

THE NECESSARY EVOLUTION OF SOVEREIGNTY IN THE AGE OF GLOBAL TERROR: A LEGAL OBLIGATION FOR HUMANITARIAN INTERVENTION

A Thesis Presented to The Judge Advocate General's School United States Army in partial satisfaction of the requirements for the Degree of Master of Laws (L.L.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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TERROR: A LEGAL OBLIGATION FOR HUMANITARIAN INTERVENTION**

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I. Introduction

On March 17, 2011, the United Nations (U.N.) Security Council passed Resolution 1973, authorizing member states to take all necessary measures, including armed intervention into the sovereign territory of Libya, in order to protect the civilian population of Libya from the violent acts of its own government.² Security Council Resolution 1973 “reiterate[ed] the responsibility of the Libyan authorities to protect the Libyan population,”³ and “demand[ed] that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians.”⁴ U.N. Secretary General Ban Ki Moon lauded the resolution for “affirm[ing], clearly and unequivocally, the international community’s determination to fulfill its responsibility to protect civilians from violence perpetrated upon them by their own Government.”⁵

A coalition of states under the North Atlantic Treaty Organization (NATO) intervened in Libya pursuant to Security Council Resolution (UNSCR) 1973.⁶ The NATO-led mission officially ended on October 31, 2011, shortly after the deaths of Libyan leader Muammar

² S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (Of the five permanent members, Russia and China abstained from voting; no member of the Security Council, temporary or permanent, voted against the Resolution). United Nations Security Council Meetings Coverage, *Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions* (Mar. 17, 2011), <http://www.un.org/press/en/2011/sc10200.doc.htm>.

³ S.C. Res. 1973, *supra* note 1.

⁴ S.C. Res. 1973, *supra* note 1, at ¶ 3.

⁵ Press Release, Secretary-General, Secretary-General Says Security Council Action on Libya Affirms International Community’s Determination to Protect Civilians from Own Government’s Violence SG/SM/13454-SC/10201-AFR/2144 (Mar. 18, 2011).

⁶ INT’L COALITION FOR THE RESPONSIBILITY TO PROTECT, THE CRISIS IN LIBYA, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya> (last visited Mar. 3, 2015) [hereinafter CRISIS IN LIBYA].

Gaddafi and his son.⁷ The intervention in Libya ended upon regime change, leaving much of the international community skeptical of the motivations for intervention and critical that the coalition had gone far beyond the mandate in UNSCR 1973 to protect the civilian population.⁸ These criticisms spread as the coalition which purported to be acting to protect the civilian population left Libyan citizens on their own with control of Libya in the hands of the various militia and rebel groups which had fought to overthrow the Gaddafi regime.⁹

Just two days prior to the passage of UNSCR 1973, civilian protestors in Syria were beaten, arrested, and forced to disperse by Syrian security forces, igniting a violent conflict in which government airstrikes alone have accounted for more than 4,300 civilian deaths¹⁰ and approximately 9 million citizens—about half the population—have been forced from their homes.¹¹ There has, however, been no vote within the Security Council to consider humanitarian intervention in Syria. Russia and China, two of the five permanent members (P5) on the Security Council, have frustrated any possibility for such a vote by threatening invocation of their veto power.¹²

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ HUMAN RIGHTS WATCH, *DEATH FROM THE SKIES: DELIBERATE AND INDISCRIMINATE AIRSTRIKES ON CIVILIANS 1* (2013).

¹¹ United Nations High Commissioner for Refugees, *United Nations Syria Tops List for Forcibly Displaced after Three Years of Conflict* (Mar. 14, 2014), <http://www.unhcr.org/5321cda59.html>.

¹² See Colum Lynch, *Russia, China Veto U.N. Sanctions Resolution on Syria*, WASHINGTON POST (July 19, 2012), http://www.washingtonpost.com/world/national-security/russia-china-veto-un-sanctions-resolution-on-syria/2012/07/19/gJQAJzsvW_story.html (noting that both countries had exercised their veto power on three occasions to block any manner of sanctions against Syria, largely out of concern that such actions may lead to intervention).

Since 2011, the situations in both countries have deteriorated rapidly and are no longer humanitarian crises limited to their own borders. In the deadliest year of the Syrian conflict to date, 2014 marked the deaths of an estimated 76,000, including nearly 18,000 civilians.¹³ In Libya, despite the apparent initial success of the humanitarian intervention which culminated in an October 23, 2011 declaration of liberation,¹⁴ the country is now in the throes of “full blown civil war.”¹⁵ “Libya represents the most active sanctuary for Salafi-jihadist groups in North Africa, and Syria the most significant safe haven for groups in the Levant.”¹⁶ This paper will draw on the situations in Libya and Syria to demonstrate that the failure of the international community to stage successful humanitarian interventions can set the conditions for countries to become terror safe havens which aid the growing global terror threat.

This paper argues that successful humanitarian intervention is necessary for the ultimate defeat of terrorism. The argument is not that intervention is the sole answer to terrorism, as it does not address the root causes, or the many other aspects of the terror threat. Instead, the proposal is that realizing humanitarian intervention where conditions warrant will deprive terror groups a critical component of what they need to thrive—failed states. Acknowledging

¹³ Alan Johnston, *Syria Conflict: 76,000 Die in Deadliest Year - Activists* BBC NEWS (Jan. 1, 2015, 7:52PM), <http://www.bbc.com/news/world-middle-east-30648181>.

¹⁴ Al Jazeera and Agencies, *NTC Declares 'Liberation of Libya'*, AL JAZEERA (Oct. 24, 2011, 7:08AM), <http://www.aljazeera.com/news/africa/2011/10/201110235316778897.html>.

¹⁵ Agencies, *Libya Ambassador Warns of Looming Civil War*, AL JAZEERA (Aug. 28, 2014, 5:56AM), <http://www.aljazeera.com/news/middleeast/2014/08/un-moves-slap-sanctions-libya-militias-2014827174728230669.html>.

¹⁶ Seth G. Jones, *A Persistent Threat: The Evolution of al Qaeda and Other Salafi Jihadists*, RAND CORPORATION x (2014). The Rand report categorizes a group as a Salafi-jihadist group as one that desires a return to what it believes to be pure Islam and believes that violent jihad is a religious duty. The report focuses on these particular groups because it encompasses those groups that pose the greatest threat to the U.S. and its allies. *Id.* at 2.

that “the realization of [human] rights is constrained by the dominant logic of political interest, which frequently inhibits the altruistic pursuit of humanitarian goals,”¹⁷ the paper avoids typical moral arguments for humanitarian intervention and instead maintains that the current global terror threat aligns humanitarian intervention with the self-interests of all nations.

The examples of Syria and Libya expose the facts, respectively, that the current framework for humanitarian intervention does not guarantee that intervention will commence when necessary, nor does it set conditions for success when intervention is carried-out. Although the responsibility to protect civilians cited in UNSCR 1973 has generated considerable international support,¹⁸ it is not a recognized legal obligation of states, and the only international legal basis for armed intervention into a state for humanitarian purposes is pursuant to Security Council authorization. Even when the Security Council authorizes humanitarian intervention, as seen in Libya, it merely provides international legal justification for any state to intervene as that state so chooses.¹⁹ Under this framework, humanitarian intervention depends wholly on the moral proclivity of states,²⁰ and is subject to the reality that “moral suasion carries little weight when presumed national interests are at stake.”²¹

¹⁷ PAUL BATTERSBY & JOSEPH M. SIRACUSA, *GLOBALIZATION & HUMAN SECURITY* 170 (2009).

¹⁸ *See infra* p. 76.

¹⁹ *See* S.C. Res. 1973, *supra* note 2, at ¶ 4 (“Authorizes Member States . . . to take all necessary measures . . . to protect civilians and civilian populated areas . . . and requests Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization.”).

²⁰ *See, e.g.* BATTERSBY & SIRACUSA, *supra* note 17, at 146 (“Human rights at the international level depend upon a broad acceptance that there is a higher moral authority to the state.”).

²¹ *Id.* at 11.

This paper proposes that a legal obligation is necessary in order to realize viable and consistent humanitarian intervention. Only a humanitarian intervention framework emancipated from the manipulation of perceived individual national interests can prove effective. The Security Council should adopt a resolution which proscribes criteria for intervention which, when satisfied, obligate all U.N. member states to participate in intervention as directed by the U.N. This paper will not propose the specific criteria that should be adopted, or the scope and management of intervention. It will focus exclusively on arguing the necessity for obligatory humanitarian intervention, partially in recognition of the current international support for the responsibility to protect (R2P) concept.

The responsibility to protect referenced in UNSCR 1973 is a concept proposed in a 2001 report published by the International Commission on Intervention and State Sovereignty (ICISS).²² The concept holds that sovereignty entails a responsibility of the sovereign state for the protection of its people, as well as a responsibility of the international community to protect the citizenry, should a state be unwilling or unable to do so—a responsibility which could ultimately justify armed intervention into a sovereign state.²³ Armed intervention is only one small facet of R2P, which also proposes criteria for guiding the decision to intervene, as well as responsibilities to prevent humanitarian abuses, react to them, and rebuild subsequent to any intervention.²⁴ As previously mentioned, although the concept has no legal force, it has certainly met with wide endorsement by the international community. However, even were R2P to become law, the concept serves only as a justification for

²² The Responsibility to Protect, Int'l Comm'n on Intervention & State Sovereignty (2001) [hereinafter Responsibility to Protect].

²³ *Id.* at XI.

²⁴ *See generally Id.*

intervention and carries no obligation, and will consequently remain subject to the same national self-interests which currently serve to derail successful intervention. A legal obligation unsusceptible to the whims of individual states is necessary in order to ensure intervention is realized when necessary and succeeds when undertaken.

Of course, states do not openly cite their lack of moral imperative or state interest when ignoring suffering in Syria or abandoning humanitarian efforts in Libya. Instead, they easily and adeptly cite international law and sovereignty. Humanitarian intervention is often thwarted through reliance on a notion of state sovereignty which is absolute, respected above all other international legal obligations, and understood to be breachable only through Security Council resolution or action in self-defense. “Enduring notions of sovereignty make it difficult for outside countries or international organizations to step in, despite considerable acceptance in recent years of the concept of “responsibility to protect.””²⁵ Russian President Vladimir Putin, for example, justified his country’s opposition to intervention in Syria by citing Syria’s sovereignty and the illegality of the use of force against a sovereign state, absent self-defense or a decision by the Security Council.²⁶ Even UNSCR 1973 “reaffirm[ed] [the Security Council’s] strong commitment to the sovereignty, independence, territorial integrity and national unity” of Libya.²⁷

²⁵ Richard N. Haass, *Foreward* to MATTHEW C. WAXMAN, COUNCIL ON FOREIGN RELATIONS, INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES vii-viii (2009).

²⁶ State News Agency, *Use of Force against Sovereign Nations Unacceptable: Putin*, THE SYRIAN OBSERVER (Sept. 4, 2013), <http://syrianobserver.com/News/News/Use+of+Force+Against+Sovereign+Nations+Unacceptable+Putin>; James Kirkup, *Syria: Russia will Stand by Assad over any U.S. Strikes, Warns Putin*, THE TELEGRAPH (Sept. 6, 2013, 8:03PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10291879/Syria-Russia-will-stand-by-Assad-over-any-US-strikes-warns-Putin.html>.

²⁷ S.C. Res. 1973, *supra* note 2.

In practice, this notion of sovereignty is used by states as another instrument for the furtherance of their own national self-interests. President Putin's statements about legal justification for intervention relying on Security Council authorization are indeed accurate, yet the statements neither comport with his simultaneous efforts to impede the Security Council from considering such action, nor Russia's lack of opposition for intervention in Libya. It is no secret that both China and Russia have long been allies of the Assad regime in Syria.²⁸ Russia's on-going multi-billion dollar arms trade with Syria and the roughly two million Russian voters who work in the industry certainly evidence the Kremlin's interest in preventing intervention in Syria which may upset the status quo.²⁹ Similarly, the NATO states acting in Libya pursuant to UNSCR 1973 clearly evidenced their ultimate desire for regime change rather than just protection of civilians and have therefore met with considerable scrutiny for intervening to further their own national interests.³⁰

The current world order is largely defined by this notion of sovereignty which shields states from international responsibilities when they do not align with the state's interests, but is easily pierced by citing growing humanitarian concerns when intervention may serve the state's interest. This paper therefore argues that an evolution in the way states understand sovereignty is necessary in order to cultivate the environment in which states can accept an obligation for humanitarian intervention. It will become evident that sovereignty was never understood historically to be absolute in the sense that it is largely conceived to be today, and has necessarily evolved throughout history as a critical component of desired new world

²⁸ See Lynch, *supra* note 12.

²⁹ David M. Herszenhorn, *For Syria, Reliant on Russia for Weapons and Food, Old Bonds Run Deep*, N.Y. TIMES (Feb. 18, 2012), http://www.nytimes.com/2012/02/19/world/middleeast/for-russia-and-syria-bonds-are-old-and-deep.html?pagewanted=all&_r=0. Russia's recent loss of considerable Libyan dollars in arms trade as a result of U.N.S.C. action in that country also certainly factored into the calculus. *Id.*

³⁰ THE CRISIS IN LIBYA, *supra* note 6.

orders to address new challenges and recognize new realities. Considering historical crossroads which necessitated an evolution in what it meant to be a sovereign state will demonstrate this reality, and analysis of the current global terror threat will confirm that the world is again at such a crossroads.

The paper will explore first the relevant existing international legal framework and how international law is derived. It will then demonstrate how sovereignty, a keystone in international law, has necessarily evolved over time to comport with new threats and new realities and must again evolve in order to allow for obligatory humanitarian intervention. The paper will then establish that successful humanitarian intervention requires the establishment of a legal obligation. Finally, the argument will turn to the new global terror threat which is in the national interests of all states to address, and demonstrate that humanitarian intervention is necessary to do so effectively.

Syria and Libya represent failures in humanitarian intervention, and how terrorism benefits from these failures. To be sure, there are many other examples available to support each point in this paper and many will be cited throughout. However, the situations in Syria and Libya are persistent cases which continue to deteriorate, serving to escalate the global terror threat. The situations in Syria and Libya will be used throughout this paper to illustrate the futility of the current humanitarian intervention framework, and well as its consequences.

II. The Legal Framework

Humanitarian intervention is commonly understood to refer to some type of armed intervention into another state in response to a humanitarian crisis.³¹ The Center for

³¹ See, e.g., Center for Strategic Studies, *Humanitarian Intervention: Definition and Criteria*, CSS STRATEGIC BRIEFING PAPERS, Vol. 3, Part 1 (June 2000), available at http://www.vuw.ac.nz/css/docs/briefing_papers/Humani.html [hereinafter CSS STRATEGIC BRIEFING PAPERS];

Strategic Studies adopted the NATO definition when it categorized humanitarian intervention as “an armed intervention in another state, without the agreement of that state, to address [the threat of] a humanitarian disaster, in particular caused by grave and large-scale violations of fundamental human rights.”³² However, there exists no universally accepted definition of humanitarian intervention under international law.³³

For the purposes of this paper, intervention refers to armed intervention into another state for the purpose of protecting the human rights of non-combatants. It therefore does not include instances in which a state invites another state into its territory, or actions in self-defense. Importantly, humanitarian intervention also does not mean taking sides in a conflict. Rather, humanitarian intervention means utilizing military force as necessary against those entities which pose a threat to human rights where the government is unable or unwilling to do so.

Though this paper will not focus on the domestic legal basis for intervention, it is important to acknowledge that most state governments would require some domestic basis to utilize its nation’s military, just as international law requires a justification for entering the sovereign territory of another state. For example, the U.S. entry into Afghanistan in 2001 was legally justified domestically by Congress’ passing of an Authorization of the Use of Military Force (AUMF),³⁴ and legitimate under international law pursuant to Security

HASSAN RAHMOUNI, SEARCHING FOR A LEGAL FRAMEWORK FOR HUMANITARIAN INTERVENTION (2006), available at <http://www.hg.org/article.asp?id=4826>.

³² CSS STRATEGIC BRIEFING PAPERS, *supra* note 31, at Vol. 3, Part 1.

³³ RAHMOUNI, *supra* note 31.

³⁴ S.J. Res. 23, 107th Cong. (2001).

Council Resolution.³⁵ The importance for the present purposes is to note that should states become party to an international agreement requiring participation in a humanitarian intervention, as proposed in this paper, domestic approval would likely be achieved through acknowledgement that action is pursuant to fulfillment of an international treaty obligation.³⁶

Under current international law, a state can enter the sovereign territory of another state under arms only with Security Council authorization,³⁷ in self-defense,³⁸ or with the consent of the state. For true humanitarian intervention, self-defense and consent are not factors, so international legal basis is reliant upon Security Council authorization.³⁹ As noted above, R2P is not currently a legal justification for humanitarian intervention, so even when it is cited, as in UNSCR 1973 authorizing intervention in Libya, the actual legal justification was cited as Chapter VII of the U.N. Charter.⁴⁰

However, “[i]n recent decades it has become generally accepted—especially after UN-authorized interventions in Haiti, Somalia, and Bosnia—that widespread atrocities occurring within states pose threats to peace and security warranting Security Council action.”⁴¹

³⁵ S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001).

³⁶ Pursuant to the Supremacy Clause of the U.S. Constitution, for example, treaties that receive the consent of at least two-thirds of the Senate and are ratified by the President become the supreme law of the land. U.S. CONST. art. VI, cl. 2.

³⁷ See U.N. Charter ch. VII

³⁸ *Id.* at art. 51.

³⁹ Although there have been some arguments for legal justification for intervention based on self-defense where a state is unwilling or unable to effectively address a threat within its borders, creating or recognizing such a right for intervention invites the same self-interest critiques as the current unworkable solutions. For a thorough discussion of the unwilling or unable test, see Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT’L L. 483 (2012).

⁴⁰ S.C. Res. 1973, *supra* note 2.

⁴¹ MATTHEW C. WAXMAN, COUNCIL ON FOREIGN RELATIONS, INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES 9 (2009).

Recognizing that humanitarian abuses may lead to threats to international peace, states have at times turned to other justifications for intervention. Some organizations and states have intervened in other states on purported humanitarian grounds without any international legal basis when the Security Council has failed to act; these intervention have in some cases been recognized as legitimate, if not all together legal, after the fact.⁴² The danger of abuse, and potential flouting of other international law, should raise considerable concern in endorsing such a basis for intervention. “Operating in an international gray zone will require tremendous investments or political and diplomatic capital,” as well as gradually establish new norms which serve to erode international law and legitimize future state action free of legal constraint.⁴³ Despite some arguments for a right to intervene, which is how some view the R2P concept, the international community has largely balked at establishing a right for states to intervene in other states, understandably out of fear of abuse in pursuit of self-interest.⁴⁴

A right for individual states to intervene is not the answer, nor is accepting the flouting of international law when the Security Council fails to uphold its charge, as both scenarios are as susceptible to national self-interest as is the current system of obtaining a Security Council resolution for each specific intervention. The only answer that will free consideration of humanitarian intervention from the influence of national self-interests is to create an international binding standard for humanitarian intervention which does not then create a

⁴² See, e.g., *Id.* (citing the NATO intervention in Kosovo in 1999); see also Julian Ku, *Will Japan Embrace the “Illegal but Legitimate” View of the UN Charter’s Limits on the Use of Force?*, *OPINIO JURIS* (Mar. 2, 2015, 1:39 PM), <http://opiniojuris.org/2015/03/02/will-japan-embrace-the-illegal-but-legitimate-view-of-the-un-charters-limits-on-use-of-force/>; BATTERSBY & SIRACUSA, *supra* note 17, at 199.

⁴³ WAXMAN, *supra* note 41, at 26-27.

⁴⁴ *Id.* at 9.

right for a state to intervene, but rather creates an obligation upon the United Nations to intervene. Doing so warrants an understanding of how international law is derived, as well as the current body of human rights law.

A. Sources of International Law

International law refers to the body of rules that govern how nations, or states, interact with one another.⁴⁵ As will be seen in this section, international law is created by states. A state is recognized under international law as an entity which has a permanent population, defined territory, a government, and the capacity to enter into relations with other states.⁴⁶ A territory reaching statehood is then recognized as possessing sovereignty within its borders, legal status, and the authority to develop international law, as well as incurring “enforceable responsibilities of legitimate statehood.”⁴⁷ This section will reveal the important fact that all binding international law is created either explicitly by states or implicitly through the behavior of states.

1. Treaty Law

A treaty, much like a common contract, is an express agreement between the parties in writing, making it legally binding and enforceable upon those parties who agree to it. The *Vienna Convention on the Law of Treaties* provides the rules governing the formation,

⁴⁵ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 101 (1987) [hereinafter RESTATEMENT]; RAHMOUNI, *supra* note 31. It is also important to note that seminal international treaties such as the Rome Statute of the International Criminal Court and the Statute of the International Court of Justice are applicable only to states. See generally The Rome Statute of the Int’l Criminal Court, U.N. Doc. A/CONF (July 17, 1998) [hereinafter Rome Statute]; Statute of the Int’l Court of Justice (Apr. 18, 1946).

⁴⁶ Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097 [hereinafter Montevideo]; RESTATEMENT, *supra* note 45, at § 201.

⁴⁷ LUKE GLANVILLE, SOVEREIGNTY & THE RESPONSIBILITY TO PROTECT 51, 55-56 (2014); see also RESTATEMENT, *supra* note 45, at § 206.

interpretation, and termination of international agreements.⁴⁸ It outlines how states can enter into agreements with one another and agree to be bound by its terms.⁴⁹ The *Vienna Convention* also develops procedures for any manner of dispute arising under treaties, either through submission of the issue to the International Court of Justice (ICJ) or by submitting a request to the U.N. Secretary General for action.⁵⁰ As of this writing, there are 45 signatories⁵¹ and 114 parties⁵² to the Convention.⁵³ Although the U.S. remains a notable signatory rather than a party to the treaty, the U.S. has consistently accepted its terms.⁵⁴

2. Customary International Law

Customary international law is not derived through written agreements, but rather general practice which is accepted as law.⁵⁵ It is law that results from states' adherence to a practice out of a sense of legal obligation, or *opinio juris*.⁵⁶ Adherence to customary international law

⁴⁸ Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331 [Law of Treaties].

