴⁷ exist. Even more, the most powerful states often invoke them.⁴⁸ A realist could explain the apparent paradox—that something called the laws of war exist and great powers profess to honor them even though they cannot constrain state behavior when survival is concerned—in one of two ways.

First, what we call the “laws of war,” a realist might say, simply reflects principles consistent with rational state action under the security dilemma. Any preemptive war based on a subjectively reasonable perception of threat is a lawful war. A war is unlawful and thus an act of aggression—not preemption—only when, from the perspective of the attacking state, there is no reasonable threat to national security posed by the target state. Few wars would be unlawful under this standard,⁴⁹ as even a slight fluctuation in relative power vis-à-vis an enemy might plausibly be perceived as a threat to a state’s security in the realist view of the world. Immanuel Kant, in rejecting a narrow doctrine of self-defense limited to imminent attack, justified a right of preemption whenever a state was threatened:

[A threat] includes another state’s being the first to undertake preparations, upon which is based the right of prevention (*jus praeventionis*), or even just the menacing increase in an-

43. See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as International Variables*, in INTERNATIONAL REGIMES 168 (Stephen D. Krasner, ed., 1983).

44. *Id.*

45. Such a realist might nonetheless see a role for international institutions in non-core areas such as economic, social, or cultural interactions across nations.

46. Dean Acheson, Remarks at the Proceedings of the American Society of International Law, 57th Annual Meeting 13-15 (1963), in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 108 (Robert J. Beck et al. eds., 1996).

47. I am here, and in subsequent references to the laws of war, talking principally about *jus ad bellum*, or the laws pertaining to the decision to wage war.

48. See THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 3 (1990) (addressing the question why powerful nations obey international rules).

49. This is not to say that all wars would be legal. Nazi Germany’s prosecution of the Second World War, for which its leaders were convicted of Crimes against Peace by the Nuremberg Tribunals, might be viewed as a case when a war of aggression might not meet even the standard of a subjectively reasonable perception of threat from the attacked country or countries.

other state's power (by its acquisition of territory) (*potentia tremenda*). This is a wrong to the lesser power merely by the condition of the superior power, before any deed on its part, and in the state of nature an attack by the lesser power is indeed legitimate.⁵⁰

A different approach would be to recognize that what others call the "laws of war" forbids some state behavior that the security dilemma compels. Such laws are not laws in a sanctionable sense given the absence of a coercive authority to enforce them.⁵¹ If those laws are contrary to a state's own interest, they can be breached without real consequence. To the extent the laws forbid preemptive war by a stronger enemy, a rational state would invoke them instrumentally, not necessarily because of a good-faith belief in the force of law but to deter the other state's resort to force. For instance, Iraq under Saddam Hussein might have invoked a rule against preemptive war to deter invasion by the United States rather than because of any intrinsic commitment to international law. States might thus rationally create or accede to laws of war even on a realist theory, given the lack of consequence for breach and the possibility of their instrumental use to deter war by enemies.

The first approach adopts a positivist approach to defining the international laws governing war. The resultant laws would be minimal, affording great latitude to preemptive war in self-defense, restrained only by the condition of a subjectively reasonable perception of threat. It is arguably plausible to read the existing U.N. Charter provisions on the international use of armed force in this fashion.⁵² Under this reading, the second U.S. war in Iraq, to the extent that it was based on a preemption rationale, might be viewed as lawful under international law.⁵³ I will go no further with this approach, since it compels the conclusion that supreme state action is lawful without the need for relaxing the norm of sovereign equality.

The second approach, though more restrictive of preemptive war and perhaps more faithful to the intent and meaning of the U.N. Charter, creates a compliance gap.⁵⁴ That is to say, something is called "law" despite the likelihood that it will be violated by an "illegal" act and despite the fact that nothing can be done to punish the wrongdoer. Should the illegal act occur and go unpunished, the project of international law would be undermined because all subjects would learn the lesson that breaking the rule carries no adverse consequences, so the rule would not be honored in

50. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 116 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797).

51. For this reason, a realist would dismiss any such laws proscribing the use of force in international affairs as causally insignificant normative aspirations.

