

Responsibility to Humanity and Threats to Peace: An Essay on Sovereignty

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This Essay examines current and emerging threats to peace—social and political threats as well as military and technological. It argues that leading conceptions of State sovereignty cannot sustain a legal order capable of meeting those threats. The Essay proposes that recent efforts by international law scholars to reformulate State sovereignty as responsibility to humanity—what the Essay calls ‘R2H’ for short—offer a better hope. Under this reformulation, a State’s decision-making must take into account the interests of those outside their sovereign territory as well as those of its own people—in particular, the shared interest in subduing dire threats to world peace. The Essay reviews the historical background of sovereignty as control and sovereignty as responsibility, the two leading current conceptions. The latter is a principle underlying the “responsibility to protect” (R2P) doctrine, but this Essay argues that R2P is both too narrow in scope and too focused on military interventions. R2H can be understood as a generalization of R2P. R2H raises distinctive philosophical issues about what “humanity” means, which the Essay addresses. Finally, it confronts the concern that in an age of resurgent nationalism, a strongly internationalist approach such as R2P is anachronistic. In reply, the Essay criticizes current reactionary nationalisms as both morally and practically misguided. An epilogue written during the COVID-19 pandemic offers preliminary thoughts about R2H in connection with the pandemic.

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Near the end of the Cold War, historian John Lewis Gaddis coined the phrase "the Long Peace" to name the surprising fact that there had been no wars among the great powers in forty years.¹ The Long Peace has now lasted more than seventy years, and during much of that time armed conflict and war deaths declined.² Unhappily, since 2010 that trend has reversed, and violent conflicts have steadily become more frequent and more lethal.³ Moreover, after decades of small wars, great power rivalries have once again become a major source of alarm.⁴

1. JOHN LEWIS GADDIS, *THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR* (1987).

2. See the sources cited in note 49, *infra*, and accompanying text. In noting this, I do not mean to minimize such horrifying conflicts as the Balkan and Congo Wars.

3. For recent data, see UNITED NATIONS and WORLD BANK, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2018), <https://openknowledge.worldbank.org/handle/10986/28337>, 11–19.

4. Here, I am referring primarily to rivalries between the United States and both China and Russia. This is certainly the view taken by the United States Department of Defense. "The central challenge to US prosperity and security is the *reemergence of long-term, strategic competition* by what the National Security Strategy classifies as revisionist powers. It is increasingly clear that China and Russia want to shape a world consistent with their authoritarian model—gaining veto authority over

The Essay that follows is born of concern about novel threats to peace, including social and political, as well as military and technological, threats. It worries that familiar conceptions of State sovereignty cannot sustain a legal order capable of countering those threats, whether we understand sovereignty in its classical Westphalian form or in the modern conception that incorporates a sovereign responsibility to protect human rights. I suggest that recent efforts to reformulate State sovereignty as *responsibility to humanity* offer a better hope for an international law that advances both peace and human rights.⁵ Under this reformulation, sovereignty includes the idea that States must take into account the interests of those outside their sovereign territory as well as those of their own people—in particular, the shared interest in subduing dire threats to world peace.

Responsibility to humanity (R2H) raises difficult practical and philosophical questions, which I shall address. With waning trust in internationalism and an upsurge of nationalism, such a utopian-sounding proposal may seem to some like exactly the wrong medicine. In response, I argue that nationalism in its contemporary resurgent form is itself a dire moral and practical mistake. This "reactionary nationalism" is a symptom of our current problems, not a cure. Other critics may fear that R2H is a neo-colonialist Trojan horse that would allow powerful States to impose their will on those less powerful. I argue that these fears arise from a misunderstanding of what R2H requires.

The approach of this Essay is historical, philosophical, and unapologetically speculative; but the threats it canvasses are all too real. Part I briefly reviews some familiar history: the creation of a postwar international legal order centered on peace and human rights. Parts II and III describe the old and new concepts of sovereignty entangled with that legal order. Although this is well-traveled territory, it is essential to set the stage for what follows. In Parts IV and V, I survey the landscape of contemporary threats to peace, drawing significantly on the work of military planners tasked with assessing those threats. Parts VI through VIII introduce R2H and explore some practical and philosophical questions it raises. Part IX examines the reactionary nationalist response. In Part X, I conclude by asking the philosophical question of what "humanity" means, and I address the objection that R2H's conception of sovereignty is fatally utopian. Finally, an Epilogue (written after the body of the text, during the early months of the COVID-19 pandemic) offers preliminary thoughts about the world's responses to the pandemic and their connection with R2H.

other nations' economic, diplomatic, and security decisions." U.S. DEP'T OF DEFENSE, *Summary of the National Defense Strategy of the United States of America* (2018), <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>, 2. These rivalries are now "the principal priorities for the [Defense] Department." *Id.* at 4.

5. See Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 102 AJIL 295 (2013).

I.

THE UNITED NATIONS ORDER AND THE RIGHTS-PEACE HYPOTHESIS

The search for peace—or at any rate, for the absence of war—lies at the origin of the postwar international order. In the preambular words of the United Nations (UN) Charter, the UN's aim is "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."⁶ "Untold sorrow" was plain truth, not rhetoric. The Second World War killed 60 million people, or three percent of the world's population. This occurred less than thirty years after World War I killed 15 million people.⁷ Untold sorrow was written on landscapes and cenotaphs in five continents.

The UN Charter's Preamble (Preamble) goes on to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."⁸ The emphasis on human rights and human dignity was also exactly right. In Europe alone, more than 10 million of the war deaths were intentional murders of helpless civilians and prisoners of war; in Asia, estimates run between 3 and 10 million.⁹ Yet, the connection of human rights with peace was not obvious, and the idea of giving human rights a central role in international affairs came along late in the Charter's drafting process. The Dumbarton Oaks draft barely mentions human rights.¹⁰ At

6. UN Charter Preamble, para. 1.

7. The number of deaths in the two world wars cited here are generally accepted estimates. Milton Leitenberg, *Deaths in Wars and Conflicts in the 20th Century* (Cornell University Peace Studies Program Occasional Paper #29 (3d ed. 2006)), https://www.clingendael.org/sites/default/files/pdfs/20060800_cdsp_occ_leitenberg.pdf, at 9.

8. UN Charter Preamble, para. 2.

9. Exact numbers are unknown, but in addition to an estimated 6 million murdered Jews, they include 1.8–1.9 million non-Jewish Poles. *Polish Resistance and Conclusions*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://web.archive.org/web/20180102111652/https://www.ushmm.org/learn/students/learning-materials-and-resources/peles-victims-of-the-nazi-era/polish-resistance-and-conclusions>. They also include Soviet prisoners of war (POWs) who died in captivity, estimated by Russian historians as between 1.2 million and 2.4 million. The lower of these estimates comes from G. F. KRIVOSHEEV, *SOVIET CASUALTIES AND COMBAT LOSSES IN THE TWENTIETH CENTURY* 236 (1997), the higher from V.N. Zemskov, "The statistical maze": *The total number of Soviet prisoners and the extent of their mortality*, *DEMOSCOPE*, no. 559–60 (Jun. 17–30, 2013), <http://www.demoscope.ru/weekly/2013/0559/analit04.php>. Historian Timothy Snyder puts the number even higher: 3.1 million Soviet POWs, half a million of whom were shot and the remainder of whom were starved. TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* 184 (2010). Snyder estimates the total World War II murders by Germany, alone, as: 5.4 million Jews, 4.2 million Soviet citizens starved between 1941 and 1944, 700,000 Belarussians and Poles shot in "reprisals"—along with 200,000 Poles shot between 1939 and 1941 by German and Soviet occupiers. *Id.* at 411. As for Japan, R. J. Rummel estimates between 3 and 10 million murders between the 1937 occupation of China and the end of the war. R. J. RUMMEL, *STATISTICS OF DEMOCIDE* (1997), <https://www.hawaii.edu/powerkills/SOD.CHAP3>.

10. Washington Conversations on International Peace and Security Organization, *Proposals for the Establishment of a General International Organization* (Oct. 7, 1944), <http://www.ibiblio.org/pha/policy/1944/441007a.html>.

the San Francisco conference, South African diplomat Jan Smuts elevated human rights into the Preamble and connected it with the "sanctity" of human life, after which Virginia Gildersleeve, a member of the US delegation, changed "sanctity" to "dignity."¹¹ The Preamble draws no explicit connection between the peace and human rights pillars of the Charter.

A. *The Universal Declaration of Human Rights*

Connection of a sort came four years later, when the UN's General Assembly adopted the Universal Declaration of Human Rights (UDHR). The UDHR's Preamble begins as follows: "[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"—language later echoed in two human rights covenants.¹² Why is respect for human dignity and human rights the foundation of peace? The connection is not obvious, and the UDHR does not explain it. Presumably, the argument would be that without such respect, nothing will constrain our aggressive drives except brute force and fear, undermining the Charter's prohibition on the threat or use of force.¹³ The Declaration contends that without protection of their human rights, oppressed people will be "compelled to have recourse to rebellion."¹⁴ No doubt its drafters had in mind the history of modern rebellions from the American and French revolutions onward, including the Latin American and European revolutions of the nineteenth century and the Russian and Chinese revolutions in the twentieth—the last of which was ongoing during the UDHR's genesis.¹⁵ Again, we must conjecture how an argument connecting internal strife with threats to international peace would proceed. Presumably, the fear is that other States may become embroiled in a strife-torn State's internal rebellions and civil wars, sometimes for geopolitical advantage, sometimes to protect their own nationals or State interests in the conflict zone, or

11. Samuel Moyn, *Why Is Dignity in the Charter of the United Nations?*, HUMANITY J. (Jun. 10, 2014), <http://humanityjournal.org/blog/why-is-dignity-in-the-charter-of-the-united-nations-2/>. As Katherine Sikkink emphasizes, the "Big Four" were ambivalent about emphasizing human rights in the Charter. KATHERINE SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 67 (2017). However, the twenty Latin American States, the largest single bloc at the San Francisco conference, along with diplomats from other small States, succeeded in overcoming these hesitations. *Id.* at 68–71.

12. United Nations, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [henceforth: UDHR], Preamble, para. 1. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1967), Preamble, para. 2; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 993 (1967), para. 2.

13. See U.N. Charter, art. 2(4).

14. UDHR, *supra* note 12, Preamble, para. 3.

15. In addition, it seems likely that some colonial powers foresaw struggles for decolonization, and perhaps hoped that the UDHR would provide a governance blueprint that, if put into practice, would defuse anticolonial movements. At the time of the UDHR, Vietnam was already fighting for independence from France (the First Indochina War began in 1946).

sometimes to protect their borders from spill-over violence and waves of refugees.¹⁶ These are reasons why domestic respect for human rights may be a necessary condition for peace, internationally as well as domestically.

The UN's founders obviously did not think that domestic respect for human rights was a sufficient condition for peace: their principal peacekeeping devices consisted of the prohibition on the threat or use of force by States against other States, backed by Security Council powers to act against threats to peace.¹⁷ But the prominent place of human rights in the Charter suggests that its framers saw domestic rights fulfillment as a contributor to peace, if only by damping down the discontents that motivate rebellion and war. Let us call the proposition that fulfilling human rights will contribute to peace the "rights-peace hypothesis." Over the intervening decades, researchers have found at least some evidence confirming that States that do the best job of protecting human rights domestically are also less belligerent in foreign affairs.¹⁸ Whether the UDHR's architects accepted the rights-peace hypothesis is unclear. Historian Samuel Moyn highlights that the UDHR is principally a blueprint for the domestic welfare state "as a talisman against the geopolitics of war."¹⁹ How the talisman would work was left unclear.

B. Human Rights and Sovereignty

This characterization does not suggest that human rights have only instrumental importance in helping maintain peace. If human rights are supposed

16. These are not hypotheticals; all of them have happened. At the very dawn of the Age of Revolution, France intervened in the American Revolution as part of its geopolitical conflict with Great Britain, and Austria and Prussia invaded post-revolutionary France to combat republicanism and lop off territory—just as foreign powers intervened in the Russian civil war following the Bolshevik revolution. India invaded Pakistan during the 1971 Bangladeshi secession struggle to stanch the flow of refugees into India, and NATO intervened in the Balkan wars, in part, because of refugees streaming into western Europe. On the relationship between refugees and the NATO intervention in the former Yugoslavia, see generally STANLEY HOFFMAN, *THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION* (1997). Rwanda's Hutu-Tutsi conflict of 1994 spilled over into Congo's Kivu Province and sparked the disastrous Congo Wars of the late 1990s.