⁴⁹ *See generally Id.*

⁵⁰ *Id.*, at art. 66.

⁵¹ A signatory is a state which has signed the treaty, but has not expressed its consent to be bound by it. *See id.* at art. 18 (providing that a state that has signed a treaty is obliged to refrain, in good faith, from acts that would defeat the object and purpose of the treaty, but signature alone does not impose any obligations on the state).

⁵² A party to a treaty is a state which has consented to be bound by the treaty. *Id.* at art. 2.1(g).

⁵³ UNITED NATIONS, https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Dec. 20, 2014).

⁵⁴ U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Dec. 20, 2014) ("The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties").

⁵⁵ Int'l Comm. of the Red Cross, Customary Int'l Humanitarian Law (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm>.

⁵⁶ RESTATEMENT, *supra* note 45, at § 102 (citing the Latin *opinio juris sive necessitates*, a practice undertaken by a state out of a sense of legal obligation).

is binding on all states,⁵⁷ although a state can avoid being bound by such practice through persistent objection to its acceptance as a norm.⁵⁸

In 2005, The International Committee of the Red Cross (ICRC) published a study in which it identified 161 rules of customary international law which are binding on states.⁵⁹ Although the ICRC study provides a valid starting-point for discerning currently accepted customary international law norms, it does not represent a conclusive end-point, as the U.S. has made clear: “[T]he United States is not in a position to accept without further analysis the Study’s conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.”⁶⁰ Customary international law then, like treaty law, is subject to the consent of the would-be governed states. There is, however, one notable exception.

3. *Jus Cogens*

Encompassed within the body of customary international law, *jus cogens* refers to a practice which is so fundamental that states are bound by it, and therefore cannot subvert. The concept is formally recognized and defined in the *Vienna Convention* as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of

⁵⁷ Int’l Comm. of the Red Cross, *supra* note 55.

⁵⁸ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 4 (2014) [hereinafter DESKBOOK].

⁵⁹ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

⁶⁰ JOHN B. BELLINGER, III & WILLIAM J. HAYNES II, GOV’T RESPONSE TO THE INT’L COMM. OF THE RED CROSS STUDY *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, 89 INT’L REV. OF THE RED CROSS 866 (2007).

general international law having the same character.”⁶¹ *Jus cogens* encompasses practices with which states have indirectly agreed to adhere as a result of the persistent and collective acceptance of the practice by other states. This means that states have agreed to comply with these norms regardless of their individual position, out of recognition that the greater community of states requires all states to honor these practices. The formal inclusion and definition of *jus cogens* in the *Vienna Convention* leaves no doubt that a considerable portion of the international community recognizes that there are such norms—those that are binding upon states even without the consent of every state. This fact should be recalled when considering if absolute sovereignty exists.

4. Courts

There are two permanent international courts, but their exercise of jurisdiction also depends upon the state parties to a dispute accepting the court’s jurisdiction, as well as agreeing to be bound by the law in question. International courts are therefore not recognized as having authority to make international law, and are not entirely empowered to enforce it.

The ICJ was created by the United Nations Charter to serve as the organization’s judicial branch,⁶² and its mandate extends to cases brought before it by the parties⁶³ and those matters that are specifically within its jurisdiction pursuant to treaty or the U.N. Charter.⁶⁴ The Court

⁶¹ Law of Treaties, *supra* note 48, at art. 53 (examples include genocide and slavery).

⁶² Statute of the Int’l Court of Justice, *supra* note 45, at art. 1.

⁶³ All U.N. Members are automatically parties to the ICJ. U.N. Charter art. 93.

⁶⁴ Statute of the Int’l Court of Justice, *supra* note 45, at art. 36.

can also issue advisory opinions on legal questions brought before it.⁶⁵ The ICJ's decisions are only binding upon the states which are directly involved in the dispute.⁶⁶

The International Criminal Court (ICC), unlike the ICJ, specifically recognizes *stare decisis*,⁶⁷ making the ICC's interpretation of applicable international law in one case effectively binding on other state parties, or at least those which are subject to its jurisdiction.⁶⁸ The ICC was created in 1998 by the Rome Statute to "exercise jurisdiction over persons for the most serious crimes of international concern."⁶⁹ Those crimes over which the Court has jurisdiction are limited to genocide, crimes against humanity, war crimes, and the crime of aggression.⁷⁰ Like U.S. criminal courts, the ICC is guided by a published set of elements for the crimes over which it has jurisdiction⁷¹ and the trial chamber must be convinced of an accused's guilt beyond a reasonable doubt in order to convict.⁷² State parties agree, amongst other things, to immediately take steps to arrest a person for whom the ICC prosecutor has issued a warrant,⁷³ and to enforce adjudged sentences.⁷⁴

⁶⁵ *Id.* at art. 65.

⁶⁶ *Id.* at art. 59.

⁶⁷ *Stare decisis* is derived from Latin, meaning 'to stand by things decided' and is the "doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1137 (7th ed. 2000).

⁶⁸ Rome Statute, *supra* note 45, at art. 21.2.

⁶⁹ *Id.* at art. 1.

⁷⁰ *Id.* at art. 5.

⁷¹ Elements of Crimes, Int'l Criminal Court (2011), <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

⁷² Rome Statute, *supra* note 45, at art. 66.3.

⁷³ *Id.* at arts. 59, 89.

⁷⁴ *Id.* at art. 103.

Again, the Court’s authority to adjudicate and to hold accountable those responsible for “the most serious crimes of international concern”⁷⁵ extends only so far as states allow.⁷⁶ “[W]ith no provisions for enforcement without the authorization of sovereign governments, like all international legal instruments, the Rome Statute can be ignored by signatory states should they so chose.”⁷⁷ There are 122 parties to the Rome Statute, meaning these states have accepted the Court’s jurisdiction over those crimes, as well as the obligations contained within the statute.⁷⁸ The effectiveness of the Court is substantially stymied, however, but the conspicuous absence of the U.S., Russia, and China—three of the P5—among the parties to the Rome Statute.⁷⁹

⁷⁵ *Id.* at art. 1.

⁷⁶ Jurisdiction of the ICC is limited to those states which become parties to the Rome Statute. For cases brought before the ICC involving one of the previously identified crimes, it may exercise jurisdiction only if the alleged conduct occurred within the territory of a state which is a party to the Statute, or the state of which the accused is a national is a party to the Statute. *Id.* at art. 12. Of further note is the inadmissibility of cases which are or have been investigated by a state with jurisdiction, regardless if the state actually pursues prosecution. *Id.* at art. 17.

⁷⁷ BATTERSBY & SIRACUSA, *supra* note 17, at 172.

⁷⁸ THE INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Dec. 20, 2014).

⁷⁹ The U.S. has, however, sent mixed-signals largely dependent upon who occupies the presidency. In 2002, the Bush administration was able to pass the American Servicemembers’ Protection Act (ASPA), which explicitly prohibits funding of or cooperation with the ICC. American Servicemembers’ Protection Act of 2002, 22 U.S.C. § 7401(a)-(b) (2002). Yet, during the Obama administration the U.S. has shared intelligence with the ICC and has supported ICC action with regard to Libya. Caitlyn Lambert, *The Evolving US Policy Towards the ICC*, INT’L JUSTICE PROJECT (Mar. 6, 2014), <http://www.internationaljusticeproject.com/the-evolving-us-policy-towards-the-icc/>. In addition, both the House and the Senate have introduced legislation that would refer Syrian President Bashar al-Assad to answer for his crimes before the ICC. H.R. Res. 229, 113th Cong. (as referred to House Comm. on Foreign Relations, May 21, 2013); S. Res. 219, 113th Cong. (as referred to Comm. on Foreign Relations, Sep. 9, 2013). A 2011 study also found that 70% of Americans polled supported U.S. participation in the ICC. WORLD PUBLIC OPINION.ORG, *Review of Polling Finds Int’l and American Support for World Order Based on Int’l Law*, *Stringer UN* (Dec. 15, 2011), available at http://worldpublicopinion.org/pipa/articles/international_security_bt/703.php?lb=btis&pnt=703&nid=&id=

There are, for purposes of this thesis, three key points to be derived from this overview of international law. First, the protections and responsibilities under international law extend only to states. Next, international law is what states say it is and is enforceable only to the extent to which they agree.⁸⁰ States are bound in international relations only by what they agree to be bound by, with the limited exception of peremptory norms. The final point, drawn from the first two, is that whatever international law currently exists with regard to humanitarian intervention was purposefully created and accepted by the states to which it applies, or is *jus cogens* which applies to all states regardless of agreement.

B. Relevant Body of International Law

It is necessary at this juncture to make clear what body of international law applies to the discussion of humanitarian intervention. This paper deals only with the decision to intervene, and not how that intervention is undertaken or what law applies to the actions of the interveners. It therefore does not discuss the Law of Armed Conflict (LOAC) or International Humanitarian Law (IHL), which are often used interchangeably to refer to the same body of law. The purpose of IHL, or *jus in bello* (law in war), is to govern how states fight in order to lessen the impact of the conflict, and does not address how or why the conflict began.⁸¹ Its provisions are triggered by certain conflicts, dependent upon the nature of the conflict, and cease to apply when the conflict effectively ends.⁸² What is most important to note for current purposes is that IHL is comprised of a multitude of international

⁸⁰ See, e.g., RAHMOUNI, *supra* note 31 (“International law is rooted in acceptance by the nation states which constitute the international system”).

⁸¹ Int’l Comm. of the Red Cross, IHL and other Legal Regimes – Jus ad Bellum and Jus in Bello (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>.

⁸² See DESKBOOK, *supra* note 58, at 24-25.

agreements which inherently infringe upon a state's sovereignty by placing limitations on the means and methods in which they may wage war, and imposing obligations with regard to treatment of certain people and places.⁸³

Jus ad bellum (law on the use of force) encompasses the body of law that addresses how states resort to conflict, and seeks to limit those circumstances.⁸⁴ It is the body of law that recognizes that the sovereignty of states should be protected against external intervention except where legal justification exists. As discussed earlier, legal justification for armed entry into another state currently only exists when acting in self-defense, when the Security Council has authorized the action, or when the state invites another state into its territory. This paper does not argue for a fourth legal justification for intervention. Instead, the Security Council should exercise its already recognized authority to authorize intervention by passing a resolution which establishes criteria that when satisfied by sufficient evidence, obligates member states to participate in humanitarian intervention as directed by the U.N.

What is most relevant to the current proposal is the body of International Human Rights Law (IHRL) which the international community has enacted, and which would appear to contemplate humanitarian intervention when necessary to fulfill human rights responsibilities. It is comprised of those international agreements which sovereign states have enacted to establish the basic responsibilities of all states for treatment of human

⁸³ INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 9-40 (2014) [hereinafter HANDBOOK] (outlining the obligations and limitations of IHL pursuant to the Hague and Geneva Conventions, the Additional Protocols, and other international agreements); *see also* BATTERSBY & SIRACUSA, *supra* note 17, at 149-50 (describing how the Geneva and Hague Conventions, as well as the International Commission of the Red Cross (ICRC) emerged out of humanitarian concerns in the conduct of war).

⁸⁴ Int'l Comm. of the Red Cross, *supra* note 81.

beings.⁸⁵ Indeed, despite the pervasive notion of sovereignty that will be addressed in detail below, through passage of these minimum standards for how a state must treat its citizens, the community of states have explicitly accepted interference in their internal affairs. The Security Council acknowledged in UNSCR 1973 that the human rights violations perpetrated by the Libyan government against its citizenry constituted a “threat to international peace and security,” and therefore authorized intervention pursuant to Chapter VII of the U.N. Charter. The U.N. must now recognize that the violations of IHRL perpetrated by the Syrian government were no less a threat to international peace and security; member states must recognize that the body of IHRL that they have created to protect human rights will fail to do so without a willingness to enforce those standards equally, and by force when necessary. Humanitarian intervention should reasonably be understood as a means by which the community of states can enforce the body of law they created to establish basic human rights.

1. The International Bill of Human Rights

In the Universal Declaration of Human Rights (UDHR), U.N. member states “pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”⁸⁶ The Declaration set forth “a common standard of achievement for all peoples and all nations,”⁸⁷ which would be unaffected by the status of a territory, “whether it be independent, trust, non-self-governing or under any other limitation on sovereignty.”⁸⁸ State parties agreed that all

⁸⁵ HANDBOOK, *supra* note 83, at 45. Although there are a multitude of agreements which are considered part of IHRL, this section will only address those most relevant to the current discussion.

⁸⁶ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), preamble (Dec. 10, 1948).

⁸⁷ *Id.*

⁸⁸ *Id.* at art. 2.

people were entitled to equal protection against violations of the Declaration,⁸⁹ as well as the existence of an “international order in which the rights and freedoms set forth in [the] Declaration can be fully realized.”⁹⁰ Although not a binding international agreement, the Declaration was adopted unanimously by the U.N. General Assembly,⁹¹ and has been the foundational document upon which subsequent human rights law was built.

Together with the UDHR, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights* comprise the International Bill of Human Rights. Both covenants are international agreements binding upon the states which have ratified them and each references the “*obligation* of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.”⁹² State parties to the covenants further agree to ensure the rights recognized in the respective covenants and to take necessary steps, including enacting legislation, to realize those rights.⁹³ Among the 168 parties to the *International Covenant on Civil and Political Rights* are four of the five permanent Security Council members; China has not ratified it.⁹⁴ Of the 162 parties to the *International Covenant on Economic, Social,*

⁸⁹ *Id.* at art. 7.

⁹⁰ *Id.* at rt. 28.

⁹¹ Forty-eight states voted in favor and eight abstained.

⁹² Int’l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter Political Rights]; Int’l Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter Cultural Rights] (emphasis added).

⁹³ Political Rights, *supra* note 92, at art. 2; Cultural Rights, *supra* note 92, at art. 2.

⁹⁴ UNITED NATIONS, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 30, 2014).

and Cultural Rights, the United States remains notably absent; the other four permanent members have all ratified the covenant.⁹⁵

2. *The Genocide Convention*

The *Convention on the Prevention and Punishment of the Crime of Genocide* states that the “parties confirm that genocide . . . is a crime under international law which they undertake to prevent and to punish.”⁹⁶ It lists five acts that when “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” constitutes the crime of genocide.⁹⁷ Those acts are: (a) killing; (b) causing serious bodily or mental harm; (c) causing the group to live in conditions that are meant to destroy the group; (d) acts meant to thwart reproduction within the group; and (e) the removal of children from the group.⁹⁸ Among the Convention’s 144 parties are all five permanent members of the United Nations Security Council.⁹⁹

3. *The United Nations Charter*

The United Nations took root in the only landscape that such idealistic international consensus can grow—that which has been churned to its core by all-out, violent, world war. The world’s most powerful nations came together in order to “take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of

⁹⁵ *Id.*

⁹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, Stat. 78 U.N.T.S. 277.

⁹⁷ *Id.* at art. 2.

⁹⁸ *Id.*

⁹⁹ UNITED NATIONS, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en (last visited Dec. 30, 2014).

acts of aggression or other breaches of the peace.”¹⁰⁰ The U.N. sought “to establish conditions under which justice and respect for the *obligations* arising from treaties and other sources of international law can be maintained.”¹⁰¹

The U.N. is an international organization created through international agreement, the U.N. Charter, with which the 193 member states have agreed to comply.¹⁰² The Charter makes clear that membership is contingent not only upon a state’s acceptance of the *obligations* in the Charter, but also the judgment of current members that the state is able and willing to carry out those obligations.¹⁰³ Article 2 of the Charter provides that in order to accomplish the purpose of the United Nations, “[a]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”¹⁰⁴ Members further bestow upon the Security Council authority to act on their behalf in the “maintenance of international peace and security,” and agree to “accept and carry out the decisions of the Security Council.”¹⁰⁵ In further pursuit of this purpose, member states agree to provide armed forces and other assistance as the Security Council deems necessary.¹⁰⁶

Article 39 provides that the “Security Council *shall* determine the existence of any threat to the peace, breach of the peace, or act of aggression and *shall* make recommendations, or

¹⁰⁰ U.N. Charter art 1, para. 1.

¹⁰¹ *Id.* at preamble (emphasis added).

¹⁰² UNITED NATIONS, <http://www.un.org/en/members/index.shtml> (last visited Dec. 29, 2014).

¹⁰³ U.N. Charter art. 4, para. 1.

¹⁰⁴ *Id.* at art.2, para. 2 (emphasis added).

¹⁰⁵ *Id.* at arts. 24-25.

¹⁰⁶ *Id.* at art. 43.

decide what measures *shall* be taken . . . to maintain or restore international peace and security.”¹⁰⁷ This language should leave no doubt that the Security Council does not only possess the authority to address threats to peace, but has the obligation to do so—an obligation that all 193 member states have created for themselves. Chapter VII of the Charter further affords the Security Council full authority to take any necessary measure to fulfill this charge, including the use of force.¹⁰⁸ Consistent with previously cited provisions, “action required to carry out the decisions of the Security Council for the maintenance of international peace and security *shall* be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.”¹⁰⁹

Both the words of its Charter and the spirit of its birth evidence that the U.N. was created by states with the understanding that protection of human life, or peace, was in the best interests of all nations and that in order to achieve that end, it was essential to transfer some of what was understood to be their inherent individual state rights to a collective body. Member states explicitly accept the hegemony of the P5 through the numerous provisions which confer absolute power upon the Council, coupled with Article 27 which establishes the so-called veto power regarding any matters other than those that are purely procedural.¹¹⁰ The creation of regional bodies, like the European Union (EU), to which individual states

¹⁰⁷ *Id.* at art. 39 (emphasis added).

¹⁰⁸ *Id.* at arts. 39-42.

¹⁰⁹ *Id.* at art. 48, para. 48 (emphasis added).

¹¹⁰ *Id.* at art. 27 (providing that Security Council decisions on procedural matters require only nine of fifteen affirmative votes, while all other votes require the concurring votes of all five permanent members). While not referred to as a ‘veto’ power in the Charter, the ability of any one of the permanent members to effectively kill any proposal by voting against it has been referred to as a “right to veto” UNITED NATIONS, <http://www.un.org/en/sc/meetings/voting.shtml> (last visited Jan. 4, 2015).

cede some of their sovereignty, further evidences this motivation for states to incur certain obligations in return for some benefit derived through membership in the organization.¹¹¹

The small body of IHRL cited above clearly indicates that states act upon their right as states to create international law. Indeed, the states themselves created these obligations to maintain peace and security and observe human rights. Yet, Syria and Libya indicate that these obligations are easily disregarded by states with no legal consequence. “[H]uman rights do not exist because international human rights law carries no legal force.”¹¹²

Humanitarian intervention represents the last resort and the most significant means available for the enforcement of human rights, but when intervention is necessary, legal obligations for the maintenance of peace and security and observance of human rights often yield to claims of inviolable sovereignty.

The position is easily supported by the same U.N. Charter that would seem to establish a responsibility to protect human rights. It states, for example, that “[t]he Organization is based on the principle of the sovereign equality of all its members”¹¹³ and that members will “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”¹¹⁴ Although not defined in the Charter itself, the so-called Friendly Relations Declaration further provides that sovereign equality means, in pertinent part, that “[e]ach State enjoys the rights inherent in full sovereignty,” and

¹¹¹ See BATTERSBY & SIRACUSA, *supra* note 17, at 36-37, 204.

¹¹² *Id.* at 146.

¹¹³ U.N. Charter art.2, para. 1.

¹¹⁴ *Id.* at art. 2, para. 4.

“[t]he territorial integrity and political independence of the State are inviolable.”¹¹⁵ The preamble to the declaration further asserts that “strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live together in peace.”¹¹⁶

States have recognized over time the necessity of maintaining world peace and protecting human rights and have codified these realizations into existing international law. They have, however, failed to evolve their understanding of what it means to be a sovereign state so as to comport with these new obligations they have created from themselves. Instead, states have tightened their grips on a notion of absolute state sovereignty and nonintervention that is incompatible with current international law, and devoid of any footing in historic understandings of sovereignty. They have done so primarily out of perceived national interests. States must now realize that the failure to observe human rights in the modern world often fortifies an unprecedented growing global terror threat which it is the interests of all states to address. Just as the notion has over time at similar crossroads, states’ understanding of sovereignty must therefore evolve in order to enable the enactment of a legal obligation for humanitarian intervention in order to address a new and unprecedented global threat.

III. The Evolution of Sovereignty.

¹¹⁵ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc A/RES/25/2625 (Oct. 24, 1970).

¹¹⁶ *Id.*

*This right of sovereignty is not the supreme power; neither is it perpetual or above law . . . Indeed, an absolute and supreme power standing above all laws is called tyrannical.*¹¹⁷

That sovereignty is a “cornerstone of International Law and of the international system”¹¹⁸ is an uncontested fact. Both the sovereign equality of states as well as the idea that states are free from outside intervention in their internal affairs is enshrined in international law, to include the U.N. Charter, as noted above. Critical though it is to international law, sovereignty “is notoriously difficult to describe.”¹¹⁹ Like humanitarian intervention, there is no universally accepted definition of sovereignty under international law. That there is no clear definition of sovereignty evidences in part what sovereignty truly is—a concept of legitimate statehood which has evolved out of necessity over time to comport with the world to which it is applied.

Sovereignty today is largely understood to embody the notions of absolute autonomy and freedom from intervention, which are claimed to have taken root with the Peace of Westphalia in 1648.¹²⁰ “Refusal and rejection of foreign intervention is generally justified by critics for pure considerations of ‘national sovereignty’.”¹²¹ The states that opposed the 1999 NATO intervention in Kosovo, for example, demonstrated “how deeply they adhere to a

¹¹⁷ Johannes Althusius, *Politica Methodice Digesta Illustratis, Sacris, Profanis* 71 [*Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples*], (Frederick S. Carney ed., trans., Liberty Fund, 1995) (1603).

¹¹⁸ FLAVIO G.I. INOCENCIO, RECONCEPTUALIZING SOVEREIGNTY IN THE POST-NATIONAL STATE: STATEHOOD ATTRIBUTES IN THE INTERNATIONAL ORDER 1 (2014).