52. Article 2(4) provides: "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." U.N. CHARTER art. 2, para. 4. Article 51 provides in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." U.N. CHARTER art. 51. The argument would be that the "armed attack" trigger enumerated in Article 51 was based on traditional, conventional state-based threats envisioned in 1945 and therefore not necessarily responsive to the present circumstance of state or non-state actors with nuclear-weapons capability and the intent to use it in a covert manner against unprotected civilian populations.

53. This is a minority view among international lawyers and scholars. See *Agora: Future Implications of the Iraq Conflict*, *supra* note 38; Murphy, *supra* note 38.

54. See FRANCK, *supra* note 48, at 3 (discussing the lack of coercive power to enforce international rules).

the future. Moreover, international law as a general matter would lose some of its obligatory character.

The international lawyer, as lawmaker, is thus confronted with a choice. Should he or she (1) shift to the minimalist definition of law and deem the act lawful should it occur; (2) call the act unlawful and stick to the preexisting rule, given the likelihood that it will become a dead letter;⁵⁵ or (3) call the act unlawful but modify the rule just enough to fit the facts to ensure that the act will be lawful in the future?

B. The Law of Preemptive War and the Supreme State

So far, this Article has discussed the law and theory of preemptive war in a multipolar setting. A sensible way to shift discussion to a presumptively unipolar world is to go back to the discussion of the second, less positivist approach to defining the laws of war—that is, to call an act of war unlawful and stick to the preexisting rule. Imagine now, however, that the actor performing the “illegal” act is the supreme state. Again, the problem after the act has been committed inheres in the likelihood that other state actors will violate the particular law in the future⁵⁶ and lose respect for laws in general. But in theory that will not happen if we reject the sovereign-equality norm and insert as a substitute the norm that the ordinary rules do not apply to the supreme state in this instance.

Other questions, however, arise. If the United States is the most powerful state by far, why does it need a robust authorization of preemptive war? Shouldn't other states be so afraid of American power that they will never contemplate attacking the United States? Even if they do, wouldn't it be a foregone conclusion that the United States could respond with a devastating reprisal and would win the war in the end? If so, then why have a special rule for the supreme state affording it a broader right to wage preemptive war?

1. Historical Precedents

History gives a useful clue to answering these questions. The leading theorists and lawyers of historical empires—Thucydides, Cicero, and the Chinese philosophers—concluded that a supreme state could justly wage preemptive war for a wide range of reasons including glory and honor. And the subject of attack was by definition a weaker state. Their common intuition was that any perturbation in world peace and the relative balance of power, however minor, affects the supreme state—or historically speaking, the empire—in a significant way. By definition, the empire's interest was not mere survival in the form of traditional notions of protecting its territory

55. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 492 (2001) (urging steadfast adherence in the face of pressure from imperial pressure).

56. See, e.g., Amy Waldman, *India Pressed on Kashmir Attacks*, N.Y. TIMES, Apr. 9, 2003, at A6 (“At first glance, the argument is seductive: if America can strike out at a suspected sponsor of terrorism and hugely destructive weapons thousands of miles away, why can't India hit out at one next door? As India sees it, its neighbor Pakistan is a nuclear-armed state that is backing anti-Indian terrorism in Kashmir. . . . India's external affairs minister, Yaswant Sinha . . . said India had a 'better case' for a preemptive strike against Pakistan than America did against Iraq.”).

and political independence, which were the sole interests of lesser states. Rather, the empire's interest was in the systemic perpetuation of the *status quo* in which it was supreme. The glory and honor of the supreme state were especially significant in this regard, as other states were likely to perceive in the empire's failure to punish an affront to honor a sign of incipient weakness and, accordingly, begin to conceive of the possibility of resistance and revolution.⁵⁷

But at the same time, the historical theorists of empire grounded the broad grant of unilateral action on the role of key domestic institutions to ensure that the supreme state accurately assessed threats to its unique and robust security interest. The problem with acknowledging that a supreme state might attack preemptively on the basis of a subjectively reasonable belief of threat, particularly reputational threats, was that those with the domestic power to decide might over-determine the danger posed to the state *qua* state. The heart of the problem, then, was that the inherent subjectivity of threat assessment given the existence of the security dilemma introduced significant discretion for policymakers entrusted with threat determinations. It seemed desirable to seek ways to cabin such discretion while retaining and increasing the possibility of accurate assessments.