17. In its original conception, the UN would have its own military forces, contributed by member States, under the supervision of a Military Staff Committee (MSC). See U.N. Charter, art. 43-47. However, "Cold War dynamics and the early rejection of an autonomous, permanent UN military force prevented the MSC from fulfilling its intended purpose of serving as the UN's global defence department." U.N. SCOR, *United Nations Military Staff Committee*, <https://www.un.org/securitycouncil/subsidiary/msc> (last visited Aug. 10, 2020).

18. See, e.g., Mary Caprioli & Peter F. Trumbore, *Human Rights Rogues in Interstate Disputes, 1980-2001*, 3 J. PEACE RSCH. 131 (2006); Caprioli & Trumbore, *Identifying 'Rogue' States and Testing Their International Conflict Behavior*, 9 EUR. J. INT'L REL. 377 (2003); Timothy M. Peterson & Leah Graham, *Shared Human Rights Norms and Military Conflict*, 55 J. CONFLICT RESOL. 248 (2011); David M. Sobek et al., *The Human Rights Peace: How the Respect for Human Rights at Home Leads to Peace Abroad*, 68 J. POL. 519 (2006); Michael Tomz & Jessica L. P. Weeks, *Human Rights and Public Support of War*, 82 J. POL. 182 (2020). This evidence is at best suggestive, however.

19. SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 44 (2018).

to be an "instrument" of anything, it is of furthering human dignity and well-being. Some argue that the value of human rights is intrinsic, not instrumental.²⁰ In the decades since the UDHR, it has become clear that viewing human rights solely through the lens of peace preservation can lead to lax enforcement of rights whenever enforcement threatens peace. This is obvious when rights enforcement would require humanitarian military intervention. A less obvious example is the unwillingness of States to accept politically unpopular refugees for fear of having to grant them human rights, a policy that, in effect, sacrifices the rights of desperate refugees for the sake of domestic political tranquility.²¹ Peace and human rights are distinct pillars of the UN Charter for good reason.²²

Even so, the UDHR, like the two binding human rights covenants, asserts that human rights recognition is the foundation of peace in the world. In other words, even if protecting the peace is not the primary purpose of a human rights regime, because the value of human rights is intrinsic, peace is very much a hoped-for collateral benefit. Thus, one can accept the rights-peace hypothesis without subordinating the intrinsic value of rights to their instrumental value—but also without denying that sometimes circumstances may force tradeoffs.

Though they were loath to admit it, the UN's framers undoubtedly understood that protecting human rights would require more than creating an international organization of States. It would require those States to cede at least a few of their sovereign powers.²³ Not only would those States henceforth "refrain from the threat or use of force" against one another, but they would also have to

20. On this point, see the overview of instrumental versus non-instrumental justifications of human rights in *THE PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 11–18 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015).

21. For telling analysis, see Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, *BERKELEY J. INT'L L.* 1 (2016); Paz, *The Law of Walls*, 28 *EJIL* 601 (2017) (both articles discussing construction of border walls in Europe to keep out immigrants who would be entitled to robust human rights protections in European territory).

22. The other preambular pillars are promotion of the international law and promotion of "social progress and better standards of life in larger freedom." U.N. Charter, Preamble. Steven Ratner argues that peace and human rights are the twin pillars of all morally defensible contemporary international law. See STEVEN RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW* (2015).

23. It might be objected that joining the UN by ratifying its Charter has no effect on sovereignty. It is no different from joining any other treaty: both are consensual exercises of the sovereign privilege of entering into binding treaties, and whatever obligations States undertake should be regarded as exercises of their sovereign power, not limitations of it. See *S.S. Wimbledon (U.K. v. Japan)*, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17), at 35. Why is joining the UN different? The answer is twofold. First, the Charter requires UN member States to carry out decisions of the Security Council (art. 25), so, in effect, the member States have granted the Council legislative power—a point that alarmed observers in connection with Resolution 1373, the post-9/11 Security Council decision that dictated a detailed list of anti-terrorist measures that States were bound to enact. U.N. Charter art. 25; U.N. Doc. S/RES/1373 (2001); see also Stefan Talmon, *The Security Council as World Legislature*, 99 *AJIL* 175 (2005). Second, obligations under the Charter take precedence over obligations under any other international agreement. art. 103.

place at least some enforcement powers in the hands of the Security Council.²⁴ Eventually, by acceding to the core human rights treaties, most States have bound themselves to honor human rights domestically, and some of those treaties created mechanisms of external monitoring and enforcement.²⁵ To abandon these two privileges of sovereignty—the privilege of launching wars and the privilege of violating the human rights of their own people—requires States to step back from the fiercest forms of nationalism.

Of course, there was a great deal of ruthless Machiavellian calculation involved in the UN project. In 1945, some imperial powers had no intention of relinquishing their colonies; and the great powers had no intention of letting weaker powers tell them what to do, or raise claims of economic justice against them.²⁶ Not all states shared the founding faith in individual human rights, as demonstrated in the General Assembly vote on the UDHR in which 10 states refrained from voting or abstained. The philosophical basis of human dignity and human rights remains as contestable as ever.²⁷ Jacques Maritain, surveying intellectuals and spiritual leaders on what the UDHR should contain, relayed an anonymous comment: "we agree about the rights but on condition no one asks us why."²⁸ Moyn contends they did not even agree about the rights.²⁹

Nevertheless, it would be a mistake to dismiss the UN Charter and UDHR language as mere rhetoric. Even the most ruthless cynics sitting in Dumbarton Oaks and San Francisco were genuinely horrified by the untold sorrow of the world wars and wanted to prevent another one.³⁰ I believe that at least some of

24. The UN Charter vests power in the Security Council to determine threats to international peace and security and decide on measures to restore peace and security (art. 39); to authorize non-military measures (art. 41), an authority used to create the international criminal tribunals in former Yugoslavia and Rwanda; and to authorize the use of military force if non-military measures are inadequate (art. 42).

25. All nine of the major human rights treaties create optional mechanisms through which their operative organizations can receive complaints by individuals. See U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, *Human Rights Bodies—Complaints Procedures*, <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm>.

26. For two skeptical views of the UDHR's world view, see MOYN, *supra* note 19, 44–64 and Martti Koskeniemi, *The Preamble of the Universal Declaration of Human Rights*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 27–39 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999).

27. MOYN, *supra* note 19, at 61–64. For a sampling of recent treatments of human dignity, see AHARON BARAK, *HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT* (2015); UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden, ed. 2014); MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012); JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (2012); GEORGE KATEB, *HUMAN DIGNITY* (2011).

28. JACQUES MARITAIN, *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 1 (1949) ("It is related that at one of the meetings of a U[NESCO] National Commission where Human Rights were being discussed, someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. 'Yes,' they said, 'we agree about the rights but on condition that no one asks us why.'" (emphasis original)).

29. MOYN, *supra* note 19, at 61–64.

30. Washington Conversations on International Peace and Security Organization, *supra* note 10.

those ruthless cynics were genuinely nauseated by the assaults on human dignity they had witnessed in the war. Even if they did not entirely believe the noble words they put in the Preamble and UDHR, millions of their own people did and still do, and domestic support for human rights creates a political check against government violations.³¹

Today, the postwar international order is under attack from many directions. The world today is in retreat from what is alternatively called "globalism," "cosmopolitanism," and "liberal internationalism."³² Moreover, the UN is beset by problems: it is weak, politically fractured, underfunded, at least slightly corrupt, and often helpless. These issues raise two fundamental questions for any discussion of international politics and law that shares the axiomatic treatment of peace and human rights: What are the prospects for peace and human rights today? Does the rights-peace hypothesis have any continued plausibility?

C. *The Supposed Threat of Liberal Internationalism to National Sovereignty*

One source of anti-globalism is the widespread fear that liberal internationalism poses a threat to national sovereignty. This has been a theme of Euroskeptics for many years, but we might date the rise of its political clout in Europe to June 2005, when Dutch voters rejected a proposed European constitution in a national referendum.³³ This surprise was the first warning shot across the bows of a European unification project that, until then, had seemed nearly inevitable. Similarly, the United States has bitterly rejected the International Criminal Court's (ICC) authority to investigate US nationals as an

31. For careful assessment of the efficacy of human rights instruments, see generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009). Her overall finding is that mobilized domestic constituencies are the key to human rights compliance by governments. For a more recent confirmation, see Beth A. Simmons & Cosette D. Creamer, *Do Self-Reporting Regimes Matter? Evidence From the Convention Against Torture* (INT'L STUD. Q. (forthcoming)), SSRN: <https://ssrn.com/abstract=3346591> (finding that self-reporting provides information to domestic constituencies and improves compliance).

32. For a typical pessimistic view, see Bruce W. Jentleson, *The Liberal Order Isn't Coming Back: What Next?*, 48 *DEMOCRACY: A J. OF IDEAS* (Spring 2018) (referring to the "Liberal International Order"), <https://democracyjournal.org/magazine/48/the-liberal-order-isnt-coming-back-what-next/>.

33. Marlies Simons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. TIMES, June 2, 2005, <https://www.nytimes.com/2005/06/02/world/europe/dutch-voters-solidly-reject-new-european-constitution.html>.

infringement of US sovereignty;³⁴ and Russia and China have both denounced criticism of their human rights records on sovereignty grounds.³⁵

Superficially, concern about sovereignty violations sounds like a legal objection, but it is really political rather than legal, because sovereignty is not a well-defined legal concept. In the complaint of one eminent international lawyer, Louis Henkin: "I don't like the 'S word.' Its birth is illegitimate, and it has not aged well. The meaning of 'sovereignty' is confused and its uses are various, some of them unworthy, some even destructive of human values."³⁶ Like it or not, though, the "S word" looms large in political discourse and in the political imagination. Suspicion that a nefarious global order has plans to "take our sovereignty away" packs atavistic emotional power. Unsurprisingly, sovereignty conceptions sometimes drive legal arguments in unarticulated ways. They will be the focus of this Essay, so it will be useful to revisit some of the varied conceptions of sovereignty.

II.

THE SOVEREIGN STATE AS PEACEKEEPER

Just as the UN Charter is emblematic of the postwar international order, the Peace of Westphalia is the emblem of traditional sovereignty.³⁷ It, too, emerged from a horrific multi-party war and aimed to restore peace. It, too, invented a

34. In June 2020, President Donald Trump issued an Executive Order imposing punitive sanctions on the ICC and its personnel if it investigates the United States or its allies. Donald J. Trump, *Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court*, WHITE HOUSE (Jun. 11, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/>. The Order asserts that ICC investigations "threaten to impinge upon the sovereignty of the United States," and warns that the ICC "must respect the decisions of the United States and other countries not to subject their personnel to the ICC's jurisdiction, consistent with their respective sovereign prerogatives." *Id.* Two individuals have been named for sanctions as of October 2020: ICC Prosecutor Fatou Bensouda and a division head, Phakiso Mochochoko. US Dep't Treasury, *Blocking Property Of Certain Persons Associated With The International Criminal Court Designations*, Sept. 2, 2020, <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200902>. For critique of this Executive Order and its sovereignty claims, see David Luban, *America the Unaccountable*, N.Y. REV. OF BOOKS (Aug. 20, 2020), <https://www.nybooks.com/articles/2020/08/20/icc-justice-america-unaccountable/>.

35. See, e.g., *China tells U.N. rights chief to respect its sovereignty after Xinjiang comments*, REUTERS (Sept. 11, 2018), <https://www.reuters.com/article/us-un-rights-china/china-tells-u-n-rights-chief-to-respect-its-sovereignty-after-xinjiang-comments-idUSKCN1LR0L0>; Jane Perlez, *China Wants the World to Stay Silent on Muslim Camps. It's Succeeding*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/world/asia/china-xinjiang-muslim-camps.html>; Philip Remler, *Russia at the United Nations: Law, Sovereignty, and Legitimacy* (Carnegie Endowment for Int'l Peace Paper, Jan. 20, 2020), <https://carnegieendowment.org/2020/01/22/russia-at-united-nations-law-sovereignty-and-legitimacy-pub-80753> (arguing that Russian conceptions of sovereignty "enables Russia to reject on principle commitments regarding human rights").