¹¹⁹ GLANVILLE, *supra* note 47, at 10.

¹²⁰ See, e.g., *Id.* at 11 (discussing the traditional view of sovereignty and citing a number of contemporary international relations texts that declare the absolute autonomy of states under the concept).

¹²¹ RAHMOUNI, *supra* note 31.

different normative hierarchy: for them, sovereignty is paramount, and they will resist attempts to legally subordinate it to other principles.”¹²²

In order to dispel this notion that sovereignty is absolute, one may logically point to a number of examples like that of UNSCR 1973, in which the Security Council exercised its authority to authorize armed intervention into the sovereign territory of Libya for the purpose of protecting citizens and maintaining peace. Though Russia and China both abstained from the vote on UNSCR 1973, neither argued that the Security Council did not have the authority to authorize such action. Indeed, in wildly incongruent logic, Russian President Vladimir Putin acknowledged that the Security Council had the authority to authorize intervention into Syria, while simultaneously citing Syria’s sovereignty as a significant basis for Russia’s blocking any Security Council consideration of intervention.¹²³

Of course, Russia is by no means the only state to adopt such incompatible notions of sovereignty in order to align with national interests. In fact, it is the pervasiveness of this treatment of sovereignty among the international community which allows Russia (and other states like those which opposed action in Kosovo on the same grounds) to act in such inconsistent and imbalanced ways with regard to intervention. This dangerous and discordant outcome is possible because despite considerable progress in creating international legal obligations for human rights, states have not accordingly divorced themselves from an antiquated and mistaken view of “traditional” sovereignty.

At present, states are able to have the best of both worlds—avoiding international obligations when they run counter to national interest by citing inviolable state sovereignty

¹²² Matthew Waxman, *Intervention to Stop Atrocities: Kosovo History as Predictive*, LAWFARE (Aug. 29, 2013, 2:12 PM), <http://www.lawfareblog.com/2013/08/intervention-to-stop-atrocities-kosovo-history-as-predictive/>.

¹²³ See State News Agency, *supra* note 26; Kirkup, *supra* note 26.

(e.g. Russia's position on Syria), while simultaneously acknowledging U.N. legal authority to intervene and pierce state sovereignty in cases that do not conflict with a state's interests (e.g. Russia's position on Libya). States seemingly have no incentive to relax this beneficial grip on sovereignty which can be easily manipulated to align with their interests. Opposition to obligatory humanitarian intervention would therefore be understandably vigorous. Setting the conditions to overcome such resistance requires a better understanding of sovereignty.

Sovereignty, or the notion of statehood, and international law effectively create the world order, or the system through which global entities interact with each other. As new threats to peace and security have manifested over time, states have created new international law to address them. How state sovereignty has been understood by states has also necessarily evolved over time to comport with those developments in international law. There are a number of key points in history which illustrate this evolution of sovereignty and international law, where states have come together to create a new world order to address threats which did not exist previously and which were incapable of being effectively addressed by the previous world order. Each evolution also ushered in new state responsibilities. This section will take a necessarily brief look at some of these complex historical crossroads in order to demonstrate both that sovereignty has never been understood to be absolute, and that the concept has necessarily evolved over time.

A. The Thirty Years' War and the Peace of Westphalia.

The mid-seventeenth century political landscape was steeped in monarchism and imperialism. Ruling powers either sought to expand their own territory or to defend against the hegemonic designs of others—often both. A complex tug-of-war for power persisted amongst kings, princes, dukes, clergy, the papacy, the Holy Roman Empire, ancient city-

states, and newer state entities.¹²⁴ Whatever passed for a state at the time certainly recognized no authority which served to protect the purported borders of another state or territorial entity. Once religious reformation was added to this volatile mixture, war was inevitable and its conclusion would require a change in the world order of the time.

1. Geopolitics

*If one potentate wielded absolute power in this realm, all the neighboring realms would have to apprehend being subjugated.*¹²⁵

In a time when imperialism was the norm and communication and travel were taxing to say the least,¹²⁶ power was inextricably linked to both the volume and location of land one controlled. Under the rule of Charlemagne, the first Emperor of the Holy Roman Empire, most of Europe was held together under one ruler.¹²⁷ When Charlemagne died in the year 814, what had comprised the Holy Roman Empire—the majority of Europe—disbanded into separate kingdoms and countries.¹²⁸ In the year 962, after nearly a century and a half without an emperor, Pope John XII crowned Otto I of Germany as Emperor Augustus, ruler of the Holy Roman Empire.¹²⁹ For the next eight centuries there would be a Holy Roman Emperor, as well as persistent conflict between the popes—who intended for the emperors to assist

¹²⁴ THOMAS CAHILL, *HERETICS AND HEROES: HOW RENAISSANCE ARTISTS AND REFORMATION PRIESTS CREATED OUR WORLD* 257 (2013).

¹²⁵ BRENDAN SIMMS, *EUROPE: THE STRUGGLE FOR SUPREMACY, FROM 1453 TO THE PRESENT* 16 (2014) (quoting Swedish negotiator at Westphalia).

¹²⁶ *See, e.g.*, TIM BLANNING, *THE PURSUIT OF GLORY: EUROPE 1648 – 1815* 3-39 (2007) (detailing the limitations and challenges to communications in Europe in the seventeenth and eighteenth centuries).

¹²⁷ PATRICIA S. DANIELS & STEPHEN G. HYSLOP, *NATIONAL GEOGRAPHIC ALMANAC OF WORLD HISTORY* 136 (2003).

¹²⁸ *Id.* at 136-37.

¹²⁹ *Id.*

them in ruling over a united Christendom—and the emperors, who often had conflicting intentions.¹³⁰

By 1450, the Holy Roman Empire “included all of present-day Germany, Austria, Switzerland, the Czech Republic and the Netherlands, as well as large parts of present-day Belgium, eastern France, northern Italy and western Poland,” and was presided over by the Holy Roman Emperor, who was elected by three Archbishops and four ruling princes.¹³¹

With its notable origins in Charlemagne, its geographic centrality, and its dominant populace, the Empire was regarded as the axis of European power and politics—with Germany at the heart of the Empire.¹³² Consequently, the position of emperor, and the European hegemony it represented, was coveted by any who desired dominion over Europe, or to frustrate another from exercising such control.¹³³ “European states were determined either to secure the imperial title for themselves or to prevent it from falling into hostile hands.”¹³⁴

The position of Holy Roman Emperor became occupied by an Austrian Habsburg in 1438, with the election of Frederick III.¹³⁵ From its inception, the desire of the Habsburg

¹³⁰ HISTORY WORLD, <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=aa35> (last visited Jan. 16, 2015).

¹³¹ SIMMS, *supra* note 125, at 3. The Archbishops were those of Mainz, Cologne, and Trier, and the princes were those of Bohemia, the Palatinate, Saxony, and Brandenburg. *Id.* See map at Appendix A.

¹³² *Id.* at 3-5.

¹³³ *Id.*

¹³⁴ *Id.* at 16.

¹³⁵ There are differing accounts as to the exact year of Frederick III’s election to emperor, and even some sources which attribute the Austrian Habsburg line of emperors to Rudolf’s 1273 accession to King of Germany. *See, e.g. Id.* at 4 (stating that the emperor had been an Austrian Habsburg since 1438); HISTORY WORLD, *supra* note 130 (stating that Frederick III was elected Holy Roman Emperor in 1440); John Graham Royde-Smith, *House of Habsburg*, ENCYCLOPAEDIA BRITANNICA (July 24, 2014), <http://www.britannica.com/EBchecked/topic/250853/House-of-Habsburg> (last visited Jan. 16, 2015) (“Frederick V, senior representative of the Inner Austrian line, was elected German king in 1440 and crowned Holy Roman emperor, as Frederick III, in 1452”); DANIELS & HYSLOP, *supra* note 127, at 137 (asserting that

line to realize an absolute monarchy over a Catholic Christendom was exposed by both military excursions and strategic marriages.¹³⁶ In particular, Frederick's son Maximilian married the heiress of Burgundy, bringing under Habsburg rule the duchy of Burgundy, Artois, the Netherlands, Luxembourg, and the County of Burgundy.¹³⁷ Maximilian then married his son Philip to the daughter of Ferdinand and Isabella of Spain.¹³⁸ Significantly, this move secured Spain, including Naples-Sicily and Sardinia, for the Habsburg line.¹³⁹ "The struggle of the Habsburgs to make good their claims, and the determination of their rivals to deny them control of the Holy Roman Empire, dominated European geopolitics for the next 200 years."¹⁴⁰

In 1453, the remainder of the Christian Byzantine Empire was toppled when its capital, Constantinople, fell to the Turks.¹⁴¹ The Ottoman ruler, Mehmed II, subsequently adopted the title of Sultan I Rum, or Ruler of Rome, and professed the intent of spreading Islam throughout the world.¹⁴²

Rudolf had been selected emperor and that a Habsburg would hold the title nearly continuously for the subsequent 500 years). Despite these differing contentions, the Habsburg line unquestionably occupied and maintained the title of Holy Roman Emperor throughout the relevant period of time for current purposes.

¹³⁶ Mottos attributed to occasional use by Frederick III include *Austriae est imperare orbi universo* ("Austria is destined to rule the world"), and *Alles Erdreich ist Österreich untertan* ("The whole world is subject to Austria"). Royde-Smith, *supra* note 135.

¹³⁷ *Id.*

¹³⁸ DANIELS & HYSLOP, *supra* note 127, at 137.

¹³⁹ Royde-Smith, *supra* note 135.

¹⁴⁰ SIMMS, *supra* note 125, at 8.

¹⁴¹ *Id.*

¹⁴² *Id.* at 8-9.

In 1519, French King Francis I sought the crown of Holy Roman Emperor in order “to prevent the said [Habsburg] King from doing so.”¹⁴³ France understood itself to be encircled by the Habsburgs (with their control of Spain to the South and the rest of the Empire to the East) and continually endeavored to weaken the Habsburg position and strengthen its own through direct military action, as well as through alliances with princes in Germany who opposed the Emperor. In an effort to weaken Emperor Charles V’s power, the Catholic King of France Henry II signed the Peace of Augsburg in 1555 with the German princes who had converted to Lutheranism, in defiance of their emperor.¹⁴⁴

England also saw significant strategic value in obtaining the imperial crown, with its seat in Germany providing an eastern flank with the French.¹⁴⁵ Having been expelled from France, Henry VII sought to reestablish the English Empire in France and claim the French throne. Henry VIII of England therefore also declared himself a candidate for the crown of Holy Roman Emperor in 1519, a crown that Charles V ultimately secured for himself.¹⁴⁶

At the heart of the Holy Roman Empire, the German princes increasingly grew wary of being alienated by the Hapsburg Emperor, especially the authoritarian rule of Charles V. Some had converted to Lutheranism, which was not permitted in the Holy Roman Empire, and thus formed the Schmalkaldic League for the purpose of their collective defense.¹⁴⁷ Even some Catholic princes turned their back on the Emperor in the name of autonomy.¹⁴⁸

¹⁴³ *Id.* at 18 (quoting French King Francis I).

¹⁴⁴ CAHILL, *supra* note 124, at 262-63.

¹⁴⁵ SIMMS, *supra* note 125, at 18.

¹⁴⁶ *Id.*

¹⁴⁷ CAHILL, *supra* note 124, at 262-63.

¹⁴⁸ *Id.* at 263.

In 1546, Charles V secured a significant victory over the Schmalkaldic League in the battle of Muhlberg.¹⁴⁹ However, the backlash within Europe resulted in Charles dividing the Habsburg line into two—one Austrian and the other Spanish. While Charles no longer wore the crown of King of Spain, the Austrian line maintained the imperial crown, and his successor in Spain remained part of the Habsburg line.

Despite the imperialist aspirations of the major powers at the time and the battles it spawned, Europe had largely realized a very delicate balance of power for nearly two centuries. All out war was avoided out of appreciation for the devastation that would result should the major powers wage such a war. It was within this tense geopolitical environment that the issue of religion eventually sparked the devastating Thirty Years' War.

2. Religion

*As if this subtly reconfiguring, strategically maddening map were not enough, into the constantly shifting tides and tornadoes of power was now thrown what we might call the Religion Bomb.*¹⁵⁰

In 1517, Martin Luther, the famous Augustinian monk, penned his ninety-five theses and sent them to Archbishop Albrecht, who was the archbishop of Mainz and thus one of the electors of the Holy Roman Emperor.¹⁵¹ Luther was challenging the corruption and incompetence of the Roman Catholic Church, and the Holy Roman Empire itself, seeking to

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 257.

¹⁵¹ *Id.* at 147, 155. Contrary to legend, Luther did not in fact pin his 95 thesis to the church door at Wittenberg. *Id.* at 155.

purify them both from past impurities.¹⁵² His ninety-five theses were printed and widely distributed, thus providing the spark that would eventually ignite the Reformation.¹⁵³

[W]hole towns and cities, dioceses and archdioceses, provinces and countries were embracing what seemed to be a radical, permanent change in their basic religious beliefs and practices. And this astonishing, seemingly overnight religious shift was only exaggerated by the normal, if sometimes quick and radical shifts and instabilities of European power politics.¹⁵⁴

The subsequent Reformation in England was driven not primarily by the desires of the English people, but by the self-interest of Henry VIII. In the 1530s, Henry VIII sought a divorce from his first wife, Catherine of Aragon, whom he had grown tired of, and who failed to produce a male heir—which was necessary to gain the crown of Holy Roman Emperor.¹⁵⁵ When the pope denied his request for divorce in order to marry Anne Boleyn, Henry VIII broke England from the Church, plundering Church lands and using the profit to finance his wars to obtain the French and imperial crowns.

When Ferdinand I, a Roman Catholic, claimed the throne of Bohemia for the Habsburgs in 1526, the freedom of the Protestant populace would gradually and increasingly be curtailed.¹⁵⁶ It would be the Bohemian revolt in 1618, materialized through geopolitical tension and ignited by religious persecution, which marked the onset of the Thirty Years' War.¹⁵⁷ Commonly understood to be a war between Catholics and Protestants, the war from

¹⁵² *Id.* at 155-159.

¹⁵³ *Id.* at 158.

¹⁵⁴ *Id.* at 258.

¹⁵⁵ *Id.* at 275.

¹⁵⁶ Staff, *Thirty Years' War*, HISTORY.COM (2009), <http://www.history.com/topics/thirty-years-war> (last visited Jan. 16, 2015) [hereinafter *Thirty Years' War*].

¹⁵⁷ GLANVILLE, *supra* note 47, at 49.

1618 to 1648 pinned the Catholic Holy Roman Empire—comprised primarily of Germany and Spain—against the leading Protestant powers—namely the Dutch, Sweden, and England.¹⁵⁸ However, evidencing a far more complicated landscape than simply a religious divide, Catholic France allied with its religious foes (in both Protestants and the Turks), as well as its perpetual foe, England, against Habsburg hegemony.¹⁵⁹

When the conflict was finally brought to an end by the Peace of Westphalia, it had destroyed the German landscape on which the majority of the battles were fought, consumed the lives of approximately twenty percent of the total German population, and a horrifying fifty percent of those who occupied central Europe.¹⁶⁰ The population of the Holy Roman Empire had fallen from twenty-one to thirteen million.¹⁶¹

3. *The Peace of Westphalia*

*By 1648, the great 200-year struggle for mastery in Europe had resulted in a stalemate.*¹⁶²

All sides had sustained significant damage to their interests during the brutal war, and no side proved quite strong enough to prevail. The peace resulted less out of the moral goal of deterring future conflict than the practical and necessary restoration of the balance of power between war-weakened States.¹⁶³ Each side made concessions, in what was essentially an effort to ensure that no power was strong enough to threaten European hegemony, as the

¹⁵⁸ *Thirty Years' War*, *supra* note 156.

¹⁵⁹ SIMMS, *supra* note 125, at 21.

¹⁶⁰ *Thirty Years' War*, *supra* note 156.

¹⁶¹ SIMMS, *supra* note 125, at 40.

¹⁶² *Id.*

¹⁶³ HENRY KISSINGER, *WORLD ORDER 3* (2014) (“The Westphalian peace reflected a practical accommodation to reality, not a unique moral insight.”).

Habsburg Empire had done.¹⁶⁴ Although the Peace of Westphalia formally consisted of the Treaty of Munster between the Holy Roman Empire and the Protestant queen of Sweden, and the Treaty of Osnabruck, between the Empire and the Catholic King of France, nearly 200 European entities were represented at the negotiations.¹⁶⁵ Much would be negotiated and settled at Westphalia with regard to imperialistic, religious, and territorial disputes, but of greatest significance were the international structure utilized in both reaching and maintaining the peace—the design of an international, interconnected community of sovereign states—as well as the notion of religious tolerance.¹⁶⁶

The Peace of Westphalia is largely regarded as the “foundational moment of the modern territorial system.”¹⁶⁷ “We are repeatedly told that the Peace of Westphalia codified a concept of the sovereign states and its corollary, the principle of nonintervention, that has remained the cornerstone of the international system to the present day.”¹⁶⁸ Indeed, the Westphalian peace introduced a critical and enduring component of sovereign statehood: the notion that the authority of a territory existed in the territory itself, not in the king, the Holy Roman Empire or any other broader entity.¹⁶⁹ “The confessional strife unleashed by the Reformation and Counter-Reformation, aided and abetted by the closely related struggles between noble factions, advertised the need for a single centre of power in each and every

¹⁶⁴ SIMMS, *supra* note 125, at 38.

¹⁶⁵ GLANVILLE, *supra* note 47, at 50-51.

¹⁶⁶ *See, e.g., Id.* at 51 (stating that Westphalia marks the “development of a sense of international society, grounded in shared concepts of international legitimacy.”) (quoting IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 51 (2005)); *Thirty Years’ War*, *supra* note 156 (noting that the elimination of religion as a destabilizing influence in Europe was possibly the greatest achievement of the Thirty Years War).

¹⁶⁷ INOCENCIO, *supra* note 118, at 9.

¹⁶⁸ GLANVILLE, *supra* note 47, at 49.

¹⁶⁹ BLANNING, *supra* note 126, at 286-287.

polity.”¹⁷⁰ Thus, the concept of the state was born and is said to have been endowed with this notion of statehood free from obligation or intervention.

In fact, the treaties themselves do not articulate or bestow upon any state a sovereignty which encompassed absolute autonomy or freedom from intervention.¹⁷¹ The terms of the Treaty of Westphalia clearly espouse the ideas both that the power of the state was not absolute, in that it had duties to its citizenry, and that the state would yield its sovereignty should it fail to fulfill its obligations. Indeed, the Treaty itself states: “all Partys in this Transaction shall be oblig'd to defend and protect all and every Article of this Peace against any one.”¹⁷²

Some rulers even sought legitimacy through social contracts whereby those he intended to rule would grant him the authority to do so in furtherance of their security.¹⁷³ For example, in 1777, Frederick the Great, then King of Prussia, published his treatise *On the Forms of Government and the Duties of Sovereigns*, in which he stated:

It is completely clear that the sovereign has no right to dictate the way in which the citizens will think. Would not one have to be demented to suppose that men said to one of their number: we are raising you above us because we like being slaves, and so we are giving you the power to direct our thoughts as you like? On the contrary, what they said was: we need you to maintain the laws which we wish to obey, to govern us wisely, to defend us; for the rest, we require that you respect our liberty.¹⁷⁴

¹⁷⁰ *Id.* at 287.

¹⁷¹ See generally Treaty of Westphalia (Oct. 24, 1648), available at http://avalon.law.yale.edu/17th_century/westphal.asp.

¹⁷² *Id.* at sec. CXXIII.

¹⁷³ BLANNING, *supra* note 126, at 292.

¹⁷⁴ *Id.* (quoting Frederick the Great).

While the German states, as well as others, certainly gained some sovereignty, or autonomy over their own affairs, this new international community of states made it clear that statehood did not just bring rights, but also clear responsibilities—specifically, an obligation to exercise religious tolerance.¹⁷⁵ Under the treaties, religious matters were to be settled through compromise of the Catholic and Protestant representatives, and the old notion that a territory took the religion of its ruler¹⁷⁶ was replaced by one in which “rulers were bound to respect certain rights, including the right to convert.”¹⁷⁷ “Just as the protection of human rights would be widely considered a precondition of international peace and stability in the wake of the Second World War three centuries later, so too the protection of religious-minority rights was conceived to be a prerequisite for the prevention of conflict in the wake of the Thirty Years’ War.”¹⁷⁸

Not only did they create obligations for states, but “the Westphalian treaties were nothing less than a charter for intervention.”¹⁷⁹ The German constitution established at Westphalia instilled in the Holy Roman Empire the authority to “intervene against princes who violated the provisions of the Westphalian settlement, or who otherwise caused a disturbance likely to upset the peace of Germany and thus Europe as a whole,” and the Empire did in fact suspend and remove some princes under this power.¹⁸⁰ Similarly, France and Sweden became guarantor powers, France to the Catholics and Sweden to Protestants, with the authority to

¹⁷⁵ GLANVILLE, *supra* note 47, at 52-53.

¹⁷⁶ *Cujus region, ejus religio* (whose region it is, his is the religion), The Treaty of Augsburg in 1555 established the principle of *cuius region, eius religio*. SIMMS, *supra* note 125, at 37.

¹⁷⁷ *Id.* at 39.

¹⁷⁸ GLANVILLE, *supra* note 47, at 52.

¹⁷⁹ SIMMS, *supra* note 125, at 39.

¹⁸⁰ *Id.* at 43; *see also* GLANVILLE, *supra* note 47, at 50.

protect other states from the dominion of the Holy Roman Empire, to include the right to intervene if necessary.¹⁸¹

States understood action in defense of religious tolerance as legitimate grounds for military intervention into another state, and religious tolerance as a responsibility subsequently became routinely cited in international treaties.¹⁸² The eighteenth century German writer Christoph Martin Wieland put it so:

From the elected head [i.e. the Emperor] right down to the mayor and corporation of the Free Imperial City of Zell Hammersbach [a tiny community in the Black Forrest], there is not a rule in Germany whose greater or lesser powers are not limited on every side by laws, tradition, and in many other ways, and against whom, should he engage in any sort of illegal activity against property, honour or personal liberty, the imperial constitution does not provide the injured party protection and redress of grievances.¹⁸³

The Westphalian peace addressed the concerns of the time which had led to the unprecedented devastation of the Thirty Years' War—specifically religious tolerance and hegemonic aspirations. It effectively created the state, endowed with a notion of sovereignty which remained viable as long as the state fulfilled the obligations that were deemed necessary for the future maintenance of peace. The European order established at Westphalia in 1648 largely endured for the next 150 years and served to avoid another total war through various acts of diplomacy and collective security, until French nationalist aspirations tipped the balance in Europe and again demanded an evolution in how states interacted with one another.