Modern mainstream IR theorists, in their quest for theoretical rigor, tend to "black-box" the state. That is, they refrain from investigating the process by which domestic preferences are translated into a sovereign state's actions on the international plane.⁵⁸ Thus, for instance, a neorealist IR theorist would conclude that a dictator waging a war based on his perception of subjective risk to his state's security is functionally indistinguishable from a war resulting from threat determination by a republican government.

Traditional theorists of international relations were not so myopic or interested in theoretical parsimony.⁵⁹ Accordingly, they were very concerned with the puzzle of domestic threat determinations and theorized workarounds to cabin concomitant discretion. For the ancient Chinese, the domestic checking function was performed by the metaphysical concept of the Mandate of Heaven: heaven would punish with downfall the emperor who waged unjust war.⁶⁰ For Cicero, it was the senate of republican Rome. Hence, he made a crucial distinction between waging war for republican glory,

57. See, e.g., THUCYDIDES, *supra* note 29, at 402 ("[I]t is not so much your hostility that injures us, it is rather the case that, if we were on friendly terms with you, our subjects would regard that as a sign of weakness in us, whereas your hatred is evidence of our power.").

58. An exception to this trend is "liberal" IR theory, which assigns causal preeminence to domestic political variables, notwithstanding associated difficulties in parsimonious theorizing. See, e.g., Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 530-33 (1997).

59. By "traditional" I would include twentieth century political scientists affiliated with the realist approach before the onset of structural or "neo" realism. See, e.g., EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1939); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1978); KENNETH N. WALTZ, *MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS* (1954); ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* (1962).

60. HERRLEE G. CREEL, *THE ORIGINS OF STATECRAFT IN CHINA* 81-100 (1970); BENJAMIN I. SCHWARTZ, *THE WORLD OF THOUGHT IN ANCIENT CHINA* 47, 110-11 (1985).

which was just, and war for an emperor or dictator's personal glory, which was unjust.⁶¹

Kant had a similar intuition in *Perpetual Peace*. A prince, as one individual, was at risk of waging war for personal reasons unrelated to the greater and legitimate glory of the state. The decisional body in a republican state, as an institution composed of those who would actually fight the war—or fathers, brothers, friends, or representatives, of those who would fight—would be more circumspect about threats to the state *qua* state.

If (as must inevitably be the case, given [the republican] form of constitution) the consent of the citizenry is required in order to determine whether or not there will be war, it is natural that they consider all its calamities before committing themselves to so risky a game. (Among these are doing the fighting themselves, paying the costs of war from their own resources, having to repair at great sacrifice the war's devastation, and, finally, the ultimate evil that would make peace itself better, never being able—because of new and constant wars—to expunge the burden of debt.) By contrast, under a nonrepublican constitution, where subjects are not citizens, the easiest thing in the world to do is to declare war. Here the ruler is not a fellow citizen, but the nation's owner, and war does not affect his table, his hunt, his places of pleasure, his court festivals, and so on. Thus, he can decide to go to war for the most meaningless of reasons, as if it were a kind of pleasure party, and he can blithely leave its justification (which decency requires) to his diplomatic corps, who are always prepared for such exercises.⁶²

2. Preemptive War and the Supreme State Today

How is this history lesson applicable today? Usefully abstracted, the lesson is that there is nothing wrong with the proposition that a supreme state should have, at least in theory, a robust authorization to use unilateral preemptive force. Although security in the sense of survival alone is not a concern, the supreme state has broader, systemic interests for which it would and should seek to engage in war. The more robust authorization, however, should come with domestic institutional safeguards to make sure that the more robust supreme power is wielded in response to the correct threats.

But there are two countervailing pragmatic concerns to consider before concluding that what appears normatively defensible in theory—a new, unique rule permitting the United States to wage preemptive war on the basis of rogue state or non-state nuclear-weapons threats—should be adopted in practice. The first arises from the potential for “bleed-over” justifications of non-supreme state preemptive wars. Given the preexisting condition of formal sovereign equality, it may be difficult for other states to accept the norm of formal hierarchy, even as to the subject of war in which the supreme state possesses overwhelming force. Another state might thus wage war under a spacious theory of preemption by citing (erroneously under the hierarchy proposition) a U.S. case as precedent. The supreme state might have the power to enforce the more restrictive all-others rule, and it may be that others will not break it after they witness enforcement in one case, but this would entail significant costs in practice uncomprehended by theory.