36. Louis Henkin, *That 'S' Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999).

37. See Treaty of Münster (1648), http://avalon.law.yale.edu/17th_century/westphal.asp.

political conception of sovereignty that spun off legal implications that were often implicit rather than explicit. Even though it originated in Europe, the Westphalian sovereign State proved easy to transplant: in the era of decolonization, former colonies understandably yearned for their own sovereignty. Today, former colonial States guard their sovereignty jealously, just as jealously as the great powers guard their own. Indeed, the UN itself is based on the principle of sovereign equality.³⁸

Early State-making involved four elements: (1) the consolidation of small political units into larger ones; (2) the accompanying creation (often by force) of an allegedly unitary "people" out of all the disparate local groups in the State's territory; (3) the replacement of overlapping jurisdictions by territorial States with exclusive and unlimited authority within their own territory (the crucial jurisdictional device of the Peace of Westphalia³⁹); (4) and the State's monopoly over the legitimate use of violence.⁴⁰ Hobbes called the result "that great LEVIATHAN, or rather, to speak more reverently, . . . that *mortal god* to which we owe . . . our peace and defence."⁴¹ By the end of the nineteenth century, nationalism had become the dominant ideology of Europe; it is the assertion of peoplehood and self-determination, and peoples without States yearn for mortal gods of their own.⁴² Sovereignty of this sort combines a domestic (or internal) principle giving the State the privilege not to be resisted by its own people with an international (or external) principle granting States immunity against outside intervention. Together, domestic and international sovereignty constitute the two familiar faces of "Westphalian" sovereignty, sometimes labeled "sovereignty as control."⁴³ With Westphalian sovereignty came the consensualist model of international law, in which States are bound only by those rules of international law to which they have consented.⁴⁴

Nation-states waged brutal wars, but some argue that the nation-state reduced overall violence because of its efficacy at the Leviathan function of suppressing

38. UN Charter, art. 2(1).

39. Treaty of Münster, *supra* note 37, art. 64–65.

40. This familiar last point comes from Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H. H. Gerth & C. Wright Mills eds. and trans., 1991).

41. THOMAS HOBBS, LEVIATHAN 117 (Michael Oakeshott ed., 1957).

42. Greece won its independence from the Ottoman Empire by 1830; nationalism helped spur the 1848 revolutions, and by 1870, Germany and Italy had achieved unification and the status of nation-states.

43. See *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (ICISS) (Dec. 2001) [hereafter: ICISS Report], § 2.14, p. 13, <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y>.

44. The standard, classic statement of the consensualist theory is the majority opinion in the *Lotus* decision of the Permanent Court of International Justice. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

private violence while also defending against external threats.⁴⁵ But the DNA of the sovereign State contained genes with deadly potential. Under the consensualist theory of international law, States retained the right to conduct war, unless they ceded the right on their own volition.⁴⁶ With good reason, Kant likened international lawyers who endorsed this right to Job's "sorry comforters," the three "friends" who explained to Job why his sufferings were justly inflicted.⁴⁷ Most dramatically, the State's exclusive authority over its own people allowed it to turn against them and commit what we now call "crimes against humanity."⁴⁸ The legal principle of sovereign equality (*par in parem non habet imperium*, "equals have no dominion over equals") means that a State cannot be held to legal account by other States without its own consent.⁴⁹ These principles enabled the 19th- and 20th-century pathologies of sovereignty, culminating in the "untold sorrow" of the world wars, which the UN order, with its prohibition on the use of force, its emphasis on human rights, and its international tribunals, hoped to eradicate.

There are obvious and dramatic failures of the postwar international order to maintain the peace—in the 1990s Balkans, in Africa, in the Middle East, and elsewhere. But, in comparison with other eras, the project of tweaking the DNA of Westphalian sovereignty succeeded. The databases compiled by the Oslo Peace Research Institute and the Uppsala Conflict Data Program show that both in

45. See, e.g., STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011). Much in Pinker's account is controversial. For a useful overview of the evidence for and against Pinker's (and others') thesis of high violence in pre-State societies, see ROBERT M. SAPOLSKY, *BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST* 306–25 (2017). Sapolsky finds "the cleanest assessment" of warfare and other lethal violence in hunter-gatherer societies in Douglas P. Fry & Patrik Söderberg, *Lethal Aggression in Mobile Forager Bands and Implications for the Origins of War*, 341 *SCI.* 270 (Jul. 19, 2013) and CHRISTOPHER BOEHM, *MORAL ORIGINS: THE EVOLUTION OF VIRTUE, ALTRUISM, AND SHAME* (2012). Neither supports Pinker's thesis. However, the issue of whether the nation-state reduced overall violence (internal and external) as compared with its political predecessors is independent from the issue of violence levels in hunter-gatherer societies.

46. The first international treaty in which States renounced war as an instrument of national policy was the Kellogg-Briand Pact of 1928 (officially titled the General Treaty for the Renunciation of War as an Instrument of National Policy). See generally OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

47. See Immanuel Kant, *Toward Perpetual Peace* (1795) in KANT, *PRACTICAL PHILOSOPHY* (The Cambridge Edition of the Works of Immanuel Kant) 326 (Mary J. Gregor ed. & trans., 1996) (1795), 8:355 in the standard pagination of Kant's works; Job 16:2.

48. Crimes against humanity are atrocity crimes committed against a civilian population. See DAVID LUBAN, JULIE R. O'SULLIVAN, DAVID P. STEWART, AND NEHA JAIN, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 926–30 (3rd ed. 2019) (comparing definitions of crimes against humanity in the statutes of six international tribunals); David Luban, *A Theory of Crimes Against Humanity*, 29 *Yale J. Int'l L.* 85, 104 (2004) (characterizing crimes against humanity). A recent piece emphasizes how novel it was to upend the supposed sovereign right of States to attack their own people by declaring such attacks to be crimes against humanity. Menachem Z. Rosensaft, *75 Years Ago at Nuremberg: Giving a Name to Crimes Against Humanity*, JUST SEC. (Nov. 19, 2020), <https://www.justsecurity.org/73432/75-years-ago-at-nuremberg-giving-a-name-to-crimes-against-humanity/>.

49. It still does. See *Al-Adsani v. United Kingdom*, [2001] ECHR 35763/97, 21 Nov. 2001, § 54 (holding that the *par in parem* principle applies even when a State violates *jus cogens*).

number and deadliness, warfare declined dramatically in the UN era, although, as mentioned earlier, this trend has reversed since 2010.⁵⁰ Annual battle deaths have fallen off by 90 percent since the late 1940s.⁵¹ Today's conflict-ridden world remains, astonishingly, among the most peaceful in modern history.

An important caution is in order here. The decline in direct physical violence (negative peace) does not indicate the absence of structural violence (positive peace).⁵² The claim that today's world is among the most peaceful in recent history refers solely to negative peace; we are still a long way away from positive peace.

III.

SOVEREIGNS AS ROBBERS, GODS, AND PROTECTORS

We might think that the State is an improbable instrument for keeping peace. One classic view holds that a State is nothing but a criminal enterprise that has defeated other criminal enterprises and been legitimated by time and habit. In *The City of God*, Augustine writes: "What are kingdoms but great bands of robbers? What are bands of robbers themselves but little kingdoms? . . . If . . . [a band of robbers] acquires territory . . . and subjugates peoples, it assumes the name of kingdom more openly."⁵³ David Hume concurs: "Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both."⁵⁴ In Hume's eyes, people obey Leviathan out of unreflective habit, not consent, and Leviathan secures its dominion "by employing, sometimes violence, sometimes false pretences."⁵⁵ Charles Tilly updates Augustine's robber theory with a different criminal analogy: "If protection rackets represent organized crime at its smoothest, then war risking and state making—quintessential protection rackets with the advantage of legitimacy—qualify as our largest examples of organized

50. See *supra* note 3; PEACE RSCH. INST. OSLO (PRIO), *Data on Armed Conflict*, <https://www.prio.org/Data/Armed-Conflict/>; UPPSALA UNIV, DEP'T OF PEACE & CONFLICT RSCH., *Uppsala Data Conflict Program (UDCP)*, <https://www.pcr.uu.se/research/ucdp/>.

51. PINKER, *supra* note 45, at 302. See the UDCP/PRIO data summarized by PINKER, 298–305. See also SIKKINK, *supra* note 11, at 186–88. For detailed data on intra-state wars, see generally JEFFREY S. DIXON & MEREDITH REID SARKEES, *A GUIDE TO INTRA-STATE WARS: AN EXAMINATION OF CIVIL, REGIONAL, AND INTERCOMMUNAL WARS, 1816–2014* (2016), a product of the long-running Correlates of War project.

52. On the distinction between negative and positive peace, see, e.g., Devon Curtis, *Introduction: The Contested Politics of Peacebuilding in Africa*, in *PEACEBUILDING, POWER, AND POLITICS IN AFRICA 6* (Devon Curtis & Gwinyayi A. Dzinesa eds., 2012).

53. AUGUSTINE OF HIPPO, *THE CITY OF GOD AGAINST THE PAGANS*, Bk. IV, ch. 4, 147–48. (R. W. Dyson ed. & trans. 1998).

54. DAVID HUME, *OF THE ORIGINAL CONTRACT*, IN *ESSAYS: MORAL AND POLITICAL* 471 (Eugene F. Miller ed. 1985).

55. *Id.*

crime."⁵⁶ States put their people at risk of war and then extort wealth and obedience as the price of protection.

Call this cynical line of thought the "deflationary view of the State." It certainly corresponds with one strand of international law: the doctrine that sovereignty over a territory requires effective control, with no additional requirement of good, or even mediocre, governance.⁵⁷ Even deflated States with no concern for their inhabitants' well-being or rights enjoy sovereign equality with other States, so long as they effectively control their territory and people.

At the other extreme from the deflationary view are those who identify the State with the nation (that is, the people), and view it with reverence, as if it were a god—a political theology closely identified with nationalism.⁵⁸ Call this the "romantic view of the State," although one might also label it the "overinflated view of the State."⁵⁹ All too frequently, the opposite views meet: tyrants and kleptocrats invoke the romance of the nation-state as a smokescreen for what is in reality a large criminal enterprise.

Is there any way to pump oxygen into the deflated state without embracing the metaphysical and theological excesses of the romantic view? The best-known answer lies in the spirit of the UDHR: what begins as a band of criminals becomes a legitimate sovereign not simply by controlling territory, but by also respecting and promoting the human rights of its people. UN Secretary General Kofi Annan articulated this now-familiar view in his 1999 address to the UN's General Assembly:

State sovereignty, in its most basic sense, is being redefined The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty—and by this I mean the human rights and fundamental

56. Charles Tilly, *War Making and State Making as Organised Crime*, in BRINGING THE STATE BACK IN 169 (Peter Evans, Dietrich Rueschemeyer, & Theda Skocpol eds., 1985).

57. The classic legal statement of effective control is Max Huber's *Island of Palmas* arbitral decision, 2 R. Int'l Arb. Awards 869 (Perm. Ct. Arb. 1928). The dispute is noteworthy: the United States and the Netherlands each claimed ownership over a tiny island also known as Miangas, located between the Philippines and Indonesia. *See id.* at 835–36. The United States' argument was based on the idea that Spain "discovered" the island in 1526 and claimed it, ceding it to the United States after the Spanish-American War. *Id.* at 836–37, 843–45. The Dutch claim was that it had ruled the East Indies, including Miangas, since 1677. *Id.* at 836–38. Huber found for the Netherlands because it had exercised effective control; and by that, he explained, is meant effective protection of foreign interests. *See id.* at 867–69. Even the bare hint that the 750 residents of Miangas should have a say is absent from the decision—as is the idea that effective control might require good governance from the inhabitants' point of view.

58. Some have argued that statism is not a secularized theology but the opposite: a deification of the secular State. *See, e.g.*, ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957); PAUL W. KHAN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011); PAUL W. KAHN, *SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY* (2008); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY*.