¹⁸¹ SIMMS, *supra* note 125, at 43, 54.

¹⁸² GLANVILLE, *supra* note 47, at 54-55.

¹⁸³ BLANNING, *supra* note 126, at 284 (quoting Christoph Martin Wieland) (clarification in original quote).

The Thirty Years' War was fought between armies comprised almost exclusively of hereditary nobility utilizing "slow, parade-ground like movements."¹⁸⁴ These were not national bodies, but rather dynastic institutions utilized to further the imperialist aims that defined the times. They were suited for such endeavors, but "when major social change stirred the European world . . . the resulting political and social upheavals began to sweep away the old military forms and to prepare the way for national warfare."¹⁸⁵

B. The French Revolution, the Napoleonic Wars, and the Congress of Vienna

1. *The French Revolution and Napoleonic Wars*

*I can never see a thrown without being tempted to sit on it.*¹⁸⁶

"The Westphalian settlement left as much unfinished business as it concluded."¹⁸⁷ Even after 1648, the wars between France and Spain and France and England persisted; growing Swedish power generated continual conflict; Russia displayed imperial expansion; and French civil wars erupted.¹⁸⁸ Although many states which had once fallen completely under the wing of the Holy Roman Empire now exercised some manner of sovereignty, the Westphalian peace left the Empire intact and the concept of legitimacy with regard to a governing power remained largely couched in dynastic and monarchical terms, rather than in the populace. The "fragmentation and diffusion of authority"¹⁸⁹ of the Holy Roman Empire

¹⁸⁴ LARRY H. ADDINGTON, *THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY* 2, 5 (1994).

¹⁸⁵ *Id.* at 7.

¹⁸⁶ DAVID KING, *VIENNA 1814: HOW THE CONQUERORS OF NAPOLEON MADE LOVE, WAR, AND PEACE AT THE CONGRESS OF VIENNA* 122 (2008) (quoting Napoleon Bonaparte).

¹⁸⁷ BLANNING, *supra* note 126, at xxiii.

¹⁸⁸ *Id.* at xxiv.

¹⁸⁹ *Id.* at 279.

after Westphalia would ultimately prove to be incapable of making a real contribution to thwarting threats to peace, or to imperial advances.¹⁹⁰ “In this brave new world of power-politics there was no room for such soft polity as the Holy Roman Empire.”¹⁹¹ “The soft centre of Europe was to remain soft and, now that both France and her Swedish satrap were guarantors of the Westphalian settlement, the way was open for future intervention in German affairs to make sure it stayed that way.”¹⁹²

Although, as addressed in the previous section, the Westphalian Peace did not actually establish or endorse the concept of absolute state autonomy, there were certainly some rulers which embraced an authoritarian or absolutist approach toward governance. In France, Louis XIV became the paradigm for such a government.¹⁹³ Although he may have understood his authority to be absolute, “there was a keen awareness that Louis XIV’s approach to government really was different, and moreover that ‘absolute authority’ was the best way to describe it.”¹⁹⁴

Louis XIV’s policies, along with those of his successors, would gradually alienate the citizenry and at the same time allow them to penetrate the French Parlements, some of which adopted titles that indicated their intent to speak for the nation.¹⁹⁵ Soon, they would be declaring to the king that “it is the consent of the nation that your Parlement represents and

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 285.

¹⁹² *Id.* at 535.

¹⁹³ *Id.* at 207.

¹⁹⁴ *Id.* at 216.

¹⁹⁵ *Id.* at 320.

which gives support to the law.”¹⁹⁶ In 1789, the third estate (i.e. the people) deemed themselves the National Assembly and refused to leave Versailles until France adopted a new constitution.

[W]hat the third estate did during these ten great days in June was to proclaim the principle of national sovereignty and to claim for themselves the right to exercise it. The people of France were in step with their American counterparts, who had ensconced the notion of national sovereignty in the very first line of their new constitution: “We the People of the United States.”¹⁹⁷

The authority that Louis XIV sought to exercise not only diverged from the terms of Westphalia, but completely missed the growing tempest of nationalism stirring among the citizenry. It is therefore no coincidence that the next major challenge to world order largely commenced in France, where the ruling class adopted an absolutist approach which was viewed as illegitimate by those meant to be ruled.

The maelstrom of competing interests prior to Westphalia—the various religions and ruling entities—did much to “deafen national voices.”¹⁹⁸ The new order freed the citizenry from such devices and enabled them to challenge the heavy hand of absolute authority, like that in France. The French revolutionaries asserted that competing values between the governed and their government, religious or otherwise, could not coexist.¹⁹⁹

Like the Thirty Years’ War, the French Revolution and the wars it spawned was initiated by the citizenry. This time, however, the very idea of legitimacy was being attacked—the revolutionaries recognized no authority except that which was granted by those to be

¹⁹⁶ *Id.* (quoting the Parlement of Rennes to Louis XV).

¹⁹⁷ U.S. CONST. pmb1.

¹⁹⁸ BLANNING, *supra* note 126, at 307.

¹⁹⁹ *See* KISSINGER, *supra* note 163, at 43.

governed. Not only did the majority of state participants at Westphalia not understand its terms to bestow absolute sovereignty upon the governing power of a state, but the citizens of France were also clearly indicating—as would the peoples of other states—that the citizenry had not acknowledged any such power either. The revolutionaries welcomed similar revolutions and pledged support to “all peoples who shall wish to recover their liberty,”²⁰⁰ while asserting that “whoever refuses to obey the general will shall be forced to do so by the whole body . . . [h]e will be forced to be free.”²⁰¹

The Westphalian peace had thus been challenged by a nationalist force that it had not been designed to address, and “the age of total war—the mobilization of a nation’s entire resources—had arrived.”²⁰² “To follow the twists and turns of the war is rendered impossible by its complexity,”²⁰³ but the Revolution and the Napoleonic Wars would eventually envelop Europe just as the Thirty Years’ War had nearly two centuries prior.

Napoleon was a general in the French Revolution when he took control of France in the coup of Fructidor in 1797.²⁰⁴ When he became Emperor in 1804, consistent with the revolutionary principle that acknowledged no other authority, Napoleon took the crown from the Pope during his coronation and placed it on his head himself.²⁰⁵ Napoleon’s ultimate

²⁰⁰ *Id.* at 43-44 (quoting French National Assembly documents, 1792).

²⁰¹ *Id.* at 44 (quoting Jean-Jacques Rousseau).

²⁰² *Id.* at 46; *see also* David A. Bell, *Napoleon’s Total War*, MILITARY HISTORY, Apr. 2007, *available at* <http://www.historynet.com/napoleons-total-war.htm> (noting that conflicts between European powers prior to the French Revolution had been limited in scope and largely comported with an aristocratic code of honor).

²⁰³ BLANNING, *supra* note 126, at 625.

²⁰⁴ SIMMS, *supra* note 125, at 154.

²⁰⁵ KISSINGER, *supra* note 163, at 45.

goal was simple: French hegemony over Europe.²⁰⁶ His personal desire was the very thing that the Westphalian Peace sought to prevent, but his methods were unprecedented.

The peace established at Westphalia, which sought to thwart hegemonic aims through a delicate balance of religious tolerance and division of power, initially proved too fragile to thwart the military might and determination of Napoleon, which was buttressed by French nationalism. The French had produced the first national army in history, and the dynastic royal armies were forced to adopt similar evolutions to survive the wars.²⁰⁷ Powers which had rested in the royal class were transferred to a National Assembly, feudalism was destroyed, and a new National Guard comprised of citizen-soldiers was formed.²⁰⁸ France would eventually dominate the largest area of Europe since the early Roman Empire.²⁰⁹

Encouraged by Russia's eventual success in halting Napoleon's advance in 1812 (largely through attrition and the over-extension of Napoleon's army),²¹⁰ the remaining European states finally came together to inflict a decisive blow at the Battle of Leipzig in 1813, which ultimately led to Napoleon's abdication in the 1814 Treaty of Fontainbleau.²¹¹ The battle alone involved 500,000 combatants, with at least 150,000 killed or wounded.²¹² By the end of the war, the death toll amounted to roughly five million souls, with considerably more

²⁰⁶ SIMMS, *supra* note 125, at 155.

²⁰⁷ ADDINGTON, *supra* note 184, at 19.

²⁰⁸ *Id.* at 22.

²⁰⁹ HYPER HISTORY, http://www.hyperhistory.com/online_n2/maptext_n2/napoleon.html (last visited Jan.20, 2015). See Map at Appendix B.

²¹⁰ The supply system eventually failed to provide adequate support to Napoleon's army as the distance between the army and supply bases extended. ADDINGTON, *supra* note 184, at 39.

²¹¹ KISSINGER, *supra* note 163, at 47; SIMMS, *supra* note 125, at 177. Napoleon would later escape his exile on the island of Elba and was subsequently, and finally, defeated at Waterloo in June 1815. *Id.* at 178.

²¹² Bell, *supra* note 202.

permanently or seriously wounded.²¹³ Important lessons had been learned since Westphalia, and they would be taken into account at the Congress of Vienna.

2. *The Congress of Vienna*

The major powers “had learned the virtues of cooperation and restraint during the final stages of the struggle with Napoleon,” and garnered a new appreciation for the affect events in one state have on all the other European states.²¹⁴ Indeed, long gone was the European sentiment at the outset of the French Revolution as pronounced by the Prussian foreign minister: “The French Revolution presents a peculiar spectacle to the rest of Europe, who can regard it, if not with indifference, then at least with tranquility.”²¹⁵ The Peace of Westphalia had introduced a “set of principles for the general conduct of foreign policy,” free from the destabilizing influence of religion, but left in place the Holy Roman Empire and other political entities as they existed, all in an effort to maintain an equilibrium and prevent a hegemonic power.²¹⁶ Although states were understood to be sovereign and therefore incurred both rights and responsibilities, what constituted a legitimate state was simply based on the monarch system in existence before the Thirty Years’ War; statehood in no way represented the will of the people. It was the failure of this system to maintain the balance, and a realization of the threat a citizenry can pose to peace, that faced the negotiators at the Congress of Vienna.

The outcome of the Congress would be the “classical geopolitical themes of buffers, encirclement and expansion [being] seen through the prisms of national, political, religious,

²¹³ KING, *supra* note 186, at 6.

²¹⁴ SIMMS, *supra* note 125, at 183.

²¹⁵ BLANNING, *supra* note 126, at 617 (quoting Prussian foreign minister Count Hertzberg).

²¹⁶ KISSINGER, *supra* note 163, at 61.

and slave emancipation.”²¹⁷ The world order that followed was one of universal governance based on an understanding of states that the preservation of the entire system was of far greater importance than any individual conflict or dispute which may arise, and that the world order must evolve in step with the world.²¹⁸ The French Revolution had demonstrated that state legitimacy on the international level depended, to some degree, on legitimacy at the domestic level.²¹⁹ As an example in practice, when the Prussian government sought to restore its internal financial balance after the war, it recognized that it was no longer permissible to raise taxes without the consent of the population; Prussia subsequently passed the *Staatschuldengesetz* in 1820, a law which formally required the Prussian government to consult with the public prior to raising taxes or establishing new loans.²²⁰ The “signal achievement” of the Vienna Congress was striking this new balance between power and legitimacy.²²¹

Following this principle, Vienna would be the first time a human rights issue, specifically the slave trade, would be addressed by the greater international community. On February 8, 1815, the Great Powers signed the Declaration of the Powers on the Abolition of the Slave Trade. The treaty deemed the engrained and lucrative practice²²² as “repugnant to the principles of humanity and universal morality” and agreed that it would be abolished in

²¹⁷ SIMMS, *supra* note 125, at 177.

²¹⁸ KISSINGER, *supra* note 163, at 61.

²¹⁹ GLANVILLE, *supra* note 47, at 74.

²²⁰ SIMMS, *supra* note 125, at 184.

²²¹ KISSINGER, *supra* note 163, at 66.

²²² “There would be lost income, the deterioration of tax revenue, and even, some prophesied, the collapse of the British economy.” KING, *supra* note 186, at 215.

Europe.²²³ Thus, the international community imposed an obligation upon themselves regarding observance of human rights, just as it had done at Westphalia with religious toleration.

The Congress also formed the German Confederation to replace the defunct Holy Roman Empire and unify the thirty-seven individual German states which had not been otherwise absorbed by other states through other agreements.²²⁴ The Confederation was responsible for maintaining the internal and external safety of Germany and afforded each state a role in the decision-making process through a division of votes.²²⁵ There was sufficient division amongst the states to avoid the possibility of the Confederation becoming a viable threat to the European order, but acting together in collective defense, it also served to discourage foreign expansionist aspirations.²²⁶ The founding document provides: “The States of the Confederation engage to defend not only the whole of Germany, but each individual State of the Union, in case it should be attacked, and they mutually guarantee to each other such of their possessions as are comprised in this Union.”²²⁷ When war was declared by the Confederation, no state was free to undertake individual negotiations without the consent of the remaining members. The hundreds of individual fiefdoms within Germany would no longer exercise any individual legitimacy on the international stage; the states acting together

²²³ Declaration of the Congress Treaty of Vienna (Feb. 8, 1815), *available at* <https://archive.org/stream/complectollecti01grea#page/n11/mode/2up/search/repugnant+to+the+principles+of+humanity+and+universal>.

²²⁴ KISSINGER, *supra* note 163, at 65.

²²⁵ Final Act of the Congress of Vienna/General Treaty arts. LIV, LVI, LVIII (June 9, 1815), *available at* <http://www.dipublico.org/100513/final-act-of-the-congress-of-viennageneral-treaty-1815/> [hereinafter Final Act].

²²⁶ KISSINGER, *supra* note 163, at 65.

²²⁷ Final Act, *supra* note 225, at art. LXIII.

as the Confederation would be the legitimate sovereign actor. It also marked another occasion in which states relinquished some rights in furtherance of realizing collective security.

The Confederation, and indeed the entirety of the Final Act of the Vienna Congress, would be overseen and enforced by the Great Powers.²²⁸ In the Treaty of Paris signed in 1814, the major states allied against Napoleon first came together and established themselves as the Great Powers.²²⁹ Pursuant to a secret article in the Treaty, the four states began meeting secretly in Vienna to establish the rules and procedures to be followed by the Congress, even before its scheduled opening.²³⁰ After a clever bout of diplomacy on the part of the French delegate, the Great Powers accepted that the legitimacy of their decisions required more than just consensus amongst themselves, which had been how they intended to conduct all business at the so-called Congress. The Committee of Eight was subsequently formed to conduct much of the business of the Congress and consisted of the four Great Powers, along with France, Portugal, Sweden, and Spain (the other four signatories to the Treaty of Paris).²³¹ The Great Powers would remain in overall control of the Congress as the Directing Committee, to which they added the presence of France.²³²

²²⁸ The Final Act of the Congress of Vienna is the culminating document of the Congress and incorporates all other individual agreements and treaties made throughout the process. *Id.*

²²⁹ See Treaty of Paris (May 30, 1814), available at http://www.napoleon-series.org/research/government/diplomatic/c_paris1.html.

²³⁰ KING, *supra* note 186, at 49.

²³¹ *Id.* at 93.

²³² *Id.* at 198.

The Quadruple Alliance,²³³ as it has come to be known, was not formally encompassed in the Congress's Final Act. Rather, the alliance between the Great Powers of Britain, Prussia, Austria, and Russia—those which defeated Napoleon and had run the Congress—was created by treaty in November 1815 in order to maintain the system established in Vienna.²³⁴ The parties agreed to meet regularly in order to maintain the European balance and address matters of mutual concern, and thus became the guarantors of the peace.²³⁵ This “Congress System”²³⁶ of committees would create the effectual pre-cursor of the United Nations Security Council through periodic conferences between the heads of State.²³⁷

The Holy Alliance, consisting of the Great Powers except Great Britain, was also signed after the Final Act, but again would play a significant role in carrying out the duties and responsibilities created at the Congress—not to mention the spirit of the Congress. It holds in part:

[T]he Three contracting Monarchs will remain united by the bonds of a true and indissoluble fraternity, and considering each other as fellow countrymen, they will, on all occasions and in all places, lend each other aid and assistance; and, regarding themselves towards their subjects and armies as fathers of families, they will lead them, in the same spirit of fraternity with which they are animated, to protect Religion, Peace, and Justice.²³⁸

²³³ The Quadruple Alliance and/or the meeting between the states has also been referred to as the Concert of Europe. *See, e.g.*, INOCENCIO, *supra* note 118, at 23; KING, *supra* note 186, at 318. This should not be confused with the current Council of Europe, which was formed in 1949 and focuses on Human Rights. COUNCIL OF EUROPE, <http://www.coe.int/en/web/about-us/who-we-are> (last visited Feb. 1, 2015).

²³⁴ KING, *supra* note 186, at 309. France would later be added, creating the Quintuple Alliance.

²³⁵ *Id.* at 311.

²³⁶ SIMMS, *supra* note 125, at 180.

²³⁷ KISSINGER, *supra* note 163, at 65.

²³⁸ The Holy Alliance Treaty art. 2 (Sept. 26, 1815), *available at* http://www.napoleon-series.org/research/government/diplomatic/c_alliance.html.

In fact, the Holy Alliance has been regarded as the first international treaty in which states consented to be bound by a shared vision—particularly peace, justice, and religious freedom.²³⁹

While not every state was thrilled with the entirety of the outcome in Vienna, sovereign states had largely agreed, or at least accepted, this hegemonic position of the Great Powers and the obligations the Congress had imposed upon them. Indeed, the Final Act of the Vienna Congress would only be signed by the Committee of Eight, with the other states simply acceding to it.²⁴⁰ Some states, like those that comprised the German Confederation, explicitly transferred some of their sovereign rights to the Great Powers, in order to maintain the peace.

Hand in hand with this responsibility for the security of Europe, the Great Powers understood a right to intervene into other sovereign states in order to discharge this duty; a right which the other states acquiesced to by their acceding to the Final Act. “The right to intervene belongs as clearly and indisputably to every government which finds itself in danger of being drawn into the revolutionary maelstrom.”²⁴¹ Over the course of four meetings of the Great Powers, their alliance had shifted from a focus on defending the status quo to a more active approach which included a right to intervene in order to keep the peace and administer justice.²⁴² In fact, the alliance intervened on at least three separate occasions from 1820-1821.²⁴³

²³⁹ KING, *supra* note 186, at 309.

²⁴⁰ *Id.* at 275.

²⁴¹ GLANVILLE, *supra* note 47, at 75 (quoting Austrian foreign minister Klemens von Metternich, quoted in SAMUEL J. BARKIN & BRUCE CRONIN, *THE STATE AND THE NATION: CHANGING NORMS AND THE RULES OF SOVEREIGNTY IN INTERNATIONAL RELATIONS* 118 (1994)).

²⁴² KING, *supra* note 186, at 318.

The hegemony granted by the international community to the Great Powers was directly at odds with the Westphalian concept of avoiding any hegemonic power. For the first time since Westphalia, it demonstrated that “in foundational moments of a new international order . . . the concept of sovereignty is flexible enough to accommodate change in the constitutional rules of the system.”²⁴⁴ The French Revolution had raised the alarm of nationalism, and the terms of Vienna were meant to capitulate to the people enough ground to provide for the peace and restore balance. The world had changed since 1648, and in 1815 the world order changed with it, creating new state responsibilities for the abolition of slavery, recognition of hegemonic powers out of necessity for collective defense, and securing legitimacy through the people. This system proved effective and although its efficacy waned at times, it would be over 100 years before the next crossroads necessitated evolution in the concept of sovereign statehood.

C. World War I and the Treaty of Versailles

*America has come to a parting of ways, when she must determine whether she stands for civilized or uncivilized warfare. We can no longer remain neutral spectators. Our action in this crisis will determine the part we will play when peace is made, and how far we may influence a settlement for the lasting good of humanity. We are being weighed in the balance, and our position among nations is being assessed by mankind.*²⁴⁵

1. World War I

The period between the conclusion of the Vienna Congress and the first shots of World War I (WWI) was not entirely free of conflict. However, with the exception of the Crimean

²⁴³ GLANVILLE, *supra* note 47, at 75.

²⁴⁴ INOCENCIO, *supra* note 118, at 24.

²⁴⁵ HEW STRACHAN, *THE FIRST WORLD WAR* 223 (2003) (quoting Colonel Edward House to U.S. President Woodrow Wilson after the British passenger ship *Lusitania* was sunk by the Germans, killing 1,201 civilians).

War, Europe had not been consumed in any multi-state conflicts during this time.²⁴⁶ The system developed at Vienna proved largely successful in keeping the peace: Russia, Austria, and France united to quell insurgencies in Spain and Italy; Britain, Russia, and France aided Greek independence from the Turks; and although internal revolutions would be commonplace, only that in France proved successful.²⁴⁷

But, the Vienna peace did not extend to all states. The Balkan peninsula (including modern day Albania and Bosnia to the west and Romania to the north) was not protected by or encompassed within the terms of the Vienna Congress—it remained part of the Ottoman Empire.²⁴⁸ Russia invaded the Balkans and eventually the Quadruple Alliance (or the Concert of Europe) met to recognize three independent states (Serbia, Montenegro, and Romania), and expand the territory of Bulgaria and Greece.²⁴⁹ Geographically, this meant that cooperation between Austria-Hungary and Russia, two members of the Quadruple Alliance, was essential to stability in the region.²⁵⁰ Their cooperation effectively ended when Austria-Hungary annexed Bosnia-Herzegovina, without the endorsement Russia.²⁵¹ The situation also proved a catalyst for strong national sentiment within Serbia, which asserted that if Bosnia was no longer under Ottoman rule, it should be under Serbian rule.²⁵²

The means and methods of war had also evolved considerably since 1815:

²⁴⁶ KISSINGER, *supra* note 163, at 79.