61. See TUCK, *supra* note 30, at 18-24.

62. KANT, *supra* note 23, at 113.

To be sure, the present international legal regime on war already recognizes a hierarchical, albeit multilateral rather than unilateral, accommodation of material power. Nine states, including the five permanent members of the U.N. Security Council that were victorious great powers in 1945, can authorize a use of military force. This very fact, however, stands as an additional practical impediment to a shift to a unilateral rule. Our attitudes and international institutions have been premised on this prior application of the power-differentiation principle with a multilateral result, and a recalibration according to present power realities would be particularly unattractive and resisted by the four other permanent members who would lose most from a modification of the prior rule in favor of the supreme state. But although the bleed-over issue is certainly the more pressing practical concern, it is less of an impediment in a constructivist theoretical Article such as this which presumes that norms of sovereign equality and hierarchy are created and subject to modification.

The second problem, which relates to the potential for U.S. domestic institutions to perform the crucial threat-assessment function mandated by supreme-state preemption, seems more compelling as a matter of theory. The United States simply cannot establish on its own the requisite domestic safeguards for accurate threat evaluation, given the nature of its relevant political institutions and the principal security threat it faces. In other words, there is no good way, even in theory, to guarantee that the supreme state's robust right to preemption will be exercised accurately and efficiently if exercised unilaterally under present circumstances.

The United States today, as the supreme state, faces two different though related, sorts of threats. One threat it no longer faces is that of a state-based military alliance with power of perceived rough equivalence. Rather, the principal *state*-based threat is posed by rogue states like Iran and North Korea with vastly asymmetrical conventional military power, but non-negligible nuclear or potential nuclear capabilities⁶³ that would enable them to attack key U.S. interests at home and abroad.⁶⁴ Such attacks would never result in victory, but the scope of devastation worked by the detonation of a nuclear weapon would be so severe that the threat is a concededly significant one, even to a supreme state. But such overt state-based threats should in theory be effectively deterred by the prospect of crushing reprisal by the supreme state, which can identify and respond to the state actor who launched the attack.

The much greater threat is covert, and it comes in the form of non-state-based actors like terrorist groups that might obtain nuclear weapons and detonate them within the United States or places of great importance to its interests. Rogue states may clandestinely assist such groups, most notably by providing them with nuclear weapons materials, and they would be subject to direct reprisal by the United States if such assistance is detected. But the diffuse, non-state character of this covert threat significantly degrades the capacity of reprisal to deter.

63. At present, biological and chemical weapons have not developed to a level of devastative potential to merit aggregation, notwithstanding the current penchant for the collective term of "weapons of mass destruction."

64. Great-power residual states with nuclear capabilities, to the extent they are incorporated into a U.S. based world-system, no longer pose grave threats.

In terms of domestic institutions, a state's ability to obtain useful intelligence to prevent and address security threats, even a supreme state's, depends on the transparency of the threat to its security. During the Cold War era of superpower bipolarity, the intelligence task was simplified by the state-based nature of the balance of power. What counted were the intentions and arms capabilities of another defined state actor and its allies. The receding residual threat posed by the traditional nuclear-power states like Russia and China, and the threat presented by potential nuclear rogue states, are similarly easier to assess, track, and deter.

But to the extent that the principal threat to the United States today comes in the form of clandestine non-state actors possessing unverifiable weapons of mass destruction, the threat assessment task is far more difficult. Complication inheres not only in the covert and diffuse nature of the non-state threat, but also in the impediments to secrecy and efficient prosecution of covert threats posed by foundational American democratic institutions like individual rights against state intrusions, intelligence and military oversight by a leak-prone and politicized Congress, and the free press. Moreover, that the non-state threat is directed to civilians at home rather than military forces abroad as a more traditional threat to national security would be, raises the possibility that even if its domestic institutions functioned properly, the people of a republican supreme state would systematically overstate the seriousness of the threat. Accordingly, the risk of inaccurate assessments and resultant erroneous decisions to wage war is high, despite the supreme state's wildly asymmetric possession of intelligence capabilities and military power.