59. David Luban, *The Romance of the Nation-State*, 9 PHIL. & PUB. AFF. 392 (1980).

freedoms of each and every individual ... —has been enhanced....⁶⁰

This view of State legitimacy through human rights is usually called "conditional sovereignty," or "sovereignty as responsibility" (the latter term coined by Francis Deng three years before Annan's speech).⁶¹ These are subtly different concepts, but we can treat them both as articulations of Annan's reformulation of sovereignty.⁶² The condition of sovereignty under this conception is that States are servants of their peoples, and in particular, protectors of their human rights; the State's sovereign responsibility is to respect, protect, and fulfill its own peoples' rights.

To be clear, Deng's and Annan's reformulation of sovereignty as responsibility does not mean that despotic States that violate the condition will forfeit international recognition of their statehood. Diplomacy with despotic, kleptocratic, or racist governments is just as crucial as it is with those that are servants of their people. The criteria of statehood must therefore remain those of the 1933 Montevideo Convention: "a permanent population" in "a defined territory," a "government" (good, bad, or ugly), and the "capacity to enter into relations with other States."⁶³ But recognizing a despotism as a State is not the same as conceding a sovereign right of its government to behave despotically.⁶⁴ Like all States, despotisms are protected under the Charter from military aggression, so declaring that they fail the test of sovereignty as responsibility does not license invasion or conquest.⁶⁵ But States cannot invoke sovereignty to shield themselves from lesser forms of international pressure, such as sanctions or "outcasting" in response to their human rights failings—or, for that matter, measures imposed by the Security Council under Chapter VII, including referral to the ICC.⁶⁶ Sovereignty as responsibility, as formulated by Deng and Annan, is a moral advance over sovereignty as control, but both are conceptions of sovereignty within an international order based on sovereign States. They are by no means a radical revision of the State-based order.

The Deng-Annan formulation of sovereignty is contemporary, as is the focus on human rights; but the idea behind it is much older. Earlier I quoted Augustine's memorable description of kingdoms as great bands of robbers, but I intentionally

60. Secretary General Address, Sept. 20, 1999, <https://www.un.org/press/en/1999/19990920.sgs7136.html>.

61. See FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996).

62. "Conditional sovereignty" suggests that the baseline concept of sovereignty remains Westphalian, with side-constraints layered onto it. "Sovereignty as responsibility" is closer to Deng's and Annan's idea, which is that baseline sovereignty itself has metamorphosed away from Westphalian sovereignty.

63. Montevideo Convention on the Rights and Duties of States (1933), art. 1.

64. I am grateful to Miriam Gur-Arye and Carlos Vázquez for suggesting this clarification.

65. UN Charter, art. 2(4).

66. See generally Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L. J.* 252 (2011) (explaining and developing the term "outcasting").

excluded the beginning of his sentence: "*Justice removed then, what are kingdoms [regna] but great bands of robbers?*"⁶⁷ Just kingdoms are a different matter, because just rulers have the interests of the ruled in mind.⁶⁸ James Turner Johnson has argued that the notion of sovereignty as responsibility for the common good has medieval roots.⁶⁹ Even so, sovereignty as responsibility struck many as a dramatic change from the conception of sovereignty that had prevailed for more than a century. The diplomats in the audience for Annan's speech gave it a chilly reception—perhaps the best evidence of how novel this conception seemed.⁷⁰

Novel or not, the Deng-Annan reconceptualization of sovereignty gave rise to current doctrines of "responsibility to protect" (R2P). The responsibility to protect doctrine originated in a 2001 report by a Canadian-sponsored international group of experts, the International Commission on Intervention and State Sovereignty (ICISS) on the issue of humanitarian military intervention by outsiders in internal armed conflicts.⁷¹ This was a pressing issue in the wake of the Balkan wars and Rwandan genocide of the 1990s. One key question was whether outside intervention can be reconciled with respect for the sovereignty of the conflict-ridden State, to which ICISS answered yes.⁷² Echoing Deng and Annan,⁷³ it argued that the UN order transformed the Westphalian concept of sovereignty as control to sovereignty as responsibility, in particular, responsibility to protect against gross human rights violations.⁷⁴ Sovereignty under either conception implies that States themselves bear the primary responsibility to prevent humanitarian catastrophes within their borders, to react when they happen, and to rebuild in their wake. But under sovereignty as responsibility, the international community serves as a backstop when the State itself fails, with outside military intervention as a remedy of last resort if lesser measures of pressure or assistance prove unavailing. ICISS's conceptual innovation is that once we reimagine sovereignty as responsibility rather than control, humanitarian

67. AUGUSTINE OF HIPPO, *supra* note 53, at 147–48.

68. For Augustine, the virtue of justice is "to give each man his due." *Id.* at 921 (bk. XIX, ch. 4).

69. JAMES TURNER JOHNSON, SOVEREIGNTY: MORAL AND HISTORICAL PERSPECTIVES 9 (2014). *See*, for example, the passages from Aquinas quoted in *id.* at 38–39.

70. Annan was rebutted bluntly in the UN by Algeria's president Abdelaziz Bouteflika, who was also chair of the Organization of African Unity: "[W]e remain extremely sensitive to any undermining of our sovereignty." Barbara Crosette, *U.N. Chief Wants Faster Action To Avoid Slaughter in Civil Wars*, N.Y. TIMES (Sept. 21, 1999), <https://timesmachine.nytimes.com/timesmachine/1999/09/21/issue.html>; A decade later, James Traub recalled the "stinging reception" of Annan's speech. James Traub, *The Perversion of Sovereignty*, GLOB. POL'Y F. (Mar. 4, 2009), <https://www.globalpolicy.org/component/content/article/172/30577.html>.

71. ICISS Report, *supra* note 43.

72. *Id.*, §§ 1.35–1.36, p.8; §§ 2.25–2.27, p. 16.

73. *See* DENG ET AL., *supra* note 61 and accompanying text.

74. ICISS Report, *supra* note 43, § 2.14, p. 13.

intervention when a State does not or cannot discharge its responsibility to protect is not a violation of its sovereignty.⁷⁵

IV.

THE NEW THREATS TO PEACE

Can the sovereign State, under either conception of sovereignty, maintain the peace under present conditions? My answer is no, because today's threats to peace transcend the boundaries and powers of States, including States committed to human rights. To respond to these threats, we need a third conception of sovereignty, which includes State responsibility to cooperate across borders to control transnational threats to peace.⁷⁶

What are those threats? To answer that question, I draw from demographers, futurologists, and, above all, from writings by people whose business it is to foresee future threats to peace: military planners looking twenty or more years out.⁷⁷ The following discussion focuses on two factors: social conditions that generate armed conflicts and new military technologies.

75. I discuss the plusses and minuses of humanitarian intervention, and its connection with sovereignty concepts, in David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 79–115 (Pablo de Greiff & Ciaran Cronin, eds., 2002). For a sophisticated recent analysis, see NED DOBOS, *INSURRECTION AND INTERVENTION: THE TWO FACES OF SOVEREIGNTY* (2012).

76. By transnational threats, I do not mean solely exogenous threats emanating from foreign sources. Transnational threats include endogenous behaviors that provoke other States to respond in a way that harms the prospects for peace. For example, a high-consuming developed State might promote commercial practices in weaker, resource-cursed developing States that elicit violence and instability—in which case, the seemingly-exogenous threat emanating from a civil war in the weaker State could also, and rightly, be regarded as endogenous to the developed State. My thanks to Sarah Nouwen for emphasizing this point.

77. The most useful I have found are the UK MINISTRY OF DEFENCE, GLOBAL STRATEGIC TRENDS – OUT TO 2045 (5th ed. 2014) [henceforth: GST 5], https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/MinofDef_Global%20Strategic%20Trends%20-%202045.pdf, along with UK MINISTRY OF DEFENCE, GLOBAL STRATEGIC TRENDS – THE FUTURE STARTS TODAY (6th ed. 2018) [henceforth: GST 6], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771309/Global_Strategic_Trends_-_The_Future_Starts_Today.pdf. I also draw on similar documents produced by the US intelligence community and think-tanks: US Joint Chiefs of Staff, *Joint Operating Environment 2035 (JOE 2035): The Joint Force in a Contested and Disordered World* (Jul. 14, 2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/concepts/joe_2035_july16.pdf?ver=2017-12-28-162059-917; David T. Miller, *Defense 2045: Assessing the Future Security Environment and Implications for Defense Policymakers*, CTR. FOR STRATEGIC AND INT'L STUDIES (CSIS 2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/151106_Miller_Defense2045_Web.pdf; ATLANTIC COUNCIL, *Global Risks 2035: The Search for a New Normal* (2016), <https://www.atlanticcouncil.org/in-depth-research-reports/report/global-risks-2035/>; U.S. NAT'L INTEL. COUNCIL (NIC), *Global Trends 2030: Alternative Worlds* (Dec. 2012),

A. *The Fall in Global Poverty and the Changing Character of Work*

In what follows, I argue that vast and undeniable improvements in human welfare and human rights over the past half-century have generated unintended consequences that threaten peace, security, and—paradoxically—some of the same hard-won rights. A good place to begin is with what surely counts as one of the greatest human rights achievements in history: the dramatic fall in global poverty over the last half-century.⁷⁸ In 1970, sixty percent of the world's population lived in extreme poverty; today, it is less than ten percent.⁷⁹ The fall in poverty can be attributed to industrialization, technology, and advances in agriculture. Not only has poverty fallen, but life expectancies have risen dramatically.⁸⁰ For example, a Frenchwoman today has a life expectancy forty years longer than a century ago.⁸¹

In obvious ways, women's rights have advanced in the UN era.⁸² An important paradigm case is the right to vote: almost seventy percent of the world's States granted suffrage to women only after 1945.⁸³ Advancing women's rights confers a collateral benefit to peace: there is evidence that States with greater gender equality are less likely to resort to force in international crises than States with less gender equality.⁸⁴ One analyst offers women's enfranchisement as a partial explanation: women voters are less supportive of warfare than men—five to fifteen percent less, according to surveys in Western democracies.⁸⁵ That is enough to make politicians responsive, at least in countries with competitive elections.

https://www.dni.gov/files/documents/GlobalTrends_2030.pdf. An important caveat: long-range forecasts are almost certain to be unreliable. On this point, see PHILIP TETLOCK & DAN GARDNER, SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION 4 (2015). This is a point of emphasis in GST 6, *supra*, at 9–11, 13. These studies should therefore be regarded as projections of current trends rather than predictions, and my own depiction of future scenarios should be understood the same way.

78. The Visual History of World Poverty, slide 8, at <https://ourworldindata.org/slides/world-poverty/#/declining-world-poverty-1820-2015-step1>.

79. *Id.* Not only is the percentage living in extreme poverty lower, the absolute numbers have fallen by two-thirds since 1970. *Id.* The fall in poverty is especially conspicuous in China, where in 1990, 98.3 percent of the population lived on less than \$5.50 per day, while in 2017, the percentage is 27.2 percent. Visual History of World Poverty, *supra*, at slide 10. World Bank data is summarized at <https://www.macrotrends.net/countries/CHN/china/poverty-rate>.

80. NAT'L INST. OF AGING ET AL., GLOBAL HEALTH AND AGING 6–7 (2011), https://www.who.int/ageing/publications/global_health.pdf?ua=1. For a graphic display of increases in life expectancy in all countries from 1960 to 2016 (based on World Bank data), see *Life Expectancy*, OUR WORLD IN DATA, <https://ourworldindata.org/grapher/life-expectancy-at-birth-total-years?year=latest>.

81. NAT'L INST. OF AGING ET AL., *supra* note 80, at 7, Figure 4.

82. Moreover, Beth Simmons has marshalled evidence that international human rights law has contributed to this advance in some countries. SIMMONS, *supra* note 31, ch. 6.