²⁴⁷ ADDINGTON, *supra* note 184, at 43.

²⁴⁸ STRACHAN, *supra* note 245, at 4.

²⁴⁹ *Id.*

²⁵⁰ See map at Appendix B.

²⁵¹ STRACHAN, *supra* note 245, at 6.

²⁵² *Id.*

The revolutionary changes in warfare associated with the French Revolution and Napoleon were mostly sociopolitical and organizational in nature; the changes in technology were secondary. After 1815 and especially beginning about the middle of the nineteenth century, the reverse was true. Changing military technology reflected the facets of the early Industrial revolution, especially the impact of steam power, mass production through the factory system, and discoveries in metallurgy, chemistry, and physics. The first products of the Industrial Revolution to affect war on land were: (1) the steam railroad; (2) the electric telegraph; and (3) the mass-produced, rifled musket. The first two developments had their greatest impact on strategy; the last had its greatest impact on tactics.²⁵³

The ineffective supply lines that had significantly contributed to Napoleon's defeat now enjoyed the benefit of the steam locomotive.²⁵⁴ By the start of WWI, soldiers were equipped with magazine-fed, bolt-action rifles effective up to a thousand yards.²⁵⁵ The navies of the time would benefit even more than did armies from industrial developments; it was during the period prior to WWI when the world saw its first screw-propelled warship, which could maneuver in battle free of wind power.²⁵⁶ Soon, the world would be exposed to the destructive force of the *Dreadnought* class of gunships, which were capable of accurate fire up to 6.5 nautical miles.²⁵⁷ Aircraft had evolved from observation craft to lethal weapons platforms capable of dropping thousands of pounds of bombs on enemy forces.²⁵⁸ WWI would also see the first military use of poison gas.²⁵⁹

²⁵³ ADDINGTON, *supra* note 184, at 48.

²⁵⁴ *Id.*

²⁵⁵ ADDINGTON, *supra* note 184, at 103.

²⁵⁶ *Id.* at 54.

²⁵⁷ *Id.* at 117.

²⁵⁸ *Id.* at 152.

²⁵⁹ *Id.* at 148.

Coupled with these advances in the destructive force available to states, Prussia's unification of Germany in 1871 effectively destroyed the balance of power that had been established at Vienna and had served to thwart total war.²⁶⁰ The unification spawned multiple short-lived conflicts, which were swiftly won by the dominant, Prusso-German "Nation-in-Arms" approach.²⁶¹ "What emerged after the unification of Germany was a dominant country, strong enough to defeat each neighbor individually and perhaps the continental countries together. The bond of legitimacy had disappeared."²⁶²

Soon the other major powers—or those which sought to be—took notice and were adopting the nation-in-arms approach to their militaries, and imitating German developments in war colleges and general staff, as well as developing strategic military alliances.²⁶³ The alliance system which sought to ensure mutual security is recognized as one of the most significant developments of the time.²⁶⁴ New alliances had been forged which linked Austria to Germany and Russia to France, not to mention alliances which also implicated the rest of the world that would eventually be consumed by the war.²⁶⁵ With the balance between legitimacy and power tilted decisively in favor of power, Serbia's national self-determination, if acted upon, would implicate all of the major European powers.

²⁶⁰ KISSINGER, *supra* note 163, at 77.

²⁶¹ ADDINGTON, *supra* note 184, at 94.

²⁶² KISSINGER, *supra* note 163, at 77.

²⁶³ ADDINGTON, *supra* note 184, at 102.

²⁶⁴ *Id.* at 105.

²⁶⁵ Japan, for example, had been an ally of Britain and further saw Russia as a strategic ally. Japan declared war on Germany on August 23, 1914. STRACHAN, *supra* note 245, at 71-72. There were also conflicting and overlapping alliances, like those between Prussia (which now controlled Germany) and Austria, and at the same time one between Prussia/Germany and Russia. The latter of which would eventually be replaced by an alliance between Russia and France. KISSINGER, *supra* note 163, at 78.

Prior to Germany's unification, the Great Powers were able to play loose with diplomacy, essentially "dar[ing] each other to back down in a succession of standoffs over tangential disputes without ever producing a showdown."²⁶⁶ But this method of diplomacy, the by-product of the Vienna peace, discounted the new realities—geopolitically as well as technologically.²⁶⁷ In fact, before the first shots of WWI were fired, the British foreign minister had attempted to call a conference of the Concert of Europe to address the threat to peace, which proved wholly ineffective.²⁶⁸

On June 28, 1914, Archduke of Austria-Hungary Franz Ferdinand was shot and killed by a nineteen-year-old member of the revolutionary group Young Bosnia, who was armed by the Serbian military.²⁶⁹ It would be the shot that finally tipped the balance and ultimately necessitated another evolution of the world order. Austria-Hungary declared war on Serbia on July 28, 1914, with artillery shells striking a hospital in the Serb capital foreshadowing the impending destruction.²⁷⁰ The Russian army was fully mobilized on July 30, 1914.²⁷¹ Germany, which had pledged to support Austria-Hungary were Russia to intervene in Austria-Hungary's affairs in Serbia, would consequently be compelled into the war.²⁷²

²⁶⁶ KISSINGER, *supra* note 163, at 80.

²⁶⁷ *See, e.g. Id.* at 79 (discussing the impact on warfare of advances like the railway system); STRACHAN, *supra* note 245, at 43 (discussing the advances in rifles since Napoleon's defeat at Waterloo – effective range 150 yards, rate of fire 2 rounds a minute. Almost a mile range, magazine fed, 10+ rounds a minute; machine gun 400 rounds a minute smokeless powder in 1880s, protection of firer).

²⁶⁸ STRACHAN, *supra* note 245, at 21.

²⁶⁹ *Id.* at 9-10.

²⁷⁰ *Id.* at 20-21.

²⁷¹ *Id.* at 21.

²⁷² *Id.* at 13.

The First World War had begun, and would indeed eventually involve the better part of the world. Some, like those early to the war, were drawn in through existing or new opportunities for strategic alliances—though this is not to say that self-interest was not also a factor, especially with regard to the Great Powers’ individual aspirations for the collapse of the Ottoman Empire.²⁷³ Others, like Italy, participated in no uncertain terms for their own self-interest, joining the side which offered the most lucrative deal.²⁷⁴ Others, like the Ottoman Empire, were also driven by self-interest to a particular side, but rather than territory they were inspired by a growing sense of nationalism. For the Young Turks, this was a nationalism based on Turkish culture and not necessarily faith or geography.²⁷⁵ Russia would experience the effects of the nationalist movement within its own borders as well, with the Bolshevik revolution and subsequent armistice with Germany.²⁷⁶

Most notable for present purposes is the eventual involvement of the United States. In both rhetoric and reality, the U.S. entry into WWI was grounded in humanitarian intervention. President Woodrow Wilson’s 1916 re-election campaign touted the slogan “he kept us out of war,” and his eventual re-election confirmed that his view was aligned with the American populace.²⁷⁷ Indeed, it would ultimately be seen as a combination of the threat to American trade and the intercepted attempts of Germany to ally with Mexico in the event of a U.S-German war which persuaded both Wilson and the American public that it was time

²⁷³ See, e.g. *Id.* at 102 (describing French, British, Italian, and Russian interests in various parts of the Middle East). After the Bolshevik Revolution in Russia, secret agreements surfaced which described the territorial ambitions of Britain, France, and Italy. *Id.* at 264-65.

²⁷⁴ *Id.* at 152 (2003) (Italy’s goal was to gain “frontiers on land and sea no longer open to annexation, and [to raise] Italy, in reality, to the status of a great power.”) (quoting Italian prime minister Antonio Salandra).

²⁷⁵ *Id.* at 109 (2003).

²⁷⁶ *Id.* at 264 (2003).

²⁷⁷ *Id.* at 225 (2003).

for the U.S. to intervene.²⁷⁸ But this seeming self-defense justification for involvement did not match either Wilson's announcement to the American people, nor his aspirations for peace:

The right is more precious than peace, and we shall fight for the things which we have always carried nearest our hearts – for democracy, for the right of those who submit to authority to have a voice in their own governments, for the rights and liberties of small nations, for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free.²⁷⁹

The war would last far longer than any of the powers had originally anticipated, and claim the lives of some twenty-five million people.²⁸⁰ The Russian Empire would give way to a populist revolt culminating in a *coup d'état*, and be ravaged by a civil war from which the Soviet Union emerged.²⁸¹ The Ottoman and Austrian Empires would cease to exist.²⁸²

2. *The Treaty of Versailles*

*The days of the Treaty of Vienna are long past. We can no longer submit the future of European civilization to the arbitrary decisions of a few negotiators striving to secure chicanery or persuasion in the interests of this or that dynasty or nation. The settlement of the new Europe must be based on such grounds of reason and justice as will give some promise of stability. Therefore it is we feel that government with the consent of the governed must be the basis for any territorial settlement in this war.*²⁸³

In 1815, the Congress of Vienna sought to restore the balance of power in Europe, largely by undoing what the French Revolution and Napoleon had done. At Versailles, the parties

²⁷⁸ *Id.* at 227(2003).

²⁷⁹ *Id.* (quoting U.S. President Woodrow Wilson, Apr. 2, 1917).

²⁸⁰ KISSINGER, *supra* note 163, at 82.

²⁸¹ *Id.*

²⁸² INOCENCIO, *supra* note 118, at 24.

²⁸³ STRACHAN, *supra* note 245, at 304 (quoting British Prime Minister David Lloyd George, Jan. 5, 1918).

sought to look forward to a new international order—a new *world* order. After Vienna, peace in Europe had been the product of a delicate balance of legitimacy and power, and when legitimacy was later discarded, power was what remained to determine order. At Versailles, the peace was again to turn toward legitimacy, this time in the form of national self-determination.²⁸⁴

There is no doubt that the actual terms of the Treaty and its creation of the League of Nations were intended to recognize legitimate states and afford them all of the rights of sovereignty, in terms almost identical to those in Article 2, paragraph 4 of the U.N. Charter: “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.”²⁸⁵ Indeed, it is recognized as the first occasion to clearly afford states a right of noninterference in *domestic* affairs; the Treaty provided that if one of the parties to a dispute claims that it is solely within the domestic jurisdiction of the party, the League will take no action.²⁸⁶ Significantly, though, it was still left to the League to decide if the issue was in fact solely domestic, and if it was not, then it was an international issue within the jurisdiction of the League.²⁸⁷

The Treaty of Versailles afforded no protection through sovereignty for a state’s affairs which may have affect outside its own borders. In fact, some have cited Versailles as actually marking the point at which state sovereignty begins to diverge from a historically

²⁸⁴ KISSINGER, *supra* note 163, at 83.

²⁸⁵ The Versailles Treaty part. 1, art. 10 (June 28, 1919), *available at* <http://avalon.law.yale.edu/imt/parti.asp> [hereinafter Versailles Treaty]; “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any states.” U.N. Charter art. 2, para. 4.

²⁸⁶ Versailles Treaty, *supra* note 285, at part. 1, art. 15.

²⁸⁷ *Id.*

absolutist notion.²⁸⁸ Of course, previous sections have made clear that this is not in fact the case. That some believe sovereignty has been non-absolute since 1919 simply reinforces the fact that contemporary notions holding sovereignty as having been sacrosanct since Westphalia are flawed.

The Treaty of Versailles established the League of Nations, the preamble of which explicitly encompasses the *obligations* of states and the observance of the rules of international law:

THE HIGH CONTRACTING PARTIES, In order to promote international co-operation and to achieve international peace and security by the acceptance of *obligations* not to resort to war by the prescription of open, just and honourable relations between nations by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty *obligations* in the dealings of organised peoples with one another Agree to this Covenant of the League of Nations.²⁸⁹

The 32 original signatories also welcomed other member states, provided a state offered “guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval, and air forces and armaments.”²⁹⁰

The Treaty therefore imposed upon state sovereignty by placing a clear prohibition on a state’s right to wage war, as well as by making members subject to the direction of the League regarding the use of force.²⁹¹ Article 16 provides that any resort to war would be viewed as an act of war against all members of the League and would result in the severance

²⁸⁸ INOCENCIO, *supra* note 118, at 29.

²⁸⁹ Versailles Treaty, *supra* note 285, at part 1 (emphasis added).

²⁹⁰ *Id.* at part 1, art. 1.

²⁹¹ The right of states to wage war was not understood to be completely banned until the 1928 Kellogg-Briand Pact. GLANVILLE, *supra* note 47, at 93.

of effectively any benefit of legitimate statehood – trade, League membership, discourse with any other states – whether a member of the League or not.²⁹² The Treaty further clearly contemplated, and obligated, collective armed intervention:

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval, or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.²⁹³

The Versailles Treaty made clear that its terms imposed obligations on its signatories, and those terms were to be the foundation for a new world order in which peace and security could thrive. “These obligations were constitutional in the sense that they were foundational of the international system inaugurated by the Versailles settlement.”²⁹⁴ The Treaty of Versailles did not only create obligations for states, but understood those obligation to be enforceable not only through expulsion or cessation of trade under Article 16, but also as determined by the Permanent Court of International Justice (PCIJ), which was created under the Treaty.²⁹⁵ In a decision that could equally speak to the contemporary view with regard to the interaction of sovereignty and other international law, the Court stated:

²⁹² Versailles Treaty, *supra* note 285, at part 1, art.16.

²⁹³ *Id.*

²⁹⁴ INOCENCIO, *supra* note 118, at 27.

²⁹⁵ Versailles Treaty, *supra* note 285, at part 1, art. 14.

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of state sovereignty.²⁹⁶

Yet, for all the rhetoric of legitimacy and state equality, neither the process nor the outcome at Versailles truly embraced either. The prevailing powers of Britain, France, Italy, and the United States would each pursue its own self interest as the leaders of these nations carved-up territories on a map and sought to create the world in their own images – which also differed considerably among themselves.²⁹⁷ The Western powers alienated all other nations in the process, leaving many “with their noses pressed against the glass as their nations were divided up,” and void of any of the promised self-determination of the Treaty.²⁹⁸ In the Middle East, for example, the Arabs would not realize the nationhood they had been led to expect.”²⁹⁹

Legitimacy and equality were utterly disregarded in the cases of Germany and Russia. Germany was stripped of over thirteen percent of its territory,³⁰⁰ while the War Guilt Clause saddled the country with harsh reparation payments.³⁰¹ The German Rhineland was to become a demilitarized zone for Germany, although the Allies were free to station troops

²⁹⁶ The SS Wimbledon, United Kingdom & ors v Germany, 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17).

²⁹⁷ DAVID A. ANDELMAN, A SHATTERED PEACE: VERSAILLES 1919 AND THE PRICE WE PAY TODAY 1-3 (2008).

²⁹⁸ *Id.* at 6.

²⁹⁹ STRACHAN, *supra* note 245, at 334.

³⁰⁰ ANDREW ROBERTS, THE STORM OF WAR: A NEW HISTORY OF THE SECOND WORLD WAR 3 (2011).

³⁰¹ ADDINGTON, *supra* note 184, at 172.

there for up to fifteen years.³⁰² The bleakness of the terms led some to describe the two German delegates who would sign the Treaty as felons being led to their doom.³⁰³ The new Soviet Union, which had replaced Russia, recognized no authority either in the old or new international order,³⁰⁴ and would join Germany in being denied membership in the League.³⁰⁵

In addition to its dubious legitimacy, “no country proved willing to enforce the terms”³⁰⁶ of the Treaty. The major European powers before WWI had largely disappeared, and those that remained were war-weary. France and Britain sought nothing more than to avoid another taxing conflict.³⁰⁷ The United States would fail to become a member of its own creation,³⁰⁸ and would turn toward isolationism as it grew weary of the old world politics of Europe.³⁰⁹ Gradually, whatever faith may have originally existed in the Versailles peace would yield to the reality that there were no longer any real parties to it: Italy officially left the League in 1936, upset with the League’s refusal to honor the deal that it had originally struck for its entry into the war; Japan finally disregarded the League completely in 1937 as the League failed to adopt a proposed clause of racial equality.³¹⁰ “[T]he League of Nations,

³⁰² *Id.*

³⁰³ ANDELMAN, *supra* note 297, at 290 (quoting *New York Times* correspondent Charles A. Selden).

³⁰⁴ KISSINGER, *supra* note 163, at 83.

³⁰⁵ ANDELMAN, *supra* note 297, at 284.

³⁰⁶ KISSINGER, *supra* note 163, at 85.

³⁰⁷ Anthony Beevor, *The Second World War 2* (2012).

³⁰⁸ ANDELMAN, *supra* note 297, at 284.

³⁰⁹ BEEVOR, *supra* note 307, at 2.

³¹⁰ STRACHAN, *supra* note 245, at 333-334.

designed to enforce the frontiers of these new nations and nourish their development, became a watered-down club for diplomats beside an isolated Swiss lake.”³¹¹

The community of states realized in 1919 the need for a new world order which made clear that sovereign states had obligations to both their citizens and the international community, and to that end created an international body to which states transferred some of their individual sovereignty. Just as Westphalia had done with hegemony and religion, and Vienna had done with nationalism and slavery, the Versailles peace recognized a crossroads in history which necessitated an evolution in international law and what it meant to be a sovereign state in order to comport with contemporary ideas of state legitimacy and human rights. The League of Nations was an unprecedented step, and the international community soon proved naïve as to what such a vision would require of them in order to be realized. “Too punitive for conciliation, too lenient to keep Germany from recovering, the Treaty of Versailles condemned the exhausted democracies to constant vigilance against an irreconcilable and revanchist Germany as well as a revolutionary Soviet Union.”³¹² Germany would ultimately prove as capable of destroying the peace as the League was incapable of maintaining it.

D. World War II and the United Nations

The Second World War irrevocably demonstrated that the First World War was not, after all, the war to end all wars. But it also enabled posterity to have it both ways. It venerated the writers who condemned that war of 1914-1918 but at the same time condemned those who embraced appeasement, the logical corollary. War literature and appeasement both derived their appeal from the same basic liberalism which had underpinned the ideals of the peacemakers at Versailles. Liberalism’s comparative failure in the inter-war years was in large part due to its own fundamental decency. It lost the

³¹¹ ANDELMAN, *supra* note 297, at 10.

³¹² KISSINGER, *supra* note 163, at 84.

*determination to enforce its own standards, a quality it possessed in 1914 and 1917, and it was reluctant to assert itself in the internal politics of states that derived from democratic norms.*³¹³

1. World War II

“Those who were ignored or distained at Versailles, for whatever multitude of reasons, were those whose heirs and descendents would return to wreak their vengeance on us all.”³¹⁴ Hitler’s rise to power was in no small part attributable to his ability to appeal to Germany’s national humiliation and resentment for the way the country was treated in Versailles; some historians have argued that WWII was actually just an extension of WWI.³¹⁵ “The bitterness of national and personal shame produced an incoherent anger. German nationalists dreamed of the day when the humiliation of the Versailles *Diktat* could be reversed.”³¹⁶ The majority of the German population would therefore revel in Hitler’s notions of superiority and follow him as he attempted to purge the world of those people and institutions which stood in the way of creating a new world order where the nation was no longer subservient to any rule of law.³¹⁷ As he had written in *Mein Kampf*, “state boundaries are made by man and are changed by man,”³¹⁸ and he intended to change those that were created in Versailles. Hitler’s intent to make Germany a great power and to make the great powers of WWI suffer as they had caused Germany to suffer would be the motivation for much of what transpired in

³¹³ STRACHAN, *supra* note 245, at 339.

³¹⁴ ANDELMAN, *supra* note 297, at 3.

³¹⁵ BEEVOR, *supra* note 307, at 1.

³¹⁶ *Id.* at 2.

³¹⁷ *Id.* at 3.

³¹⁸ *Id.* at 10 (quoting ADOLF HITLER, *MEIN KAMPF* (1925)).

the next war.³¹⁹ Just as the Great Powers at Versailles had attempted to craft the world in their own image, the Nazis “intended to reorder Europe in their own brutal image.”³²⁰

Immediately upon gaining control of Germany, Hitler began discretely ignoring the disarmament clauses of the Versailles Treaty and in March 1935, Germany formally denounced the clauses and announced the formation of the Luftwaffe.³²¹ Hitler then ordered the occupation of the Rhineland, again in violation of the Treaty, and again with no opposition.³²² Significantly, had the Germans encountered any opposition to this occupation, they had standing orders to withdraw—which could have spelled the end for Hitler’s grand vision.³²³ Some have argued persuasively that had the strong European powers, the protectors of the Treaty of Versailles, been prepared for war in 1938, the future would have been considerably different.³²⁴

Japan was also flouting the League of Nations and pursuing its own expansion through military force, no doubt encouraged by the League’s refusal to heed Chinese calls for sanctions against Japan.³²⁵ Germany saw an opportunity for an ally. In November 1936, the

³¹⁹ See, e.g., *Id.* (describing Hitler’s desires for *Lebensraum* in which Germany would dominate Europe in order to become a great power; to demoralize and make others starve as Germany had; and to spread German nationalism through reducing other populations).

³²⁰ *Id.* at 51.

³²¹ ROBERTS, *supra* note 300, at 4.

³²² KISSINGER, *supra* note 163, at 86.

³²³ ROBERTS, *supra* note 300, at 4.

³²⁴ BEEVOR, *supra* note 307, at 8.

³²⁵ *Id.* at 7.

Axis powers which would eventually fight on one side of the Second World War were formed through the Anti-Comintern Pact between Germany, Japan, and Italy.³²⁶

Still, the nations with the greatest ability to address the growing German and Japanese threats (England, France, and the United States) were unprepared and unwilling to take any effective steps toward addressing them. Each seemed willing to accept a militarily viable Germany, some out of fear of a repeat of the First World War, and others out of misinformation or miscalculation.³²⁷ Although U.S. President Roosevelt had the foresight to realize the possible implications of the war beyond European borders and took action to supply arms to France and England,³²⁸ as well as to freeze Japanese assets,³²⁹ the U.S. was dominated by isolationist thoughts and refused to fully acknowledge the import of the war.³³⁰

On September 1, 1939, the Second World War began with the blitzkrieg in Poland, during which German bombers devastated the country from the air.³³¹ Two days later, on September 3, Britain and France declared war on Germany in fulfillment of promises made to protect Poland in the event of a German invasion.³³² The U.S. would be torn from its isolationism on December 7, 1941, when the Japanese attacked Pearl Harbor, killing 2,335

³²⁶ ROBERTS, *supra* note 300, at (Hitler and Mussolini would later sign a 10-year alliance known as the Pact of Steel), *Id.* at 9.