Multilateralism is a useful means to address the threat assessment gap, and sovereign equality is a very useful means of enabling maximally effective multilateralism. In this sense, multilateral consent to the supreme state's exercise of force in a preemptive self-defense case would not be required for legality *per se* (or out of a respect for sovereign equality), but as a filter to ensure accuracy in threat perception. The concurrence of the United States' closest allies, for instance, the United Kingdom, Australia, and Japan, would appear particularly valuable in serving this function, as they are the countries with which the United States is most likely to share its most confidential intelligence and therefore the states from which it can expect the most useful objective assessment of all pertinent intelligence. Objectivity might be particularly enhanced when those closest allies—all of which are liberal democracies—are led by political leaders of parties ideologically diverse from the administration in power in the United States.⁶⁵ Moreover, as the United States' closest allies, they are likely to be targets of the same non-state groups that threaten America, so they necessarily would have common interest in addressing the threat. Other useful allies for intelligence purposes would be those proximate to rogue states, or those whose populations share language skills, faiths, or other social ties with likely non-state terrorist actors, such as Indonesia, Pakistan, and Saudi Arabia.

65. The case of Tony Blair's support for the Bush administration's war in Iraq is a powerful rejoinder in fact to a hypothesis that seems highly plausible in theory.

To be sure, such multilateral input might be obtained without formal sovereign equality; but preservation of formal equality might, at the margins, increase the willingness of states essential to intelligence collection to help. Simultaneously and more generally, reinforcing the concept that all sovereign states have equal responsibilities and rights would preserve the sovereign state institution as a focal point to marshal cooperation and distribute rewards to those who help and to dole out retribution to those who aid the covert threat. The twin premises underlying this proposition are: (1) that other sovereign states will be incrementally more inclined to help if they perceive themselves as equals under law rather than inferiors, and (2) that non-state threat groups, despite their atomized status, will generally need support from state institutions at some level. Because it is impossible to conceive of a coherent principle by which the supreme state might designate a preferred formal status for these two subsets of states rather than for all states in the world, it seems advisable to stick with the existing norm of sovereign equality for all. The benefit to threat assessment by this system may be very small, but given the stakes—the potential nuclear destruction of an American city—it should suffice to tip the balance against the case for abandoning the sovereign equality norm.

V

CONCLUSION

The bedrock concept of sovereign equality neither fits nor suits the present world order. From the supreme state's point of view, however, sovereign equality is justified in the context of the preemptive use of force because it enables the supreme state to effectively measure the most serious threat it faces. And if the norm is justified when the self-preservation of the supreme state is in jeopardy, then it is difficult to see how any case can be made against it. That is the thesis of this brief Article. The supreme state should act as if it were more *primus inter pares* than king.

Most scholarship in the disciplines of IR theory and international law is historically contingent in the sense of being premised on a world system that appears to have persisted as a descriptive matter since at least the mid-seventeenth century. Based on this premise, people over the centuries have developed settled expectations about what international law should look like and what international relations theory should explain. Thus, when we think of international law, we typically think of decisions or resolutions adopted by international institutions (in which sovereign states are equal members), treaties among equal states, and customary international law as established by the consensual practice of all states.

These presumptions are fairly challenged today, and when one turns to the possible normative justifications for sovereign equality, he or she would find a surprisingly tepid defense in theory. Rights equality for all sovereign states cannot be grounded in human equality, nor in the value of world stability, nor even in the normative value of multilateralism.

In theory, then, if it is true that sovereign equality should no longer be a privileged norm, there can be no effective objection to the proposition that international law does not and ought not constrain supreme-state resort to preemptive war, even as it restricts

such resort by lesser states in a unipolar world. What supreme states—the great empires of antiquity—have historically done is a different matter. Although their formal articulations of universal or international law on the matter were generally permissive, these states developed methods of domestic structural restraint as checks against erroneous decisions to go to war—false wars, so to speak. The normative case for a robust right of the supreme state to engage in preemptive war, this Article has argued, was importantly linked to the presence of such domestic institutions.

In this is a valuable lesson for the United States today. To the extent that the principal threat to the security of the United States as supreme state cannot be effectively measured and addressed by domestic institutions, pragmatic and targeted multilateralism is a powerful and effective substitute. And sovereign equality remains a very useful norm in enabling such multilateralism.