83. See the timeline in WOMEN SUFFRAGE AND BEYOND, *The Women Suffrage Timeline*, https://womensuffrage.org/?page_id=69.

84. GST 5, *supra* note 77, at 5–6.

85. AZAR GAT, WAR IN HUMAN CIVILIZATION 606–07 (2006).

Yet these advances generate new threats to peace, in the form of unintended consequences, which are what I want to focus on. Better health and greater longevity allow older workers to work longer. But that has the unintended consequence of freezing youth out of job markets, and unemployment is a source of social unrest.⁸⁶ Automation likewise kills low-skill jobs, and this may become even more pronounced as artificial intelligence becomes more sophisticated.⁸⁷ Young men have always been the most violent segment of humanity.⁸⁸ Although evidence is inconclusive about whether unemployment correlates with violent crime, the lack of alternative economic opportunities makes unemployed youth fertile ground for recruiting insurgent or otherwise irregular soldiers in politically unstable countries.

These unintended consequences generate stresses that threaten both rights and social stability. One result is a backlash against women's rights.⁸⁹ Another is hatred of immigrants and resentment of foreigners, who are seen (often wrongly) as economic competitors or, alternatively, as welfare moochers. In the developed world, unemployed young men threaten social stability; in the developing world,

86. Aimee Picchi, *More Americans are Working into Old Age*, CBS NEWS (Dec. 19, 2019, 11:34 AM), <https://www.cbsnews.com/news/more-americans-are-working-into-old-age/>.

87. The usual rejoinder is that automation also creates new jobs. That may be true, but it is far from obvious that those whose jobs have been killed can transition to those new jobs.

88. This conclusion (confirming common experience) comes from the confluence of two strands of research—one on gender differences in rates of serious physical violence and the other on age differences. Pinker notes two large studies concluding that "countries with a larger proportion of young men are more likely to fight interstate and civil wars." PINKER, *supra* note 45, at 688 (citing J. D. Fearon & D. D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97 APSR 75 (2003) and C. G. Mesquida & N. I. Wiener, *Human collective aggression: A behavioural ecology perspective*, 17 ETHOLOGY & SOCIOBIOLOGY 247 (1996)). As for gender, military historian John Keegan observes that "[i]f warfare is as old as history and as universal as mankind, we must enter the supremely important limitation that it is an entirely masculine activity." JOHN KEEGAN, *A HISTORY OF WARFARE* 76 (1993); a more nuanced and detailed evaluation, reaching roughly the same conclusion, may be found in GAT, *supra* note 85, at 79–86. Outside of war, anthropological evidence indicates that "violence is mostly committed by men." SAPOLSKY, *supra* note 45, at 323 (summarizing findings in BOEHM, *supra* note 45, about contemporary hunter-gatherer societies—thought by many anthropologists to be the closest socially and behaviorally to the hunter-gatherer societies that were all humans' evolutionary ancestors; see also GAT, *supra* note 85, at 3–55). Pinker's discussion of gender and violence, PINKER, *supra* note 45, at 684–89, concurs on "the most fundamental empirical generalization about violence, that it is mainly committed by men." *Id.* at 684.

On age differences, "late adolescence and early adulthood are when violence peaks". SAPOLSKY, *supra* note 45, at 170. "As has been said, the greatest crime-fighting tool is a thirtieth birthday." *Id.* Contemporary US crime statistics bear this out. In 2018, for example, 40 percent of arrests for murder and manslaughter and 25 percent of arrests for aggravated assault were of suspects between the ages of 15 and 24. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, *Arrests by offense, age, and gender*, https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1.

These statistics lump together all arrests of individuals 25 or older; one supposes that 25-to-30 year olds make up an additional sizable share of the murder and aggravated assault arrests. Of these arrests, male aggravated assault arrests outnumbered female arrests three-to-one, and male murder arrests outnumbered female arrests by more than seven-to-one. *Id.*

89. This was already evident decades ago. See SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (2006) (analyzing the backlash against feminism).

demobilized soldiers and militiamen who have no skills except fighting pose a perpetual menace.⁹⁰ Meanwhile, the aging population strains the resources of the developed world.

B. Urbanization

Next, consider the worldwide tendency toward intense urbanization. Already, city-dwellers outnumber rural populations, and some demographers predict that by 2045 seventy percent of the world's population will live in cities.⁹¹ The Chinese government forecasts that in China alone, somewhere between 250 and 300 million people will move from rural to urban areas in the next fifteen years.⁹² The number of mega-cities, that is, cities with populations over 10 million, has tripled in the last quarter century. Furthermore, the UN predicts that, by 2030 there will be 41 mega-cities, mostly in the global South (there were 31 mega-cities in 2016).⁹³

The problem, based on extrapolating current trends, is that many of these cities will contain vast slums and shantytowns, with distressed infrastructure and impure water. In regions where central governments are weak, these slums will be nearly ungovernable, plagued by crime and violence, and filled with desperate, restless people.⁹⁴ Overcrowding makes disease more likely to spread, and we are now living through the proof that travelers can swiftly turn local epidemics into global pandemics. Pandemics are not only devastating threats to well-being; they are threats to global stability as well, carrying the possibility of panics and military responses.⁹⁵

C. Climate Change, Inequality, and Global Migration

The threat that climate change poses to individual well-being and international peace is well known. In its broadest terms, climate change will make

90. This was a matter of particular concern to humanitarian organizations trying to reintegrate demobilized soldiers, especially child soldiers, in the wake of West African wars. *See generally* MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2012).

91. GST 5, *supra* note 77, at 17.

92. *Id.*

93. U.N., DEP'T OF ECON. AND SOC. AFFS., POPULATION DIV., THE WORLD'S CITIES IN 2016 – DATA BOOKLET ii, 2, https://www.un.org/en/development/desa/population/publications/pdf/urbanization/the_worlds_cities_in_2016_data_booklet.pdf.

94. *See, e.g.*, GST 5, *supra* note 77, at 17–19.

95. The pandemic has certainly caused panic, and some heightened military tension, although not direct military responses such as militarily-enforced quarantines. For further discussion of the COVID-19 pandemic, including the heightened military tension, see the Epilogue to this Essay, *infra*. On pandemics as security threats, *see, e.g.*, JOE 35, *supra* note 77, at 9, 38; GST 6, *supra* note 77, at 56, 66–67. The Obama administration recognized global pandemics as a security threat in its national security strategies. *See, e.g.*, WHITE HOUSE, NATIONAL SECURITY STRATEGY 16, 48–49 (2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

some parts of the Earth, especially the poorest, unable to sustain their human populations. Coastal plains will flood; semi-arid regions will become deserts.⁹⁶ If catastrophic storms proliferate, ever-larger numbers of people will be internally displaced.⁹⁷ Other forms of environmental degradation and pollution threaten water supplies. For example, one research team claims that two-thirds of the world's people currently face severe water shortages.⁹⁸ Already, the Chinese government reports that four-fifths of the well water in China is unfit to drink or bathe in.⁹⁹

The threat to peace arising from these developments is obvious: as resources and living space become more scarce, environmental and climate refugees will flee from unlivable regions into countries that do not want them, and, in some cases, cannot support them. This will serve as an invitation to violence, confinement, or even genocide. Those who cannot leave may plunge their countries into civil conflicts, as some believe was the case in Darfur during the drought of the early 2000s.¹⁰⁰ Civil conflicts themselves can and do create mass migrations of refugees. Today, there are 20 million refugees, and twice that number of internally displaced persons.¹⁰¹

Growing economic inequality between rich and poor States is also likely to intensify migration. For that matter, growing inequality within States is a worldwide phenomenon.¹⁰² Endemic corruption contributes to inequality in many parts of the world.¹⁰³ A US military forecast warns that weak States will collapse into failed States through "a mix of real or perceived corruption, economic inequality, and ethnic/religious discrimination."¹⁰⁴ As a result, "violence is likely

96. See, e.g., GST 5, *supra* note 77, at 33–34 and sources cited therein.

97. Current research suggests that while climate change will not necessarily increase the frequency of hurricanes, it is likely to increase their intensity. Union of Concerned Scientists, *Hurricanes and Climate Change* (June 25, 2019), <https://www.ucsusa.org/resources/hurricanes-and-climate-change>.

98. Nicholas St. Fleur, *Two-Thirds of the World Faces Severe Water Shortages*, N.Y. TIMES (Feb. 12, 2016), <https://www.nytimes.com/2016/02/13/science/two-thirds-of-the-world-faces-severe-water-shortages.html>.

99. *Four-fifths of China's water from wells 'unsafe because of pollution'*, THE GUARDIAN (Apr. 12, 2016), <https://www.theguardian.com/environment/2016/apr/12/four-fifths-of-chinas-water-from-wells-unsafe-because-of-pollution>.

100. See U.N. ENV'T PROGRAMME (UNEP), SUDAN: POST-CONFLICT ENVIRONMENTAL ASSESSMENT 8 (2007), https://postconflict.unep.ch/publications/UNEP_Sudan.pdf. This report can be faulted for ignoring the political and social causes of the conflict.

101. UNHCR, *Figures At A Glance*, <http://www.unhcr.org/en-us/figures-at-a-glance.html>. The 20 million figure refers to those under UNHCR's mandate, with an additional 5.6 million Palestinian refugees under UNRWA's mandate. *Id.*

102. See generally Thomas Piketty & Emmanuel Saez, *Inequality in the Long Run*, 344 SCI. 838 (May 23, 2014), <http://science.sciencemag.org/content/344/6186/838.full>.

103. JOE 2035, *supra* note 77, at 8.

104. *Id.*

to occur in the form of sectarian strife, insurgency, or civil war."¹⁰⁵ Thomas Piketty, perhaps the most comprehensive student of economic inequality, warns of "the violent political conflict that inequality inevitably instigates."¹⁰⁶

D. *The Democratization of Violence*

The final threat to peace that I want to discuss is the development of new military technologies. In doing so, I will set aside the dangers of nuclear war, not because they are unimportant, but because they are obvious.¹⁰⁷ Instead, I will focus on a different set of developments: the proliferation of inexpensive, dangerous, and small-scale technologies outside of the control of States. Gabriella Blum and Benjamin Wittes label this proliferation the "[d]emocratization of [v]iolence."¹⁰⁸

The most obvious democratizers of violence are small arms and explosives. These are hardly novel technologies, although their proliferation was greatly accelerated by the vast sell-off of Soviet arsenals after the collapse of the Soviet Union.¹⁰⁹ But advanced hacking tools are a relatively new development, and the more societies come to depend on computers to control their infrastructures, the more vulnerable they become to cyberattacks.¹¹⁰ Cybertheft and ransomware already assault individuals and businesses, including in ways that have nothing to do with the theft of money. For example, internet predators extort sexual favors and photos by threatening to release embarrassing information obtained from indiscreet victims, often children—a crime common enough to have acquired its own name, sextortion.¹¹¹ These are all threats to individual rights, but they are

105. *Id.*

106. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 3 (Arthur Goldhammer trans., 2013). This is a recurrent theme in Piketty's long book.

107. What is far from obvious is whether the existential deterrence that worked in the bilateral world of the Cold War can also work in a world with multilateral nuclear antagonists. In any event, uncertainty about rivals' nuclear capabilities gives nuclear-armed States incentives to continue nuclear arms races, and current US nuclear superiority may cause fearful rivals to compete fiercely in other arenas. *See generally* KEIR A. LIEBER & DARYL G. PRESS, *THE MYTH OF THE NUCLEAR REVOLUTION: POWER POLITICS IN THE ATOMIC AGE* (2020); Lieber & Press, *The New Era of Counterforce: Technological Change and the Future of Nuclear Deterrence*, 41(4) *INT'L SEC.* 9 (2017). These issues are beyond the scope of this Essay.

108. *See* BENJAMIN WITTES & GABRIELLA BLUM, *THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES* 115 (2015).

109. *Soviet Small Arms Land in Wrong Hands*, ABC NEWS (May 29, 2002), <https://abcnews.go.com/International/story?id=79968&page=1>.