³²⁷ BEEVOR, *supra* note 307, at 8-9.

³²⁸ *Id.* at 49 (the Cash and Carry Bill which passed in 1939 allowed the Allies to purchase arms). Under the Lend-Lease Act of March 1941, U.S. arms and equipment could be lent to foreign forces when the President determined that it was in the national interest. ADDINGTON, *supra* note 184, at 227.

³²⁹ BEEVOR, *supra* note 307, at 219. In July 1941, both the U.S. and England froze Japanese assets. *Id.*

³³⁰ *See, e.g. Id.* at 221 (noting that even after the Nazi invasion of the Soviet Union, American isolationists failed to acknowledge the widening scope and impact of the war).

³³¹ ROBERTS, *supra* note 300, at 21.

³³² *Id.* at 7-9, 22.

American servicemen, wounding 1,143, and damaging or sinking more than ten battleships and destroyers, and over 300 aircraft.³³³ The “isolationist lobby led by the slogan ‘America First’ was utterly silenced.”³³⁴

The Second World War, like those before it, introduced deadly new technology and tactics. It would take the Allied forces “half a war to catch up” to the coordination and speed of Blitzkrieg tactics.³³⁵ The Second World War saw considerable developments in airpower with long-range bombers, effective bomb sights, and paratroopers.³³⁶ Electronic warfare also became a significant aspect of the war in the form of radar, timed fuses, radios, and encoding devices.³³⁷ The most notable development in warfare of the time, of course, was the atomic bomb which was responsible for ending the Pacific conflict after wiping two Japanese cities from the map and killing over 100,000 people immediately; the Japanese emperor was willing to “assent to an armistice on almost any terms.”³³⁸

Commensurate with Hitler’s aims, he relied heavily on tactics of terror and fear.

Treatment of civilians as well as prisoners of war was indeed terrifying:

By February 1942, some 60 per cent of the 3.5 million Red Army prisoners had died of starvation, exposure, or disease. Convinced Nazis did not just take pride in their pitilessness. Their dehumanization of victim categories – Jews, Slavs, Asiatics and Roma – was a deliberate self-fulfilling prophecy: to reduce them through humiliation, suffering and starvation to the level of animals, and thus ‘prove’ their genetic inferiority.³³⁹

³³³ BEEVOR, *supra* note 307, at 251.

³³⁴ *Id.* at 279 (2012).

³³⁵ ROBERTS, *supra* note 300, at 25.

³³⁶ ADDINGTON, *supra* note 184, at 186, 188.

³³⁷ *Id.* at 189-91.

³³⁸ *Id.* at 262.

³³⁹ BEEVOR, *supra* note 307, at 417.

The German Final Solution was meant to purge Europe of approximately eleven million Jews and would be realized through unimaginable forced labor as well as disturbingly efficient mass slaughter.³⁴⁰ Allied prisoners of war in Japanese camps would endure a death rate of twenty-seven percent, a number far less than that at the slave camps. The methods, like those utilized by the Nazis, were unthinkable—cannibalism just one such technique.³⁴¹

The magnitude of death and destruction in the Second World War are as chilling the techniques used to cause them: somewhere between sixty and seventy million people ultimately died and an uncountable number left psychologically and physically maimed.³⁴² The advances in the means of destructive force available to a growing number of powerful nations and the human rights abuses that so ran afoul of generally accepted state behavior necessitated, once again, a new world order.

2. *The United Nations*

*[T]hough they did understand the consequences of another conflagration, they recoiled before the implications of acting on their foresight . . . reluctant to exercise the force required to vindicate its proclaimed moral alternative, Europe was now consumed by another war that, at its end, brought with it once more the need to recast the European order.*³⁴³

The United Nations was “born out of the ruins and devastation of the Second World War, and was an indispensable instrument of international co-operation, which [would] seek to bequeath to coming generations a better world.”³⁴⁴ In 1945, fifty-four countries came

³⁴⁰ *Id.* at 516.

³⁴¹ *Id.* at 780.

³⁴² *Id.* at 780-81.

³⁴³ KISSINGER, *supra* note 163, at 86.

³⁴⁴ Statement of Tomohiko Kobayashi (Japan), Council President, Economic and Social Council Marks Victory over Nazism and Fascism, United Nations Publications, 1985.

together to form the United Nations.³⁴⁵ The preamble to the U.N. Charter provides that the international community was:

Determined to save succeeding generations from the scourge of war . . . and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person . . . and for these ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace.³⁴⁶

History was replete with examples of conflict and peace, and the international community would attempt to draw upon many of these lessons after WWII in the creation of the United Nations.

The U.N. shared the ideology of the League of Nations (indeed, it was modeled after the League), but sought to overcome the shortcomings of the world orders which had come before it and had proved incapable of preventing world war.³⁴⁷ Specifically, the U.N. would need international legitimacy and true enforcement to succeed where the League had failed. The enforcement problem would be addressed through the formation of the Security Council and the P5. Legitimacy would be realized primarily in terms of sovereignty.

At the outset of this section on sovereignty, it was made clear that the concept was regarded as the cornerstone of the U.N., both in terms of the sovereign equality of member states as well as individual state sovereignty in terms of non-interference in domestic matters.³⁴⁸ The incompatibility between an absolutist notion of sovereignty and other international legal responsibilities was also established.³⁴⁹ What should now become evident

³⁴⁵ LINDA FASULO, AN INSIDER'S GUIDE TO THE UN 15, 215 (2004).

³⁴⁶ U.N. Charter Preamble.

³⁴⁷ INOCENCIO, *supra* note 118, at 37.

³⁴⁸ *See supra* p. 27.

³⁴⁹ *See supra* pp. 27-29.

is that this balance is not as untenable as it appears in contemporary state practice. State sovereignty, in its multitude of forms since 1648, has been demonstrated to have always assimilated both rights and responsibilities. From Westphalia to Vienna to Versailles, each peace structure clearly conveyed that an entity endowed with sovereign rights was susceptible to intervention into its affairs and its territory should it fail to satisfy its obligations. The U.N. is no different in this regard.

World War II was prompted by a proposed world order that lacked legitimacy and alienated certain states; the war was realized through cross-border invasions by advanced national military forces. Like Westphalia, Vienna, and Versailles, the U.N. endeavored to address the failures in the previous world order which had led to unprecedented conflict. The U.N. did so by acknowledging at the outset the sovereign equality of all states and the sanctity of state borders.³⁵⁰ The concept was understandable for the time: the war that had just ended was one between states, and if every state were treated equally and enjoyed autonomy within its own borders, and each state respected the borders of the other, peace could be maintained.

Still, history and reality revealed that threats to international peace would certainly persist, and the U.N. endeavored to avoid future wars. States were of course continuing to develop the tactics which proved so decisive and destructive in the war, including nuclear devices, aircraft, precision-guided munitions, and electronics.³⁵¹ So, while the U.N. garnered the legitimacy that had been lacking in the League of Nations by recognizing the sanctity of

³⁵⁰ See *supra* p. 27.

³⁵¹ ADDINGTON, *supra* note 184, at 266.

sovereignty for all states and the illegality of infringing upon the borders of another sovereign, it required some means of enforcement of these new norms.

Few nations could endure conflict with one of the so-called superpowers, and even the powerful nations understood that it had taken their collective efforts to end the violent war. Thus, adherence to certain norms and the idea of collective defense was in the best interests of all states, and member states therefore acquiesced to the transfer of some of their sovereignty to a body with the means to enforce the terms of the U.N. Charter. It was in recognition of the “empirical reality” of the P5 nations’ dominant positions within the world and the position historically enjoyed by the dominant powers which, at least in part, drove the structure of the U.N.³⁵²

The U.N. created in the P5 a legalized hegemony in which those five nations saddled themselves with upholding the terms of the U.N. Charter, while other states willingly accepted the direction of the P5 out of the necessity of collective defense and the recognition of the power these states possessed to address future threats to peace. The fact that all U.N. member states recognize the authority of the P5 to authorize intervention is itself irrefutable evidence that state sovereignty is not absolute. It also aligns with similar authority granted to the guarantors of the peace in the terms established at Westphalia, Vienna, and Versailles.

What it means to be a sovereign state has evolved over time out of necessity. After the Thirty Years’ War, the Treaty of Westphalia introduced a basic idea of statehood and central authority in order to ensure religious tolerance and frustrate hegemonic aims. The French Revolution and Napoleonic Wars necessitated the Congress of Vienna, which recognized that the authority of the state must account for the will of the people and the inhumanity of the practice of slavery. Through a common world order devoted to the collective defense of

³⁵² INOCENCIO, *supra* note 118, at 38.

peace and human rights, the Treaty of Versailles attempted to address the extended reach of war resulting from new technology and national self-determination evidenced in WWI. The United Nations endeavored to address the shortcomings of previous peace structures and address the destructive reality of powerful states with powerful new technology by recognizing the legitimacy of all states and fortifying state borders through collective defense, as well as emphasizing the inviolability of basic human rights. Today, the notion of sovereignty has come to stand more for the fortification of borders than for collective defense and the protection of human rights.

With perhaps the exception of the League of Nations, each of the peace structures addressed above realized its purpose for a notable period of time. Their failures were not necessarily in their inability to keep the peace, but in their inability to keep the peace when faced with a new threat which they were not designed to overcome. Each of the treaties created new international law and new notions of sovereignty which sought to address the conflict that had preceded them, and each only proved inadequate when challenged in a manner that had not been envisaged when the peace had been forged. The United Nations is no exception to this truth, and the world now faces a new threat which the U.N. was not designed to address.

The world is once again at a crossroads and evolution is again necessary. The community of states must adapt their understanding of sovereignty to allow for obligatory humanitarian intervention. The next section will explain why humanitarian intervention will only prove successful when realized through international legal obligation. It will be followed by analysis of the new global terror threat and why humanitarian intervention is necessary to defeat it.

IV. The Next Evolution: Obligatory Humanitarian Intervention

*Experience suggests that the prevention of state failure depends almost entirely on a scarce commodity: international political will.*³⁵³

A. The Responsibility to Protect (R2P)

The ICISS sought “to build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty . . . [and] to develop a global political consensus on how to move from polemics – and often paralysis – towards action within the international system.”³⁵⁴ The ICISS asserted that in becoming a member of the U.N. and enjoying the benefits of participating in the world order, a state does not forfeit sovereignty but does undergo a “necessary re-characterization . . . from *sovereignty as control to sovereignty as responsibility* in both internal functions and external duties.”³⁵⁵

The R2P concept further proposed that individual states and the community of states have shared responsibilities to prevent the necessity for humanitarian interventions, to react effectively to end human rights abuses, and to stabilize and rebuild a state when intervention is carried out.³⁵⁶ The ICISS recognized that intervention will sometimes be necessary in order to halt humanitarian catastrophes and therefore included in the R2P proposed criteria to guide the decision of when intervention would be appropriate.³⁵⁷

Similar to the argument in these pages, the R2P concept proposed an evolution in the way states understood sovereignty. Although the ICISS report asserts that states currently

³⁵³ Robert I. Rotberg, *Failed States in a World of Terror*, FOREIGN AFFAIRS, Aug. 2002, <http://www.foreignaffairs.com/articles/58046/robert-i-rotberg/failed-states-in-a-world-of-terror>.

³⁵⁴ Responsibility to Protect, *supra* note 22, at 2.

³⁵⁵ *Id.* at 13 (emphasis in original).

³⁵⁶ *See generally Id.*

³⁵⁷ *Id.* at XII.

understand sovereignty to encompass internal duties to respect the rights of its citizenry, it also acknowledges that sovereignty still serves at times to impede intervention when a state fails to fulfill those responsibilities.³⁵⁸ The ICISS did not intend, however, for the R2P to create an obligation for humanitarian intervention, or to otherwise create an international legal obligation. In fact, even the strongest proponents of the concept contend that its success relies in part on observance of the old notions of sovereignty and the fact that R2P does not actually create any new law or legal obligation:

R2P does not obligate the Security Council to use force. It calls for—but does not obligate—timely and decisive responses to protect populations from the four crimes and sensibly recommends a “case by case” approach. Following the U.N. Charter, R2P leaves it to the Council to decide on the best course of action—and force will rarely [be] judged to be the best course of action. While this can be frustrating when the Council fails to discharge its responsibility—as it has spectacularly in Syria—it is absolutely necessary for protecting the consensus on which R2P is based and ensuring that principle pays due respect to other cherished norms such as sovereignty and non-interference.³⁵⁹

Gareth Evans, who co-chaired the ICISS and currently serves as co-chair of the Global Centre for the Responsibility to Protect, relied on similar logic when he encouraged the criteria proposed in the R2P report to be understood simply as guidelines to which the “Security Council should have regard” when it considers humanitarian intervention.³⁶⁰

Given its status as simply an altruistic suggestion to the international community, it is not surprising that the R2P concept has been met with significant support and outright

³⁵⁸ *Id.* at 7-9.

³⁵⁹ Alex Bellamy, Dir., Asia Pacific Centre for the Responsibility to Protect, Univ. of Queensland, The Responsibility to Protect & Int’l Law, Lecture presented at Eleri Univali Conference, Santa Catarina, Braz. (June 4, 2014), in Asia Pacific Centre for the Responsibility to Protect, issue 10, June 2014, at 4-5.

³⁶⁰ Gareth Evans, Co-chair, Global Centre for the Responsibility to Protect, Responsibility while Protecting: What’s Next?, Address to GCR2P/FGV/Stanley Foundation Workshop, Rio de Janeiro (Aug. 23, 2012).

endorsement. The concept was endorsed by the General Assembly in the 2005 World Summit Outcome Document³⁶¹ and later by the Security Council.³⁶² The Outcome Document states that “each individual State has a responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”³⁶³ and acknowledges U.N. member’s willingness to take timely collective action where a state fails in its responsibility.³⁶⁴ The concept “rejects powerfully the argument that sovereignty shields [states] from international concern.”³⁶⁵ Indeed, the U.N. website provides that “[s]overeignty no longer exclusively protects States from foreign interference; it is a charge of responsibility where States are accountable for the welfare of their people.”³⁶⁶ Recall that the concept was also cited by the Security Council in UNSCR 1973 authorizing intervention in Libya.

Despite this considerable international support for the R2P concept, the situation in Syria is one of many examples that the responsibility to protect people from humanitarian abuses is still routinely disregarded by both individual states within their own borders, as well as by the greater community of states. States have only half-heartedly shifted their understanding of sovereignty as responsibility as it aligns with their national self-interest. What R2P currently represents is the opportunity for states to have it both ways: recognize a

³⁶¹ 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

³⁶² S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (affirming the language contained in the World Summit document regarding the responsibility to protect).

³⁶³ G.A. Res. 60/1, *supra* note 361, at para. 138.

³⁶⁴ *Id.* at para. 139.

³⁶⁵ WAXMAN, *supra* note 41, at 10.

³⁶⁶ UNITED NATIONS, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited Dec. 20, 2014).

responsibility when it is convenient, and cite sovereignty as a legal basis for not fulfilling this responsibility when intervention is inconvenient.

Support for the R2P may—and hopefully will—continue to expand within the international community, but when it comes to humanitarian intervention, the concept will fail to achieve the global political consensus for action that it aspired to. The R2P concept is meant to encourage the international community to recognize its obligations for the maintenance of peace and protection of human rights and to take action—to include intervention—as necessary to comply with those responsibilities. Were R2P to become codified as law itself, it would become a right for individual states, or collections of states, to intervene. As it currently stands, the legal authority for humanitarian intervention, even when R2P is invoked as it was in UNSCR 1973, remains in Security Council authorization. Intervention fails under either scheme.

Any framework under which humanitarian intervention can be realized or ruined by individual states will prove ineffective. Such structures will continue to be easily manipulated to serve the self-interests of states, will routinely lack international legitimacy, and will rely upon an expenditure of political capital which will prove too costly for some states to participate in legitimate interventions. Creating a standing legal obligation for humanitarian intervention guided by codified criteria will serve the obvious purpose of guaranteeing intervention in situations that warrant it, as well as liberate the intervention decision from the often insurmountable impediments of national interest and politics.

B. Legitimacy and Self-Interest

*[T]hose states skeptical of or hostile to a more human rights-protective regime must come to see it as in their own long-term interests to facilitate rather than undermine timely and decisive action.*³⁶⁷

States are inherently guided in foreign affairs by their national interests. States, like individuals, are motivated to enter into agreements (and create international law) because there is some benefit to the state in doing so. It is also an intuitive fact that the interests of one state do not align with the interests of all other nations all of the time. The U.S. does not have the financial interests in Syria that Russia does, and Russia did not share in the clear desire of the U.S. and NATO states for regime change in Libya. Humanitarian intervention cannot serve its necessary purpose under a system that makes its implementation susceptible to individual state interests and politics. Likewise, the interests of all states are served when military action can be attributable to the collective United Nations, rather than to individual states or collections of states.

Under the current humanitarian intervention framework, “the national interests of the intervening powers . . . doubtless influence their willingness to participate.”³⁶⁸ Authorization for intervention by the Security Council is considered on a case-by-case basis, and can be held hostage by P5 vetoes—as action in Syria has been by China and Russia. Even when authorized by the Security Council, intervention requires states to choose to participate and the scope is easily influenced by the states which choose to do so—as action in Libya was by NATO. States must recognize that humanitarian intervention will never be consistently or effectively realized as long as it remains subject to the influence of the unique interests of every individual state. A standing legal obligation acknowledges that humanitarian

³⁶⁷ Waxman, *supra* note 122.

³⁶⁸ ADDINGTON, *supra* note 184, at 325.

intervention serves the interests of all states as well as the international community, while unfettering its implementation from the derailing effects of individual state interests on specific interventions.

At a 2009 General Assembly debate on the implementation of R2P, many states joined the U.S. in strongly supporting the concept; others vehemently cited the sanctity of sovereignty and non-intervention.³⁶⁹ Many of those states opposed humanitarian intervention out of concern that states can and will use intervention as a mechanism to further their own self-interests.³⁷⁰ “International support for future interventions in potentially more threatening strategic crises or in Darfur will be more difficult because of mistrust over U.S. intentions and UN complicity with U.S. foreign policy goals.”³⁷¹ Russia has regularly cited its belief that Western powers are pursuing their own interests for the removal of Assad and are not intent on humanitarian intervention, but rather the use of force or sanctions only against the Syrian government.³⁷² Given NATO actions in Libya, Russia has good reason for concern.

In addition to blocking any consideration of intervention in Syria through threat of veto, China and Russia have both exercised their veto power on at least three occasions to prevent any resolution intended to affect the Assad regime.³⁷³ The British ambassador to the U.N. echoed the sentiments of others within the U.N. when he said that Russia and China had

³⁶⁹ WAXMAN, *supra* note 41, at 11.

³⁷⁰ *Id.*

³⁷¹ BATTERSBY & SIRACUSA, *supra* note 17, at 118.

³⁷² *See, e.g.*, Lynch, *supra* note 12; Herszenhorn, *supra* note 29.

³⁷³ Michelle Nichols, *Russia, China Veto U.N. Security Council Resolution on Syria*, REUTERS (Jul.19, 2012, 3:32 PM), <http://www.reuters.com/article/2012/07/19/us-syria-crisis-un-idUSBRE86I0UD20120719>.

“chosen to put their national interests ahead of the lives of millions of Syrians.”³⁷⁴ The image of Syrian President Bashar al-Assad viewing from atop a Russian tank the devastation his forces wrought on Syrian towns animates these words.³⁷⁵

Russia in fact has continued to supply the Syrian government with arms—including rocket launchers, howitzers, air defense systems, and a \$550 million deal for attack planes—even as Syrian officials were turning their weapons on their own citizens.³⁷⁶ Russia has long been in the business of arms with Syria, which currently amounts to a nearly \$5 billion industry for Russia and employs over two million Russian citizens.³⁷⁷ The ties run deeper than just weapons deals; Russia’s position in the Middle East relies almost exclusively on Syria. Russia’s only military installation outside of former Soviet territory is in Syria and Russian companies operate or have financial interests in myriad industries in Syria, including oil, natural gas, agriculture, irrigation, telecommunications, and nuclear energy.³⁷⁸ Upsetting the status quo in Syria runs deeply counter to Russia’s national interests.

The hurdle to intervention in Syria is certainly not all-encompassed in Russia’s financial interest in the area, but also in its legitimate concern that intervention would simply serve as a pretext to further the interests of other states. In fact, Russia had similar ties to Libya prior to the Security Council sanctioned intervention, which Russia did not oppose. The lack of opposition can certainly be linked to assurances that Russian arms deals with Libya would be honored regardless of the intervention; instead Russia has lost an estimated \$4 billion in

³⁷⁴ *Id.* (quoting British ambassador to the U.N. Mark Lyall Grant).

³⁷⁵ *See* Herszenhorn, *supra* note 29.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

previously agreed contracts with Libya.³⁷⁹ After Russia and China agreed not to veto a no-fly zone over Libya, the NATO-led intervention effort clearly evidenced the desire for regime change (as opposed to humanitarian intervention) when it began striking government targets, leaving Russia particularly furious.³⁸⁰

There are certainly other prices to be paid for perceptions that state interests are the driving force behind foreign policy: A 2006 Pew study found that “[t]he perception that the U.S. acts unilaterally in international affairs, concerns about the American military becoming a threat, negative views of the Iraq war . . . all drive pro-terrorism sentiments.”³⁸¹ The surviving Boston attacker Dzhokhar Tsarnaev, for example, cites the “American wars” in Iraq and Afghanistan as the motivation for his and his brother’s attack.³⁸² In fact, most of the serious homeland terror threats to the U.S. were at least in part motivated by U.S. military activities abroad.³⁸³ Deployments of U.S. troops often serve to facilitate terror recruitment and propaganda, allowing terror groups to justify their actions as combating the infidel countries.³⁸⁴ Foreign policy will of course continue to be driven by national interests, but states will benefit considerably—especially the U.S.—from a collective U.N. face on interventions rather than their own.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Richard Wike & Nilanthi Samaranyake, *Where Terrorism Finds Support in the Muslim World*, PEW RESEARCH CENTER (May 23, 2006), <http://www.pewglobal.org/2006/05/23/where-terrorism-finds-support-in-the-muslim-world/>.