110. BLUM & WITTES, *supra* note 108, at 54.

111. *See* U.S. FBI, *SEXTORTION IN THE UNITED STATES: A FACT SHEET FOR PARENTS AND CHILDREN* (July 2015) (defining "sextortion" as "a criminal act that occurs when someone demands something of value, typically images of a sexual nature, sexual favors, or money from a person"), <https://www.douglascountys.org/sites/default/files/media/depts/district-attorney/pdf/fbi-brochure-sextortion-of-children-united-states-fact-sheet-parents-and-children.pdf>, On this and related threats such as cyberstalking and cyberharassment, *see generally* DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

also threats to peace if States suspect that hackers might be other hostile States concealing themselves as private criminals, or if hacker host-states are unwilling to repress their activity. State-against-State cyberwarfare has so far proven impossible to regulate, for both technical and strategic reasons.¹¹² If carried out on a large scale, cyberattacks on hospitals, power grids, cell phone networks, GPS systems, aircrafts, and computer-regulated dams and water stations could create mass casualties.¹¹³ Both State and non-State actors could carry out such attacks. On an entirely different technological front, biological weapons that attack food crops could cause famines, and the science needed to develop these weapons is already available to non-State actors.¹¹⁴ Electromagnetic pulse weapons may be capable of disabling communications satellites and GPS devices, as well as shutting down electrical grids.¹¹⁵

Closely related to other cyber-threats are the information wars that exploded into public consciousness in the wake of the 2016 US election. The possibility of hostile State or non-State actors manipulating big data and social media to sway elections, sow public discord, and spread fake facts is a painful reality.¹¹⁶ Visual images and videos can be altered, human voices can be impersonated, and the

112. The group of legal experts who wrote the most thorough treatment of international law and cyberwarfare, the Tallinn 2.0 Manual, left many areas of disagreement, even on the foundational question of whether respect for State sovereignty is a binding legal rule, rather than a non-binding principle.

113. BLUM & WITTES, *supra* note 108, at 23.

114. Tom Daschle & Richard B. Myers, *A Threat to the Food System*, U.S. NEWS & WORLD REP. (Oct. 17, 2016), <https://www.usnews.com/opinion/articles/2016-10-17/americas-food-supply-and-national-security-are-at-risk-to-bioterrorism>. On the more familiar issue of bioterrorism against humans, see, e.g., Christopher Chyba, *Biological terrorism and public health*, 43 SURVIVAL 93 (2001).

115. See, e.g., Robert Beckhusen, *Military Looks to Shield Its Satellites from Electromagnetic Attacks*, FOREIGN POL'Y (Jan. 3, 2014), <https://foreignpolicy.com/2014/01/03/military-looks-to-shield-its-satellites-from-electromagnetic-attacks/>; Trevor English, *What Are EMPs and How Are They Used in Warfare?*, INTERESTING ENG'G (Dec. 29, 2019), <https://interestingengineering.com/what-are-emps-and-how-are-they-used-in-warfare>. Some readers may be aware of the menace of EMPs from WILLIAM R. FORSTCHEN, *ONE SECOND AFTER* (2009), a techno-thriller about an EMP attack.

116. A knowledgeable and (frankly) terrifying overview is P.W. Singer & Emerson T. Brooking, *LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA* (2018). Reportedly, both Russia and China have intentionally sowed disinformation in the United States regarding the coronavirus crisis. See, e.g., Julian E. Barnes et al., *As Virus Spreads, China and Russia See Openings for Disinformation*, N.Y. TIMES, (Mar. 28, 2020) (updated Apr. 10, 2020), <https://www.nytimes.com/2020/03/28/us/politics/china-russia-coronavirus-disinformation.html>; Robin Emmott, *Russia Deploying Coronavirus Disinformation to Sow Panic in West, EU Document Says*, REUTERS, (Mar. 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-disinformation/russia-deploying-coronavirus-disinformation-to-sow-panic-in-west-eu-document-says-idUSKBN21518F>; DEUTSCHE WELLE (DW), *Is Russia running a coronavirus disinformation campaign?*, (Mar. 20, 2020) <https://www.dw.com/en/is-russia-running-a-coronavirus-disinformation-campaign/a-52864106> (reporting Russian news media blaming Latvian biologists and the British military for developing coronavirus); Edward Wong et al., *Chinese Agents Helped Spread Messages That Sowed Virus Panic in U.S., Officials Say*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/politics/coronavirus-china-disinformation.html>.

very fact that these "deepfake" technologies are matters of public knowledge itself contributes to a mistrust of shared public reality.¹¹⁷ As Hannah Arendt observed decades ago, the real problem with large-scale public lying is not that it persuades us of falsehoods, but that it leads to "a peculiar kind of cynicism—an absolute refusal to believe in the truth of anything, no matter how well this truth may be established."¹¹⁸ Information warfare is particularly difficult for democracies to deter, regardless of cyber superiority, because their openness creates vulnerabilities that are hard to defend.¹¹⁹

As for State-on-State "kinetic" wars, they are likely to be quick and lethal.¹²⁰ Missiles fly fast, and short-range missile defense systems like Israel's Iron Dome will respond by becoming automated, creating the prospect of "machine-driven escalation[s]" comparable to machine trading duels on the stock market.¹²¹

Next, consider robotics.¹²² Miniaturized drones, the size of insects, already exist; I found one for sale on the Internet for \$119.¹²³ Soon, experts predict, they will be equipped with surveillance cameras or, potentially, with weapons.¹²⁴ Governments will have access to them, but so will extremist groups and mafias. For that matter, as Blum and Wittes warn, so will your creepy neighbor who uses

117. See, e.g., Cristian Vaccari & Andrew Chadwick, *Deepfakes and Disinformation: Exploring the Impact of Synthetic Political Video on Deception, Uncertainty, and Trust in News*, SOC. MEDIA & SOC. (Feb. 19, 2020), <https://journals.sagepub.com/doi/10.1177/2056305120903408>; Garfield Benjamin, *Deepfake videos could destroy trust in society – here's how to restore it*, THE CONVERSATION (Feb. 6, 2019), <https://theconversation.com/deepfake-videos-could-destroy-trust-in-society-heres-how-to-restore-it-110999>; Simon Kuper, *The age of scepticism: from distrust to 'deepfake'*, FIN. TIMES MAG. (Oct. 18, 2018), <https://www.ft.com/content/2fc9c1fa-d1a2-11e8-a9f2-7574db66bcd5>.

118. Hannah Arendt, *Truth and Politics*, in BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 257 (rev. ed. 1968).

119. Jack Goldsmith & Stuart Russell, *Strengths Become Vulnerabilities* 8 (Hoover Institution Aegis Series Working Paper No. 1806 (2018)), <https://www.hoover.org/research/strengths-become-vulnerabilities> (arguing that the United States does not retaliate against cyberattacks because of "the fear of losing in escalation due to asymmetrical digital dependence"); see also Jack Goldsmith, *The Failure of Internet Freedom*, KNIGHT FIRST AMEND. INST. (Jun. 13, 2018), <https://knightcolumbia.org/content/failure-internet-freedom>.

120. In this connection, the sobering techno-thriller GHOST FLEET: A NOVEL OF THE NEXT WORLD WAR (2016), co-written by military analysts P. W. SINGER and AUGUST COLE, offers a fictional glimpse of a future China-US war, and the authors include a full set of footnotes documenting the technologies their novel incorporates into its story line.

121. See LUCAS KELLO, THE VIRTUAL WEAPON OF INTERNATIONAL ORDER 252 (2017).

122. In addition to BLUM & WITTES, *supra* note 108, see generally P. W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY (2009).

123. Jon Gabay, *Tiny, insect-like drones may be the future of surveillance*, ELEC. PRODS. (Mar. 30, 2017), http://www.electronicproducts.com/Robotics/Futurism/Tiny_insect_like_drones_may_be_the_future_of_surveillance.aspx.

124. SINGER, *supra* note 122, at 118.

his mini-drone to watch you on his smartphone as you undress, and then posts the video on Facebook.¹²⁵

Militaries are researching biological and mechanical enhancers that can make soldiers stronger, faster, unsleeping, and nearly impervious to pain.¹²⁶ Cognitive enhancements and drugs that deaden sympathetic emotions are also on the table.¹²⁷ It is hard to determine whether the US government is pursuing such weapons, but in 2015 a US defense official stated that "[o]ur adversaries, quite frankly, are pursuing enhanced human operations. And it scares the crap out of us, really. We're going to have to have a big, big decision on whether or not we are comfortable going that way."¹²⁸ Once enhancements come into State military use, it will be hard, if not impossible, to keep them out of the hands of warlords, mercenaries, and criminal cartels. Non-State actors will churn out weapons with 3D printers. Their enhanced foot soldiers will wear night-vision goggles and lightweight graphene body armor stronger than steel.¹²⁹ States may respond with autonomous weapons systems that choose their own targets—"killer robots," the regulation of which UN-sponsored experts are only beginning to explore.¹³⁰

Taken singly, each of these threats is worrying; together, they are the stuff of nightmares.

On the other hand, Blum and Wittes observe that defensive capabilities will also be widely dispersed among private actors.¹³¹ Governments already rely on private security firms to fight hackers, and NGOs operating in conflict zones hire private military contractors to protect them.¹³² You can defend yourself against insect drones with an electric fan or a fly-swatter (if you know the drone is there).

125. BLUM & WITTES, *supra* note 108, at 44.

126. See GST 5, *supra* note 77, at 89; PETER EMANUEL ET AL., U.S. ARMY DEVCOM, CYBORG SOLDIER 2050: HUMAN/MACHINE FUSION AND THE IMPLICATIONS FOR THE FUTURE OF THE DOD (2019).

127. JONATHAN D. MORENO, MIND WARS: BRAIN SCIENCE AND THE MILITARY IN THE 21ST CENTURY 135–62 (2012); see also *Creating Supermen: battlefield performance enhancing drugs*, ARMY TECH. (Apr. 14, 2013), <https://www.army-technology.com/features/featurecreating-supermen-battlefield-performance-enhancing-drugs/>.

128. Bob Work, *Deputy Secretary of Defense Speech*, CNAS DEF. F. (Dec. 14, 2015), <https://www.defense.gov/News/Speeches/Speech-View/Article/634214/cnas-defense-forum/>.

129. On graphene body armor, see Rebecca Boyle, *Bulletproof graphene makes ultra-strong body armour*, NEW SCIENTIST (Nov. 27, 2014), <https://www.newscientist.com/article/dn26626-bulletproof-graphene-makes-ultra-strong-body-armour/>. Graphene body armor is readily available for purchase on the internet.

130. The Convention on Conventional Weapons (CCW) has convened an expert group that, after three meetings, has come up with only tentative suggestions and inconclusive results.

131. BLUM & WITTES, *supra* note 108, at 56–73.

132. *Id.* On humanitarian organizations' use of private military contractors (PMCs), see P. W. SINGER, CORPORATE WARRIORS 82 (2003) (noting use of PMCs to protect World Vision International humanitarian operations in Sierra Leone and UNHCR operations on the Afghanistan border, and predicting increased reliance by humanitarians on PMCs).

E. Consequences

The net result of all these developments is an enormous challenge to the sovereign nation-state's monopoly on the legitimate means of violence. As Hobbes foresaw, that monopoly rests on a promise that Leviathan will protect our security.¹³³ But what if Leviathan cannot protect us, while private entities sometimes can? The UK Ministry of Defence predicts a long-term "erosion of [S]tate sovereignty,"¹³⁴ and Blum and Wittes ask a cogent question: "Can the [S]tate endure once it is unable to prevent the electrical grid from being shut down, the lethal spider drone from attacking you in the shower, or new or manipulated biological agents produced in garages anywhere in the world from threatening your health?"¹³⁵ Within a few years, the answer may be no.

The fact is that territorial sovereignty and the public-private distinction, both basic conceptual features of the sovereign nation-state, have already eroded to a significant degree. In many States, including strong States, traditional public functions are contracted out to private corporations—and large multinational corporations do not respect territorial boundaries. Neither, for that matter, do transnational criminal networks (some of which perform some of the social welfare functions of the State). Nor, obviously, does climate change. While States will remain the preeminent actors on the world stage for the foreseeable future, the image of more or less self-contained territorial sovereigns is no longer accurate.

This would be true *even if States did their best to keep the promise of respecting, protecting, and fulfilling their inhabitants' human rights*. The threats to peace brought on by climate change, mass migration, pandemics, and the democratization of violence transcend national boundaries. Other social generators of conflict—youth unemployment, intense urbanization in failing States, rising inequality, and backlash against women's rights—may lie beyond the power of any State to control unilaterally. For example, Piketty has argued that the best way to tackle rising economic inequality is through a global tax on capital.¹³⁶ Relying solely on local wealth taxes would fail because wealth can flee elsewhere. Piketty's proposal can be accused of political utopianism, but suppose we were to take it seriously, on the ground that ballooning inequality poses a threat to peace.¹³⁷ Obviously, such a global tax would require international cooperation and coordination.

133. See THOMAS HOBBS, *LEVIATHAN* 109–20, chs. 17 and 18. (Michael Oakeshott ed., 1957) (1651).

134. GST 6, *supra* note 77, at 16, 108.

135. *Id.* at 107. On this same theme, see MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 354–414 (1999).

136. PIKETTY, *CAPITAL*, *supra* note 106, ch. 15.

137. See *supra*, Part IV.C.

V.

TWO OBJECTIONS

I foresee two objections to the above description of upcoming threats to peace: that it ignores issues of injustice, and that the threats are all, at bottom, threats to human rights—so that the project of guarding against them is simply an updated version of the UN project of peace through human rights.

Start with the first. You may have noticed that the words "justice" and "injustice" were absent from the preceding Part's catalogue of nightmares. I spoke only of future violence and what might instigate it, not of whether the violence might be justified. If young workers don't have jobs, if millions of people live in desolate shantytowns with no way out, and if inequalities cascade, are not anger and disruption justified? Even the UDHR, which is hardly a militant manifesto, warns that in the face of such deprivations, "man [may be] compelled to have recourse, as a last resort, to rebellion."¹³⁸ By contrast, antiseptic terms like "stability" and "instability" seem like the amoral vocabulary of defense intellectuals on the side of the status quo.

I accept that violence can sometimes be just; elsewhere, I have argued that the struggle for basic human rights can be a just cause for war.¹³⁹ But it hardly follows that the violence arising from the forecasts catalogued above will be in the service of justice. Ransomware hackers are not freedom fighters. Biologically-enhanced mercenary soldiers will fight for whomever pays them to fight. Criminal gangs armed with high-tech weapons will kill for the reasons criminal gangs have always killed. And States have never waged wars to rectify economic injustices.

The point is not that justified violence could not happen—it is that much of the violence that *will* happen, even in the pursuit of a just cause, will not be justified. Indeed, it may be nearly impossible for a just rebellion to succeed without inflicting unjustified violence—for example, by forcibly conscripting foot soldiers, deliberately provoking government atrocities, or murdering rival rebel leaders.¹⁴⁰ Even a just war or rebellion waged in accordance with the *jus in bello* will be a human rights catastrophe. Homes are ruined, health care collapses, and decades of economic development are destroyed in a matter of weeks.

The second objection is that all the scary trends just described are fundamentally human rights problems, so that revising the existing conception of sovereignty as responsibility to protect human rights is unnecessary. Economic rights, environmental rights, and the right to nationality are human rights on par with rights to security against violence. If threats to these human rights are the future causes of violence and warfare, then the solution is what the UN order

138. See UDHR, *supra* note 12, Preamble, para. 3. Recall that the UDHR enshrines economic rights and rights to well-being, as well as civil and political human rights. *Id.* at art. 22–25.

139. David Luban, *Just War and Human Rights*, 9. PHIL. & PUB. AFF. 160 (1980).

140. Allen Buchanan, *The Ethics of Revolution and Its Implications for the Ethics of Intervention*, 41 PHIL. & PUB. AFF. 294 (2013).

already aims at: to respect, protect, and fulfill those rights. Recall that the rights-peace hypothesis claims that human rights will contribute to peace. Rather than challenging the rights-peace hypothesis, one might argue that today's threats confirm it.

Again, it is hard to disagree in the abstract, although I suspect that labeling climate change or pandemics as human rights violations is not a helpful extension of the core concept of human rights. Even if it were, the problem is that even conditional sovereignty envisages that each State will keep its own human rights house in order, with the international community functioning only as a complementary backstop—a point I elaborate in Part VII below.¹⁴¹ This model is palpably inadequate when the future threats to peace are thoroughly transnational and will require cooperative international responses. Whatever political structures evolve to cope with these threats will require a different way of conceptualizing State sovereignty and State responsibility.

VI.

SOVEREIGN RESPONSIBILITY TO HUMANITY: R2H

Today we cannot know what those institutional structures will be any more than those who first conceptualized the United Nations knew what the UN order with its many satellite institutions would look like half a century later. But it does seem possible to search for a legal and philosophical conception of State sovereignty suitable for the world we are rapidly approaching. It must be a form of sovereignty as responsibility not only for the human rights of a State's own citizens, but also responsibility for cooperating to control transnational threats to peace. Put another way, it is conditional sovereignty with an added condition: not only human rights protection at home, but also transnational cooperation to control emerging threats to peace (which may include cooperation to protect human rights abroad). My label for sovereignty understood on these lines is sovereignty as responsibility to humanity. I will use the abbreviation "R2H," in parallel with the "R2P" abbreviation for the Responsibility to Protect doctrine.

A few international lawyers have begun to conceptualize sovereignty along these lines. One proposal is Eyal Benvenisti's conception of sovereigns as trustees of humanity.¹⁴² Evan Criddle and Evan Fox-Decent develop a closely related

141. I use the word "complementary" deliberately. In the Rome Statute of the International Criminal Court, "complementarity" means that States themselves are the first resort for investigating and prosecuting ICC crimes committed on their territory or by their nationals. *See* art. 1, 17. The ICC can admit only those cases that states are unwilling or unable to prosecute. In the same way that the ICC is "complementary to national jurisdiction" (art. 1), the UN scheme of conditional sovereignty envisages international human rights enforcement solely as a complement to national enforcement.

142. Benvenisti, *supra* note 5. This proposal is the one that has most influenced my own thinking. Benvenisti summarizes his arguments in his Hague Academy lectures: EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* 121–44 (2014).

proposal under the title "fiduciaries of humanity."¹⁴³ There are differences between these proposals: Criddle and Fox-Decent focus principally on international organizations as fiduciaries of humanity, while Benvenisti focuses on States.¹⁴⁴ As a legal matter, the concept of fiduciary responsibilities has a wider scope than that of trusteeship, which exists only when a legal trust is formally established.¹⁴⁵ For present purposes, though, this difference is not crucial, because the heart of the responsibility is more or less the same: it involves responsibility to care for the interests of outsiders beyond the duty not to inflict unjustified harm, and beyond ordinary market relations between the parties.

In Benvenisti's imagery, "[i]n past decades the predominant conception of sovereignty was akin to owning a large estate separated from other properties by rivers or deserts. By contrast, today's reality is more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families."¹⁴⁶ Living in a global apartment building imposes responsibilities on each resident to others in the condominium, as well as mutual stewardship of the condominium as a whole.¹⁴⁷ What those responsibilities entail may be unclear, but at the very least, the residents are responsible for working together to alleviate threats to peace.

The question for us to consider is whether concepts like "trustee of humanity" or "fiduciary of humanity" offer a cogent expression of these responsibilities. Some of Benvenisti's critics complain that the concept of trusteeship reeks of colonialism and empire.¹⁴⁸ Historically, greedy European powers used trusteeship as legal cover to rule the lives and territories of indigenous people. The foreign trustee governed a territory for the supposed benefit of an allegedly "immature" native population, until it gained the maturity needed for self-

143. EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (2016).

144. On international organizations, see *id.* at 283–317. Criddle and Fox-Decent take States' most basic fiduciary obligations to run to their own people, not to humanity at large; but they do allow that under existing international law, sovereign States can be thought of as fiduciaries of humanity in certain contexts. These include international humanitarian law, *id.* at 171–74; the law governing detention of foreign nationals, *id.* at 212–14; and refugee law, *id.* at 265–81. See also Criddle & Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in *FIDUCIARY GOVERNMENT* (forthcoming), available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040152. Cf. Benvenisti, *supra* note 5.

145. I am grateful to Criddle and Fox-Decent for clarifying the relationship. Private communications, Dec. 11, 2018.

146. Benvenisti, *supra* note 5, at 295.

147. In conversation, Benvenisti has proposed "stewardship" as an alternative word for "trusteeship," and I gratefully take the word from him.

148. CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 143, at 15–16; Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 *THEORETICAL INQUIRIES IN L.* 447 (2015); Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 *THEORETICAL INQUIRIES IN L.* 511 (2015). Benvenisti responds to these critiques in *The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks*, 16 *THEORETICAL INQUIRIES IN L.* 535 (2015).

determination. In reality, trusteeship was a system of exploitation and condescension, masquerading as benevolence.

But it is only the historical connotations of the word "trusteeship" that are objectionable, not the concept itself. That is because the model changes dramatically once we think of sovereigns as trustees not of a colonized people, but of *humanity* as a whole. Today, those former colonies are themselves sovereign States. Like all other States, they too would continue to exercise sovereignty over their own territory; but as trustees of humanity, they would do so with due regard for the legitimate interests of outsiders—as would all other States. To say sovereigns are trustees of humanity means that each and every State is now the trustee, not only the beneficiary, in the relationship. Sovereign trustees of humanity are therefore nobody's colonial or imperial subject, so the fear of imperialism or colonialism is unfounded. This is not to deny that sovereignty as responsibility to humanity could be invoked by powerful States as a pretext for international bullying or aggression. But that is equally true of other conceptions of sovereignty, including Westphalian sovereignty and sovereignty as responsibility. There are few legal or political ideas that cannot be abused; this should not prevent us from examining their merits and drawbacks in situations where they are not abused.

Whether the terminology is trusteeship, fiduciary obligation, or something else altogether, the root idea of R2H is an understanding that sovereignty entails responsibilities that transcend national borders. This Essay focuses on one special case: the responsibility to cooperate transnationally to manage threats to peace. But the more generalized conception of sovereignty underlying R2H seems well worth elaborating.

VII. FROM R2P TO R2H

It will assist our understanding of R2H to compare it with R2P. Recall that R2P originated with ICISS, a group of experts exploring the legitimacy of humanitarian intervention in the wake of the Balkan wars and Rwandan genocide.¹⁴⁹ The UN General Assembly quickly picked up ICISS's idea that States have a responsibility to protect their own people from "genocide, war crimes, ethnic cleansing, and crimes against humanity"—the four core crimes in the Balkan and Rwandan calamities. The Security Council affirmed this doctrine.¹⁵⁰ According to the official UN version of R2P, the responsibility to protect against core crimes has three "pillars."¹⁵¹ First, States themselves bear the

149. *See supra*, Part III. of this Essay.

150. 2005 World Summit Outcome, UNGA Res. 60/1, A/Res/60/1 (Oct. 24, 2005), §§ 138–39; UNSCR 1674 (2006), § 4.

151. Ban Ki-Moon, Implementing the Responsibility to Protect: Report of the Secretary-General, Jan. 12, 2009, UNGA A/63/677, § 11 (discussing three "pillars").

primary responsibility to protect their people from the core crimes.¹⁵² Second, the UN and its members carry out the international community's responsibility "to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations" against these crimes.¹⁵³ Third, R2P authorizes States "to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter" if all else fails.¹⁵⁴ Such collective action includes military intervention as a last resort. The Security Council invoked R2P when it authorized the use of force to protect civilians in Libya, as well as to restore order in the Central African Republic and in Mali.¹⁵⁵

Whatever its virtues, R2P has conspicuous limitations and weaknesses. The UN version of R2P is narrower than the original ICISS proposal: the latter did not limit itself solely to the four core crimes (genocide, war crimes, ethnic cleansing, crimes against humanity), but spoke more generally of "deadly conflict and other forms of man-made catastrophe."¹⁵⁶ Furthermore, ICISS emphasized the proactive responsibility to *prevent* humanitarian catastrophes, not merely to react to them; and it called on the international community to help distressed States alleviate the root causes of violent internal conflict through development aid and rule of law assistance.¹⁵⁷ By contrast, the version of R2P endorsed by the Security Council is reactive, not proactive.