³⁸² Scott Miller, Greg Miller, & Sari Horwitz, *Boston Bombing Suspect Cites U.S. Wars as Motivation, Officials Say* WASHINGTON POST (Apr. 23, 2013), http://www.washingtonpost.com/national/boston-bombing-suspect-cites-us-wars-as-motivation-officials-say/2013/04/23/324b9cea-ac29-11e2-b6fd-ba6f5f26d70e_story.html.

³⁸³ Jones, *supra* note 16, at 54.

³⁸⁴ *Id.* at 53-54.

Intervention that is not both authorized and guided by the Security Council, free from the manipulation—or perceived manipulation—of self-interested states, will continue to be nothing more than an instrument for advancing the interests of participating states and will therefore fail. Had there been a standing resolution in place in 2011 which promulgated criteria for intervention, the Security Council would have simply needed to determine if the situations in Libya and Syria satisfied those criteria. If they had, then all U.N. member states would have been obligated to participate in intervention as directed by the U.N., free from any Russian veto or U.S. and NATO desires for regime change. The Syrian people would have likely enjoyed the protection of the international community, while the Libyan citizenry would be benefitting from collective support in rebuilding their country after their government was toppled. The world would have benefitted by denying terror groups the places they need to develop and grow.

C. Political Will

[A] democratic leader's need for domestic support may make military intervention difficult unless there is a clear-cut threat to a vital national interest.³⁸⁵

National leaders naturally desire to stay in power and doing so, in most countries, requires the support of the people. Every government action is a transaction in political capital. As mentioned above, the arms industry in Russia employs over two million citizens and represents a significantly strong voting bloc.³⁸⁶ What is important to understand, then, is that even if the Russian government considered it in the international best interests of Russia to support intervention in Syria, the impact on domestic affairs might be catastrophic to the

³⁸⁵ BATTERSBY & SIRACUSA, *supra* note 17, at 77.

³⁸⁶ Herszenhorn, *supra* note 29.

survival of the government. Russia may very well understand that the growth of the Islamic State (ISIS, also referred to as ISIL) and the overall situation in Syria is a threat to Russia, but may not possess the political capital to take necessary action. That Russia does in fact acknowledge such a threat is evidenced by its not only supporting, but drafting, UNSCR 2199 intended to address terror groups in Iraq and Syria.³⁸⁷

“The need to hold together international coalitions with legitimacy is important at the front end of intervention and also over time, because confronting mass atrocity crimes as well as their underlying causes often requires long-term commitment not only to coercive strategies but also to the political engagement and reconstruction efforts that must follow.”³⁸⁸ Libya is a salient reminder that “if the big powers walk away from failed states too soon and decide that the long slog of reconstruction is for others, then the real war against terror will not have been won.”³⁸⁹ But these are costly endeavors, both politically and financially. For example, “[n]ational support for the [Iraq] war fell away dramatically after the initial swift removal of Hussein, raising questions about the preparedness of the U.S. voting public to support future military interventions of any kind.”³⁹⁰ Indeed, after many taxing years of fighting in Iraq and Afghanistan, American support for ground troops in Syria and Iraq to fight ISIS only recently reached a majority (fifty-seven percent).³⁹¹

³⁸⁷ S.C. Res. 2199, U.N. Doc. S/RES/2199 (Feb. 12, 2015); *see also* Kristen Boon, *Important New Terrorist Financing Resolution Passed by Security Council*, OPINIO JURIS (Feb. 16, 2015, 10:19 PM), <http://opiniojuris.org/2015/02/16/important-new-terrorist-financing-resolution-passed-security-council/>.

³⁸⁸ WAXMAN, *supra* note 41, at 18.

³⁸⁹ Rotberg, *supra* note 353.

³⁹⁰ BATTERSBY & SIRACUSA, *supra* note 17, at 118.

³⁹¹ Adam Chandler, *For the First Time, Americans Support Ground Troops Against ISIS*, THE ATLANTIC (Feb. 19, 2015, 2:16 PM), <http://www.theatlantic.com/international/archive/2015/02/a-first-a-majority-of-americans-back-ground-troops-against-isis/385650/>.

International alliances are also susceptible to erosion where national interests are at odds. When Egypt, one of the United States' closest allies in the Middle East, began a military campaign against ISIS in Libya, both Egyptian citizens and government officials openly questioned the lack of support from their key ally.³⁹² Despite ISIS being a common foe, and the long and costly efforts in forging the U.S.- Egypt relationship, the U.S. refused to endorse Egypt's efforts in Libya and instead insisted that efforts against ISIS should focus on Iraq and Syria.³⁹³ The opposing viewpoints, grounded in the perceived self-interests of the two nations, are broadening the rift between the U.S. and Egypt, and may very well cost each an important ally. Meanwhile, ISIS of course benefits from such fractured alliances.³⁹⁴

Recent polls have revealed that a majority of citizens in the polled countries believe that states should adhere to international law even when it is counter to the states own interests; Americans and Chinese were at the top of this group with sixty-nine percent and seventy-four percent of those polled supporting the proposition, respectively.³⁹⁵ Significant majorities also approved of the U.N. using force "to protect people from severe human rights abuses even against the will of the government."³⁹⁶ These statistics indicate that national populations largely support humanitarian interventions to maintain peace and secure human rights, but believe that the U.N. should be shouldering the burden.

³⁹² Nancy A. Youssef, *U.S. won't Back Egypt's Attacks on ISIS*, THE DAILY BEAST (Feb. 19, 2015), <http://www.thedailybeast.com/articles/2015/02/18/u-s-won-t-back-egypt-s-attacks-on-isis.html>.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ WORLD PUBLIC OPINION.ORG, *supra* note 79.

³⁹⁶ *Id.*

Political concerns, like other individual national interests, understandably impact a state's decision to endorse or participate in humanitarian intervention. The decision of the international community to intervene must therefore also be detached from the political concerns of individual states. Were continued membership in the international community of states to impart an obligation for states to participate in humanitarian interventions when established criteria are met, states would be far less susceptible to scrutiny—domestic or otherwise—for their participation. While individual interventions will continue to affect individual state interests differently, a standing legal obligation would serve to codify the understanding that the realization of humanitarian intervention when it is necessary serves the interests of the entire community of states and therefore must trump individual concerns. When Russia, then, is required to participate in an intervention to protect the people of Syria from the abuses of their government, the domestic opposition or affects in Russia can be addressed through citing an international obligation that was previously accepted in return for remaining a legitimate member of the international community.

To be viable, humanitarian intervention must be undertaken in all situations in which it is warranted, and must therefore remain indisputably immune from the singular interests of each individual state. An international legal obligation for intervention is required in order to embody the legitimacy necessary to succeed and offer the promise of intervention in all cases in which it is required.

This paper previously examined the necessity for the community of states to evolve in their understanding of sovereignty in order to facilitate an obligation for humanitarian intervention. This section argued that a legal obligation is a necessary antecedent to successful humanitarian intervention. The final hurdle that remains is establishing the

existence of a new global terror threat and the necessary role of humanitarian intervention in its demise.

IV. The Age of Global Terrorism

*[W]hile the world continues to seek peaceful resolutions to the conditions that breed war, new patterns of war unfortunately continue to evolve.*³⁹⁷

Conflict is no longer fought between states with uniformed militaries amassing at borders, as it was in 1945. Trends clearly indicate that interstate conflict has declined considerably since the end of WWII and has been replaced by intrastate and internationalized conflicts.³⁹⁸ “[T]he global trend in interstate warfare has remained at a relatively low level since the end of the Second World War and the establishment of the [U.N.], particularly in comparison with the high levels of interstate war during the first half of the twentieth century.”³⁹⁹ As interstate conflict declines, societal warfare has increased at a constant rate, and although all manner of conflict declined over a short period of time, societal warfare has again increased over the past several years.⁴⁰⁰ According to a 2014 report, by mid-year there were twenty-three countries with major conflicts within their territories, and all were societal warfare.⁴⁰¹

³⁹⁷ ADDINGTON, *supra* note 184, at 325.

³⁹⁸ UPPSALA UNIVERSITET, DEPARTMENT OF PEACE AND CONFLICT RESEARCH, *available at* http://www.pcr.uu.se/digitalAssets/66/66314_1armed-conflict-by-type.pdf (last visited Feb. 21, 2015). See graph at Appendix C.

³⁹⁹ MONTY G MARSHALL & BENJAMIN R. COLE, CENTER FOR SYSTEMIC PEACE, GLOBAL REPORT 2014: CONFLICT, GOVERNANCE, AND STATE FRAGILITY 12 (2014).

⁴⁰⁰ *Id.* at 12. Societal warfare refers to civil, ethnic, and communal warfare as opposed to warfare between nation-states. *Id.*

⁴⁰¹ *Id.* at 14.

These conflicts have also increasingly become internationalized wars, in which foreign powers intervene—both legally and illegally.⁴⁰²

Furthermore, “[s]hifting geopolitical balances since the UN Charter’s founding have undermined the Security Council’s legitimacy, as the membership distribution—and especially the veto-wielding and permanent status of the five main World War II victorious powers—reflects less and less contemporary global power distribution.”⁴⁰³ In acknowledging the error of the western powers in shaping the Treaty of Versailles by dictating the destinies of smaller nations, author David Andelman similarly notes that leaders are largely doing the same today, but that these smaller, weaker nations pose a much more significant threat than did those of 1919: “New tactics of terrorism and new weapons of mass destruction have equalized the balance between small and large. Today, even large nations must beware.”⁴⁰⁴ “[A]cquisition by lesser powers of nuclear weapons will enhance their ability to intimidate stronger powers from intervening in any wars they care to launch—a disquieting circumstance for the future of international peacekeeping.”⁴⁰⁵ The international community must overcome this “failure to adapt to the wicked problem of non-state threats in a networked world.”⁴⁰⁶

There can certainly be no doubt that terrorism exists today. How that threat is gauged by the international community is what is important if the world order is to be altered in order to

⁴⁰² *Id.* at 13.

⁴⁰³ WAXMAN, *supra* note 41, at 25.

⁴⁰⁴ ANDELMAN, *supra* note 297.

⁴⁰⁵ ADDINGTON, *supra* note 184, at 335.

⁴⁰⁶ Clint Watts, *Inspired, Networked, & Directed – The Muddled Jihad of ISIS & al Qaeda post Hebdo* WARONTEROCKS.COM (Jan. 12, 2015), <http://warontherocks.com/tag/al-qaeda/>.

address it. Criticizing the U.S. 2014 Quadrennial Defense Review’s emphasis on shifting defense focus to the Asia-Pacific, a Rand Corporation report asserted that “[f]or the near future, the most acute security threats to the U.S. homeland and its interests overseas will likely come from terrorist groups and state sponsors of terror, not countries in the Asia-Pacific.”⁴⁰⁷ Like the attack on Pearl Harbor, if states continue to ignore the threat terrorism poses to the entire international community, they will each in time be forced to reconcile the somber consequences of their ignorance.

Neutrality and isolationism are not viable options. Such “strateg[ies] would severely jeopardize U.S. national security, especially in cases where Salafi-jihadist groups overseas were actively plotting attacks against the United States.”⁴⁰⁸ The terror threat not only exists, but it is growing more powerful and more expansive, and affects all states.

A. The Growing Global Threat

1. Potency

Despite thirteen years in the so-called war on terror, British intelligence is reporting that the terror threat is more dangerous now than it was prior to the events in America on September 11, 2001.⁴⁰⁹ In fact, since 9/11, there has been a distinct increase in the number of tactical attacks utilizing simple explosives against soft targets, while “high casualty terrorist bombings (HCTB)”—those that result in fifteen or more deaths—have claimed 32,000 lives.⁴¹⁰ The death toll resulting from HCTB has increased considerably in places

⁴⁰⁷ Jones, *supra* note 16, at 49.

⁴⁰⁸ *Id.* at 53.

⁴⁰⁹ Andrew Osborn & Kylie MacLellan, *UK Faces Biggest Terrorism Threat in its History: Minister* REUTERS.COM (Nov. 24, 2014), <http://in.reuters.com/article/2014/11/24/britain-security-idINKCN0J80YW20141124>.

⁴¹⁰ MARSHALL & COLE, *supra* note 399, at 16.

like Syria, as well as other Muslim countries, and reached a peak in mid-2014 when the 2014 Center for Systemic Peace Global Report was published.⁴¹¹

Britain is not alone in declaring that it is “facing the biggest terrorism threat in its history.”⁴¹² In a report published in April 2014, the U.S. State Department identified ISIL as the strongest it has been since 2006.⁴¹³ It also identified 2013 as a year in which the terror threat evolved rapidly and saw an increase in the number of groups which pose a terror threat.⁴¹⁴ The Rand Corporation found that between 2010 and 2013, the number of Salafi-jihadist groups increased fifty-eight percent.⁴¹⁵

Terror groups today are also willing to target and kill masses of civilians in a manner that is not historically common among terror groups.⁴¹⁶ The attack in Pakistan that claimed the lives of at least 135 school children provides sobering evidence of the tactic in practice.⁴¹⁷ In fact, non-combatant deaths during armed conflict stand at approximately eighty-four percent since 1991, compared with sixty-two percent from 1946-1991.⁴¹⁸

2. Positioning

⁴¹¹ *Id.* at 17.

⁴¹² Osborn & MacLellan, *supra* note 409.

⁴¹³ U.S. STATE DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2013: EXECUTIVE SUMMARY 7 (2014) [hereinafter COUNTRY REPORTS].

⁴¹⁴ *Id.* at 10.

⁴¹⁵ Jones, *supra* note 16, at x.

⁴¹⁶ *Id.* at 2.

⁴¹⁷ *Pakistan Taliban: Peshawar School Attack Leaves 135 Dead* BBC NEWS (Dec. 16, 2014, 1:30PM), <http://www.bbc.com/news/world-asia-30491435>.

⁴¹⁸ MARSHALL & COLE, *supra* note 399, at 19.

The terror threat is not only growing in potency, but perhaps more importantly, it continues to expand in scope, without regard for national borders. There is ample evidence that terror groups operating in Syria likely possess the ability to conduct attacks against Western countries, both abroad and on their own soil.⁴¹⁹ Indeed, the U.S. State Department has acknowledged “a concern about the creation of a new generation of globally-committed terrorists.”⁴²⁰

There are terror attacks on three or more continents every day.⁴²¹ Most Salafi-jihadist groups are active in more than a single country, and many of the groups unite in training and operations, as well as information exchange, “suggesting that there is considerable intra-group (as well as inter-group) movement in fighters, money, weapons, and other resources across national boundaries.”⁴²² The territorial encumbrances that effect state action do not exist for terror groups; terrorism neither respects borders nor requires them. For example, after losing eighty-five percent of the territory it occupied in 2010, al Shabaab managed to execute the deadly attack on the Kenyan Westgate Mall in 2013 with disturbing precision, followed by a highly efficient propaganda campaign through Twitter and the group’s magazine.⁴²³

It should certainly be acknowledged that terror groups are in disagreement with each other on a number of issues, including the extent to which Western countries should be

⁴¹⁹ Jones, *supra* note 16, at xiii.

⁴²⁰ COUNTRY REPORTS, *supra* note 413, at 7.

⁴²¹ Watts, *supra* note 406.

⁴²² Jones, *supra* note 16, at 31-32.

⁴²³ *Id.* at 25.

attacked.⁴²⁴ But there should be no doubt that there are groups that prioritize such targets: “military work firstly targets the head of (international) disbelief, America and its ally Israel, and secondly its local allies that rule our countries” with the intent “to exhaust her and bleed her to death.”⁴²⁵ Al Qaeda’s magazine *Resurgence* ran an entire issue in 2014 devoted to drawing Westerners to their cause and encouraging independent attacks at home,⁴²⁶ while the Anwar al-Awlaki Battalion successfully recruits English-speakers to conduct attacks on their home soil.⁴²⁷ The April 2013 Boston Marathon bombing carried out by two young brothers, which killed three and wounded over 250, is evidence that recruitment efforts have proven successful.⁴²⁸

Direct targeting is not limited to the U.S.; there are terror groups that desire direct attacks on all of the P5 countries, including China and Russia. There are conscious efforts through social media and terror magazines like *Inspire* to encourage such attacks.⁴²⁹ Al Qaeda leader Ayman al-Zawahiri has asserted the goal to “liberate all occupied Muslim lands and reject each and every international treaty, agreement, and resolution which gives the infidels the right to seize Muslim lands, such as . . . Russia’s seizure of Chechnya and the Muslim

⁴²⁴ *Id.* at 14.

⁴²⁵ *Id.* (quoting Ayman al-Zawahiri’s 2013 *General Guidelines for Jihad*).

⁴²⁶ *Id.* at 41.

⁴²⁷ Alessandria Masi, *ISIS Creates English-Speaking Foreign Fighter ‘Anwar al-Awlaki’ Brigade for Attacks on the West: Report*, INT’L BUSINESS TIMES (Jan. 22, 2015, 10:05 AM), <http://www.ibtimes.com/isis-creates-english-speaking-foreign-fighter-anwar-al-awlaki-brigade-attacks-west-1791400>. Awlaki was an American member of al Qaeda killed by the U.S. in 2011. *Id.*

⁴²⁸ Miller, Miller, & Horwitz, *supra* note 382.

⁴²⁹ Watts, *supra* note 406 (noting that such attacks have been inspired in as far off places as Ottawa and Sydney, and law enforcement prevents similar attacks on a weekly basis in countries throughout the world).

Caucasus . . . and China’s seizure of East Turkestan.”⁴³⁰ France and the U.K have also been specifically targeted by terror groups,⁴³¹ the Charlie Hebdo attack in Paris just one recent example.⁴³²

The affects of the expanding terror threat will not be limited to those nations which are directly targeted. The rapidly growing terror groups in Syria continue to threaten U.S. allies in the region, such as Jordon, Turkey, Israel, and European Union (EU) countries.⁴³³

“[C]ountries bordering on war-torn and war-recovery states experience serious diffusion and spillover effects that further increase and expand the reach of organized crime, stimulate political tensions and corruption, increase local and regional insecurity, challenge local authorities, and overwhelm the already severely limited provision of crucial social services.”⁴³⁴ The effects of refugees fleeing the conflict in Syria have had a profound impact on neighboring countries like Lebanon, which houses approximately 1.6 million of the 3.2 million total Syrian refugees.⁴³⁵

⁴³⁰ Jones, *supra* note 16, at 15 (quoting Ayman al-Zawahiri).

⁴³¹ *Id.*

⁴³² On January 7, 2015, two masked gunmen (Cherif and Said Kouachi) entered the offices of the magazine Charlie Hebdo in Paris, eventually shooting and killing eleven people. They would go on to kill a police officer and wound a number of others before being shot and killed by police on January 9. On January 8, also in Paris, an associate of the brothers, Amedy Coulibaly, shot and killed a police officer and later took hostages at a supermarket, demanding that the Kouachi brothers be released or he would kill hostages. Coulibaly would also eventually be killed by authorities, but not before killing four hostages. *Charlie Hebdo Attack: Three Days of Terror* BBCNEWS.COM (Jan. 14, 2015, 12:55 PM), <http://www.bbc.com/news/world-europe-30708237>. The brothers are also said to have had contact with Awlaki in Yemen. Masi, *supra* note 427.

⁴³³ Jones, *supra* note 16, at xiii.

⁴³⁴ MARSHALL & COLE, *supra* note 399, at 15.

⁴³⁵ Paul Wood, *Syrians Entering Lebanon Face New Restrictions*, BBC NEWS (Jan. 5, 2015, 9:55 AM), <http://www.bbc.com/news/world-middle-east-30657003>.

There is also the unprecedented threat of foreign fighters. The estimate of foreign fighters flowing into Syria is over 10,000, with ten to fifteen percent of them coming from Europe,⁴³⁶ which indeed evidences a phenomenon not previously witnessed on such a scale.⁴³⁷ Although radicalized Westerners do not typically plot attacks against their homelands initially, they do tend to do so upon returning from a war zone abroad.⁴³⁸

Having kicked the can down the road on the Syrian conflict as thousands of Western fighters have joined the ranks of Jabhat al Nusra and the Islamic State, the West may now finally understand the magnitude of their policy inaction. Foreign fighters traveling to Syria this decade outnumber the foreign fighters that went to Iraq tenfold, and these Syrian foreign fighters are returning home daily.⁴³⁹

Eventually, “three generations of foreign fighters dating back to the early 1980’s will mix together creating their own local communities of jihadi sympathizers with connections back to both al Qaeda and the Islamic State.”⁴⁴⁰ The threat already exists, it is just a matter of time before it is fully realized: “Jabhat al-Nusrah’s access to foreign fighters, external networks in Europe and other areas, and bomb-making expertise suggest that it may already have the capability to plan, support, and conduct attacks in the West.”⁴⁴¹

The global terror threat affects the entire international community, and it is therefore in the interests of all states to act collectively to overcome it. The proposal in this paper of a

⁴³⁶ Jones, *supra* note 16, at 42.

⁴³⁷ Swati Sharma, *Map: How the flow of foreign fighters to Iraq and Syria has surged since October*, WASH. POST (Jan. 27, 2015), <http://www.washingtonpost.com/blogs/worldviews/wp/2015/01/27/map-how-the-flow-of-foreign-fighters-to-iraq-and-syria-has-surged-since-october/>. See map at Appendix D.

⁴³⁸ Jones, *supra* note 16, at 42.

⁴³⁹ Watts, *supra* note 406.

⁴⁴⁰ *Id.*

⁴⁴¹ Jones, *supra* note 16, at 42.

legal obligation for humanitarian intervention aims to deny terror organizations what they need to survive and grow: places like Syria and Libya. As the next section will demonstrate, the growing potency and positioning of the terror threat has been aided considerably by the international community's failure to realize successful humanitarian intervention where it was warranted.

B. Humanitarian Intervention and Terrorism

*Failed states have come to be feared as . . . reservoirs and exporters of terror. The existence of these kinds of countries, and the instability that they harbor, not only threatens the lives and livelihoods of their own peoples but endangers world peace.*⁴⁴²

The terror threat is growing, and it is taking root primarily in areas where humanitarian interventions have been proposed—and likely justified⁴⁴³—but unrealized. Where human rights are being violated and the government is unwilling or unable to effectively address the problem, it fails at governance and creates an opportunity for terrorism to take root and grow. “Groups like al Qaeda and ISIL exploit the anger that festers when people feel that injustice and corruption leave them with no chance of improving their lives.”⁴⁴⁴ The facts are clear that terrorism thrives in these failed states, and as the previous section illustrated, in the

⁴⁴² Rotberg, *supra* note 353.

⁴⁴³ It is again prudent to note that this paper does not propose the specific criteria that should be satisfied in order to trigger the humanitarian intervention obligation, just that such criteria should be agreed upon by the Security Council and codified in a resolution which obligates intervention when those criteria are met. The assumptions in this paper as to when humanitarian intervention is likely warranted rely on generally accepted criteria like those proposed in the R2P concept.

⁴⁴⁴ Erin McClam, *ISIS Terror: Obama Says Fight against Extremists a Battle for 'Hearts and Minds,'* NBC NEWS (Feb. 18, 2015, 7:39 AM), <http://www.nbcnews.com/storyline/isis-terror/isis-terror-obama-says-fight-against-extremists-battle-hearts-minds-n308096>.

globally-connected world of today, “these states pose dangers not only to themselves and their neighbors but also to peoples around the globe.”⁴⁴⁵

The Rand Corporation cites Yemen, Syria, Iraq, and Somalia as having the most notable increases in terror-related violence,⁴⁴⁶ while the U.S. State Department’s 2013 terror report states that recent years have “seen an emergence of a more aggressive set of AQ affiliates and like-minded groups, most notably in Yemen, Syria, Iraq, Northwest Africa, and Somalia.”⁴⁴⁷ In the past decade, al Qaeda in the Arabian Peninsula was established in Yemen (2009); Jabhat al-Nusrah established in Syria (2013); ISIL is operating in Iraq after its split from core al Qaeda in January 2014; al Qaeda in the Islamic Maghreb took root in Northern Africa (2006); and al Shabaab came about in Somalia (2012).⁴⁴⁸

Significantly, the International Coalition for the Responsibility to Protect (ICRtoP) also lists each of the five areas among those crisis areas which have prompted “civil society, the UN and/or other national, regional and/or sub-regional actors to refer to or invoke the Responsibility to Protect,”⁴⁴⁹ as a result of government failure to protect the population from humanitarian abuses. The State Department’s terror report defines terrorist safe havens in similar terms as “ungoverned, under-governed, or ill-governed physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train, transit, and operate in

⁴⁴⁵ Rotberg, *supra* note 353.

⁴⁴⁶ Jones, *supra* note 16, at 34.

⁴⁴⁷ COUNTRY REPORTS, *supra* note 413, at 5.

⁴⁴⁸ Jones, *supra* note 16, at 10-11.

⁴⁴⁹ INT’L COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises> (last visited Jan. 17, 2015). Northwest Africa is represented in the crisis list by the Ivory Coast, Nigeria, and Guinea. Somalia is identified as a crisis of concern not quite on par with the others.

relative security because of inadequate governance capacity, political will, or both.”⁴⁵⁰ The report then names Yemen, Iraq, Northwest Africa, and Somalia—four of the five areas identified in the report as housing the most significant increase in aggressive terror affiliates—as terrorist safe havens.⁴⁵¹ Although Syria apparently does not meet the distinction, the report nonetheless holds Syria in part accountable for Iraq and Lebanon (two of its neighbors) meeting the grade.⁴⁵²

The correlation between terror and failed states is unsurprising. “State fragility and warfare are closely connected,”⁴⁵³ and the fact that the new global threat is manifesting primarily in those countries whose governments are too weak to protect their own citizens’ basic human rights is understandable. Weak governments lack popular support and are unable to adequately govern or manage challenges to authority, leaving an obvious opening for terror groups.⁴⁵⁴ “A large body of quantitative evidence suggests that weak and ineffective governance is critical to the onset of substate actors—including insurgent and terrorist groups.”⁴⁵⁵ While the terror threat was growing across the Middle East and Africa from 2010 to 2012, it was facilitated by the area’s seventeen percent drop in political stability, ten percent drop in government effectiveness, six percent drop in rule of law, and

⁴⁵⁰ COUNTRY REPORTS, *supra* note 413, at 23.

⁴⁵¹ *Id.* at 24-27 (Northwest Africa is represented on the list by Mali and the Trans-Sahara).

⁴⁵² *Id.* at 26.

⁴⁵³ MARSHALL & COLE, *supra* note 399, at 14.

⁴⁵⁴ Jones, *supra* note 16, at 43.

⁴⁵⁵ *Id.* at 44.

six percent drop in control of corruption.⁴⁵⁶ During the same period, rule of law dropped by thirty-one percent in Libya, thirty-nine percent in Yemen, and sixty-one percent in Syria.⁴⁵⁷

Since the inception of the concept of the state, security and order have been the vanguard of its legitimate existence.⁴⁵⁸ The organization that is able to provide for the basic needs of the people is the one they are likely to support; if governance is strong terror groups are less likely to enjoy the support of the people and will struggle to thrive, while weak governance allows terror groups to fill that void and garner citizen support.

When governing authorities are either unwilling or unable to adequately address the sources of contention and institute accountability and accommodations that can successfully dampen, dissipate, or dispel emotive content within the general political process, discontent may energize and combine multiple issues of contention in a societal-system so that interests are perceived to overlap and issues (and social identity groups) become linked in common cause and concerted (often anti-state) political action.⁴⁵⁹

As governance fails, the populace becomes more apt to “transfer their allegiances to communal warlords” and “[t]he rise of terrorist groups becomes more likely.”⁴⁶⁰

“[G]overnance is critical to prevent insurgencies . . . “provision of temporary security, the building of new institutions capable of resolving future conflicts peaceably, and an economy capable of offering civilian employment to former soldiers and material progress to future citizens.”⁴⁶¹ Many terror groups capitalize on the governance void in order to gain or

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.* Rule of law “includes the extent to which agents have confidence in and abide by the rules of society, particularly the quality of contract enforcement, property rights, the police, and the courts.” *Id.*

⁴⁵⁸ Rotberg, *supra* note 353.

⁴⁵⁹ MARSHALL & COLE, *supra* note 399, at 4.

⁴⁶⁰ Rotberg, *supra* note 353.

⁴⁶¹ Jones, *supra* note 16, at 5.

strengthen the support of the people by providing those services that weak governments are unable to provide. Jabhat al-Nusrah in Syria, for example, is conducting humanitarian relief efforts itself, in addition to establishing legal and educational systems.⁴⁶² Similarly, Ansar al-Sharia Libya now operates in various cities throughout Libya, including Benghazi, where the group has attempted to serve local governmental functions propagandized by slogans like “Your Sons at Your Service.”⁴⁶³ The Islamic State successfully recruits children by offering free schooling and thus indoctrinating the next generation to their cause.⁴⁶⁴ In environments void of alternative government resources or somewhere else to turn, these terror groups are creating the next generation of terrorists.⁴⁶⁵

Once terror groups take hold in an area of weakened government, they continue to benefit through use of those countries for training, recruitment, networking, and as operating bases. As seen in Syria, terror fighters move to new camps and new battlefields, which “provide a unique opportunity for terrorists to pray together; share meals; train together in classrooms, at shooting ranges, through physical conditioning; socialize with each other during breaks; and sometimes fight together.”⁴⁶⁶ Such opportunities, according to former fighters, substantially improve terror capabilities.⁴⁶⁷ The recruitment of English-speakers into the Anwar al-Awlaki

⁴⁶² *Id.* at 34.

⁴⁶³ *Id.* at 29.

⁴⁶⁴ Reid Standish, *Kazakh Child Soldier Executes ‘Russian Spies’ in Islamic State Video*, FOREIGN POLICY (Jan. 13, 2015, 12:44 PM), <http://foreignpolicy.com/2015/01/13/kazakh-child-soldier-executes-russian-spies-in-islamic-state-video/>.

⁴⁶⁵ See Kate Brannen, *Children of the Caliphate: The Islamic State is Raising an Army of Child Soldiers, and the West could be Fighting them for Generations to Come*, FOREIGN POLICY (Oct. 24, 2014), <http://foreignpolicy.com/2014/10/24/children-of-the-caliphate/>.

⁴⁶⁶ Jones, *supra* note 16, at 45.

⁴⁶⁷ *Id.*

Brigade in order to stage attacks on their homelands in fact begins with training on the battlefields of Syria and Iraq, before being sent home to carry-out attacks.⁴⁶⁸ Terror organizations *need* these locations to survive and more often than not they find what they need in states where humanitarian intervention was warranted but left unrealized. Syria and Libya are again illustrative.

In 2011, when the Security Council was authorizing the intervention into Libya and largely disregarding the crisis in Syria as a result of veto threats from Russia and China, there was no notable presence of Salafi-jihadist groups in Syria.⁴⁶⁹ By 2014, “these groups represented a significant portion of the Syrian rebel manpower.”⁴⁷⁰ To be sure, the conflict in Syria has strengthened ISIL.⁴⁷¹

Although intervention into Libya was authorized by the U.N., it eventually was distorted by Western desires for regime change and since that goal was realized and intervention efforts ceased, “Libya remains a failed state held hostage by the several local militias that originally organized in the fight against the Ghaddafi regime.”⁴⁷² The number of terror groups has risen considerably since the intervention that ousted Muammar Qaddafi, and the country is now “perhaps the most active Salafi-jihadist sanctuary in North Africa.”⁴⁷³ Libya is now a safe haven for terror groups which freely use its territory for training and rearming.⁴⁷⁴

⁴⁶⁸ Masi, *supra* note 427.

⁴⁶⁹ Jones, *supra* note 16, at 32.

⁴⁷⁰ *Id.*

⁴⁷¹ *See, e.g.*, COUNTRY REPORTS, *supra* note 413, at 7 (“ISIL . . . has exploited . . . the conflict in Syria to significantly increase the pace and complexity of its attacks”).

⁴⁷² MARSHALL & COLE, *supra* note 399, at 31.

⁴⁷³ Jones, *supra* note 16, at 28.

⁴⁷⁴ *Id.* at 32.

Libya's porous borders, the weakness of Libya's nascent security institutions, and large amounts of loose small arms create opportunities for violent extremists.⁴⁷⁵

The terror threat the world faces today is unprecedented and no state will prove immune from its effects if the international community remains content with the status quo. Humanitarian intervention alone will not solve the terror problem, but failure to acknowledge the link between a weak government that is unwilling or unable to protect its own people and the intensifying terror threat will prove fatal to its ultimate resolution. Humanitarian intervention will mean denying terror groups the void they need to take root and grow.

V. Conclusion

The world faces a terror threat today that previous generations were incapable of imagining, and that posterity must. The states that came together in 1945 to create the United Nations built a world order that addressed the reality of the times, just as had been done throughout history. The world has evolved, as have the threats to peace—the world is again at a crossroads. The current world order in which human rights yield to national interests, and sovereignty is allowed to trump all other international legal obligations, is unsustainable. The new paradigm of global terrorism will continue to capitalize on the inadequacies of this system and blood will continue to mark these failures. States must recognize that the blood that spills will not coagulate at political borders, but will flow unabated through all states until the methods for dealing with this new threat adapt accordingly.

States need not be stirred to humanitarian action by moral argument. Such laudable entreaties have unfortunately proven susceptible to the countervailing forces of national interests. Instead, states must recognize that it is in the interests of all states to rout the terror

⁴⁷⁵ COUNTRY REPORTS, *supra* note 413, at 7.

threat, and acknowledge the critical role of humanitarian intervention to the success of that effort. Consistent with these realizations, states must then free themselves from the blinding effects of their hold on an incompatible notion of sovereignty, in order to perceive the necessary evolution of sovereignty that will allow for a standing resolution for obligatory humanitarian intervention.

If we believe that all human beings are equally entitled to be protected from acts that shock the conscience of us all, then we must match rhetoric with reality, principle with practice. We cannot be content with reports and declarations. We must be prepared to act. We won't be able to live with ourselves if we do not.⁴⁷⁶

Indeed, the failure of the international community to fulfill its obligations for the protection of human rights has left millions of Syrians and Libyans living with the consequences. The continued failure to appreciate the impact of these humanitarian abuses on international peace and security will assure the same fate for an unimaginably greater number, in every corner of the globe.

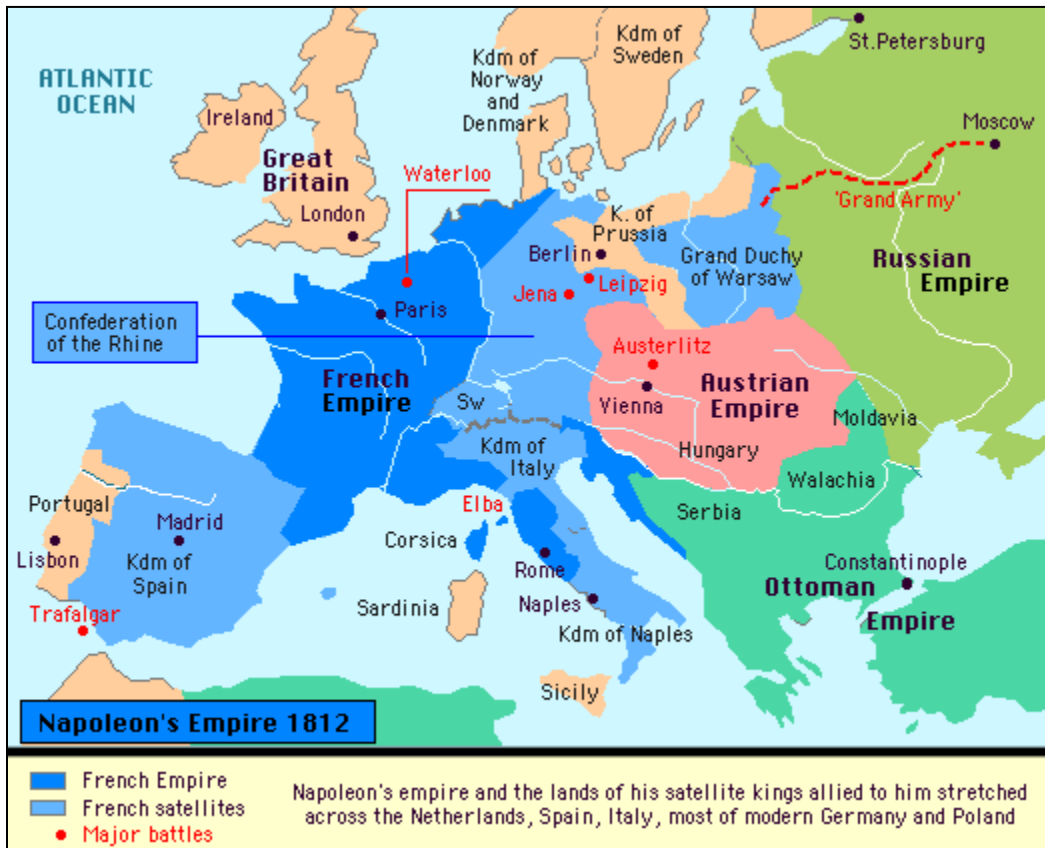
⁴⁷⁶ Responsibility to Protect, *supra* note 22, at 75.

Appendix A: Europe during the Renaissance and Reformation⁴⁷⁷



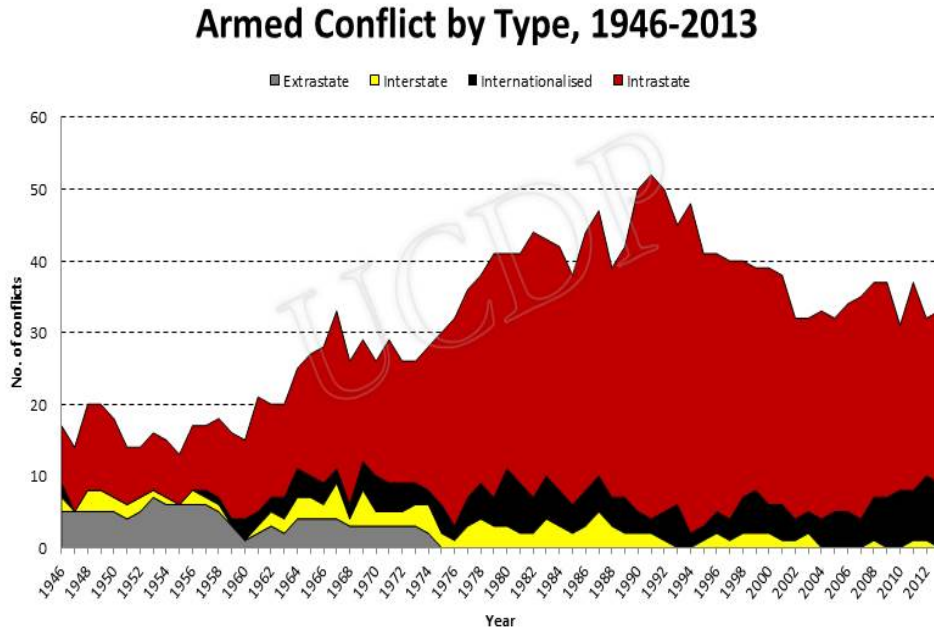
⁴⁷⁷ Europe during the Renaissance & Reformation, MYHISTORYLAB.COM, available at <http://westerneuropa.weebly.com/1450---1750.html> (last visited Mar. 15, 2015).

Appendix B: Map of Napoleonic Empire⁴⁷⁸



⁴⁷⁸ HYPER HISTORY, *supra* note 209.

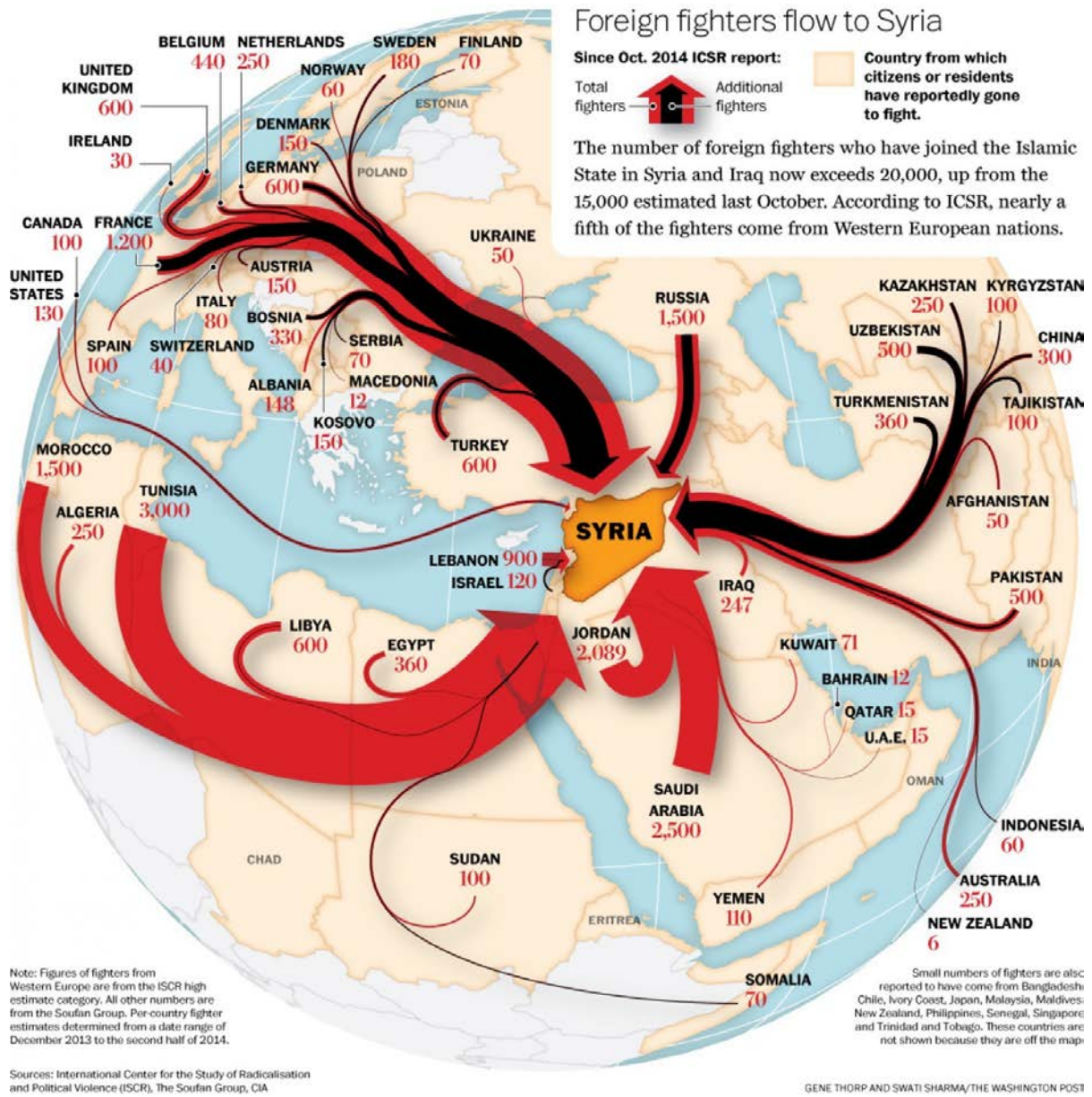
Appendix C: Armed Conflict by Type, 1946 - 2013⁴⁷⁹



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⁴⁷⁹ UPPSALA, *supra* note 398.

Appendix D: Flow of Foreign Fighters into Syria⁴⁸⁰



⁴⁸⁰ Sharma, *supra* note 437.