Notwithstanding the pages it rightly devotes to prevention, the ICISS report unmistakably focuses on humanitarian military intervention when States fail in their responsibility to protect.¹⁵⁸ That focus proved unfortunate. It means that in public discussions, R2P seems inevitably yoked to the last-resort remedy for humanitarian catastrophes: military force, prong three.¹⁵⁹ Debates over humanitarian military interventions will always eclipse the less exciting responsibility to prevent catastrophes by alleviating their root causes. This should hardly surprise us; as the journalistic maxim puts it, if it bleeds it leads, and military intervention bleeds in a way that rule-of-law or development assistance never will. Unfortunately, coupling R2P with humanitarian military intervention plays into the hands of cynical politicians who dislike the very idea of sovereignty

152. 2005 World Summit Outcome, *supra* note 150, § 138.

153. *Id.* § 139.

154. *Id.*

155. *See generally* UNSCR 1973 (2011) (Libya), 2085 (2012)(Mali), 2127 (2013)(Central African Republic).

156. ICISS Report, *supra* note 43, at 19, § 3.2. Later, however, the Report suggests that the important norm of non-intervention gives way only in the exceptional circumstances of core crimes. *Id.* at 31, §§ 4.12–13.

157. *Id.* §§ 3.3–.8, 3.18–.24.

158. *See id.* §§ 4.1–4.43.

159. *See* SIKKINK, *supra* note 11, at 189. JEAN L. COHEN warns that R2P "opens a Pandora's box" of "maximalist" claims, inviting "strategic, self-serving 'humanitarian' and 'democratic' interventions" in GLOBALIZATION AND SOVEREIGNTY 176–77 (2012).

as responsibility: it allows them to oppose R2P on the ground that it is a cover for military aggression.¹⁶⁰

The ICISS report focused on internal ("intra-state") conflicts, and this too narrows its scope.¹⁶¹ Certainly genocide and ethnic cleansing within a State represent the most dramatic failure of the State's responsibility to protect its people. But restricting R2P to internal conflicts suggests by negative implication that sovereigns have no responsibility to prevent *inter*-state (that is, international) conflicts, except via the UN Security Council, which is easily gridlocked by the P-5 veto power.¹⁶²

Thus, despite the worthy intentions of ICISS, R2P is too narrow, in the three ways just identified:

1. it focuses only on protection against core crimes,
2. principally in internal conflicts;

160. I do not mean to suggest that it is only cynical politicians who have this view. In 2019, Alfred de Zayas, a former Independent Expert appointed by the UN's Human Rights Council, tweeted: "The R2P 'doctrine' is nothing but a pretext for military aggression, which remains prohibited and a crime under the ICC statute, because #R2P cannot replace the #UN Charter and a pertinent Security Council resolution. But the media still peddles the 'fake legality' of R2P[.]" Twitter, March 2, 2019, <https://twitter.com/Alfreddezayas/status/1101829152045441027>. The tweet was in connection with US pressure on Venezuela, about which Zayas had written a scathing anti-intervention report. See UN Human Rights Council, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order on His Mission to the Bolivarian Republic of Venezuela and Ecuador, Aug. 3, 2018, UNGA A/HRC/39/47/Add.1.

The tweet itself is built on a falsehood, because the R2P doctrine does not replace the UN Charter or bypass the Security Council. On the contrary, it permits military intervention only when authorized by the Security Council under its Chapter VII powers. World Summit Outcome, *supra* note 150, § 139; UNSCR 1674, *supra* note 150, § 4. Deceptive or not, the equation of R2P with military intervention is a view shared by others who suspect R2P is a pretext for Great Power aggression. See, e.g., Edward S. Herman, "Responsibility to Protect" (R2P): An Instrument of Aggression. *Bogus Doctrine Designed to Undermine the Foundations of International Law*, GLOB. RES. (Oct. 30, 2013), <https://www.globalresearch.ca/r2p-as-an-instrumt-of-aggression/5356195>.

161. ICISS Report, *supra* note 43, at 20, § 3.6.

162. The Security Council has indeed "identified potential or generic threats as threats to international peace and security, such as terrorist acts, the proliferation of weapons of mass destruction and the proliferation and illicit trafficking of small arms and light weapons." UNITED NATIONS SEC. COUNCIL, *Frequently Asked Questions*, Question 12 ("How does the Security Council determine the existence of any threat to the peace, breach of the peace, or act of aggression?"), at <http://www.un.org/en/sc/about/faq.shtml#threat>. But, except in the case of terrorism, it has taken no decisive action against generic threats. On terrorism, see, e.g., UNSCR 1373 (2001).

In 2008, Myanmar (Burma) refused to permit international aid to assist in the wake of a devastating cyclone. France called on the Security Council to compel Myanmar to grant access on the ground that such denial violated R2P. But the Security Council disagreed, with China, Russia, and South Africa as leading voices for the claim that France's proposal would violate Burmese sovereignty over a purely internal matter. See Roberta Cohen, *The Burma Cyclone and the Responsibility to Protect*, BROOKINGS INST. (July 21, 2008), <https://www.brookings.edu/on-the-record/the-burma-cyclone-and-the-responsibility-to-protect/>.

3. and—despite protestations to the contrary—it deflects too much attention to humanitarian military intervention at the expense of less drastic remedies.

Suppose, as a thought experiment, that we relax these limitations. Suppose that sovereignty as responsibility meant that sovereigns are responsible not just for atrocity-prevention but for broader enhancement of peace and human rights—and not just for peace and human rights domestically, but internationally as well. Indeed, suppose that sovereignty as responsibility includes States' responsibility to consider the global condominium in the conduct of all their affairs. In other words, expand the international community's responsibilities under the second prong of R2P beyond humanitarian catastrophes to all matters of grave international concern. Finally, suppose that the modal response to States that violate their responsibility is legal and political, not military.

That is R2H. If, gradually, R2H were to become our new "political imaginary" of sovereignty, State responsibility to cooperate transnationally in order to manage emerging lethal threats would follow as a corollary.

VIII.

R2H AND DEMOCRACY

Like other features of the political imaginary, sovereignty concepts do not change overnight, and they obviously do not change at the say-so of jurists and philosophers. They transform gradually and by inches, one micro-context at a time, responding to tangible needs. Each change presents itself as an unexciting tweak of the existing order, not a dramatic metamorphosis. For example, the World Trade Organization's (WTO) dispute-settlement tribunals have interpreted treaty language prohibiting members from discriminating against foreigners ambitiously, as an other-regarding obligation to take the interests of foreigners into account in policymaking.¹⁶³ For trade specialists, this was perhaps a big deal; but for everyone else it was a small technocratic adjustment, or a "my eyes glaze over" minor news item. And yet, if in a few decades R2H were to emerge as a coequal conception of sovereignty, on a par with sovereignty as control and conditional sovereignty, this line of WTO cases might in hindsight seem like a significant precursor. Viewed one way, this is a baby step. Viewed another way, the gradual accretion of baby steps can take us long distances.

Climate change offers an even more compelling illustration of the difference between R2H and a more nationalistic conception of State responsibility. The United States subjects federal regulations, including environmental regulations

163. Eyal Benvenisti & Sivan Shlomo Agon, *The Law of Strangers: The Form and Substance of Other-Regarding International Adjudication*, (GlobalTrust Working Paper 08/2017), <http://globaltrust.tau.ac.il/publications>.

pertaining to climate change, to cost-benefit analysis (CBA).¹⁶⁴ But in doing CBA, whose costs and benefits count? In the Obama administration, the CBA methodology used the *global* cost of methane and nitrous oxide emissions in its calculations.¹⁶⁵ That is because "climate change presents a problem that the United States alone cannot solve," and "adverse impacts on other countries can have spillover effects on the United States," including national security and humanitarian concerns.¹⁶⁶ Taking into account costs to other countries is a paradigmatic example of R2H thinking. By contrast, the more nationalistic Trump administration counts only domestic costs of greenhouse gas emissions, which dramatically tilts the CBA away from regulation because the benefits of abating emissions is less—not because the world is different, but because the CBA methodology is different.¹⁶⁷ Again, the difference is in regulatory minutiae, although, in this case, the impacts may be far greater than the WTO decisions, and the US policy change moves *away* from R2H rather than toward it.

The notion of sovereigns as trustees or fiduciaries of humanity raises thorny questions of political theory, which are the subject of a vast literature that I do not discuss here.¹⁶⁸ These questions include those of global governance, sovereignty, and the rule of law. R2H also raises thorny questions of practice. One, of course, is what incentive any State would have to fulfill its fiduciary obligations. The

164. The requirement to subject regulations to cost-benefit analysis comes from Exec. Order No. 12291, 3 C.F.R. 127 (1981); the requirement to regulate greenhouse gases was established in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

165. INTERAGENCY WORKING GRP. ON SOC. COST OF GREENHOUSE GASES, ADDENDUM TO TECHNICAL SUPPORT DOCUMENT ON SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866: APPLICATION OF THE METHODOLOGY TO ESTIMATE THE SOCIAL COST OF METHANE AND THE SOCIAL COST OF NITROUS OXIDE, (Aug. 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf, at 5.

166. *Id.*

167. Niina Heikinen, *EPA Revises the Social Cost of a Potent Greenhouse Gas*, SCI. AMER., (Nov. 20, 2017), <https://www.scientificamerican.com/article/epa-revises-the-social-cost-of-a-potent-greenhouse-gas/>. An op-ed writer harshly condemns this and other technical changes in CBA methodology as "accounting gimmicks" that "cooked the books." Catherine Rampell, *Forget the Trump Tweets. This is the Trump action that might actually kill us.*, WASH. POST, (Aug. 17, 2020), https://www.washingtonpost.com/opinions/forget-the-trump-tweets-this-is-the-trump-action-that-might-actually-kill-us/2020/08/17/e912c0ae-e0b8-11ea-b69b-64f7b0477ed4_story.html.

168. *E.g.*, COHEN, GLOBALIZATION AND SOVEREIGNTY, *supra* note 159; FRIEDRICH KRATOCHWIL, THE STATUS AND LAW IN WORLD SOCIETY: MEDITATIONS ON THE ROLE AND RULE OF LAW (2014); HANS LINDAHL, FAULT LINES OF GLOBALIZATION: LEGAL ORDER AND THE POLITICS OF A-LEGALITY (2013); Steven Bernstein, *Legitimacy in intergovernmental and non-state global governance*, 18 REV. INT'L POL.ECON.17 (2011). Ethan J. Leib and Stephen R. Galoob have argued forcefully that fiduciary political theory is a bad fit with international law, because the former implies not only obligations on how States behave, but also how they deliberate, giving the beneficiary's interests pride of place in their deliberations. International law, by contrast, cares solely about compliance, not compliance for the right reasons. Leib & Galoob, *Fiduciary Political Theory: A Critique*, C 125 YALE L.J. 1820, 1825–44, 1868–77 (2016). Criddle and Fox-Decent respond in *Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob*, 126 YALE L.J. F. 192 (2016). They argue that Leib and Galoob have constructed an inaccurate model of fiduciary relations.

answer implicit in my argument is a form of enlightened self-interest: it is the only way to keep the peace in the face of transnational threats that States cannot manage unilaterally. But as with many schemes of collective action, participants have rational incentives to defect and free ride, as climate change treaties illustrate.¹⁶⁹ It will take great ingenuity in institutional design to overcome those incentives.

A deeper question is whether responsibility to humanity is consistent with responsibility to one's own people. What if a State's responsibility to its own citizens' welfare conflicts with its cosmopolitan responsibility as trustee of humanity? As France's Yellow Vests complained about Emmanuel Macron's environmentalism-guided gasoline tax, he's worried about the end of the world; we're worried about the end of the month.¹⁷⁰

How should sovereign trustees weigh the interests of their own citizens against those of "humanity"? Benvenisti avoids this question by restricting his proposal to cases where sovereigns can benefit outsiders at no cost to their own peoples.¹⁷¹ But what if satisfying cosmopolitan responsibilities cannot be done costlessly to one's own people?

The short answer is that one's own people are themselves part of humanity—they, too, are the beneficiaries of sovereign trustees' faithful stewardship. This Essay has emphasized State responsibilities to cooperate in managing threats to peace that transcend national borders. Managing emerging threats is in the medium-term self-interest of all peoples, even if cooperation requires short-term sacrifices and disruptions. The fiduciary responsibilities of States to their own people, like all fiduciary responsibilities, sometimes require balancing of the beneficiaries' short-term and longer-term interests, and sometimes that requires making short-term sacrifices to preserve the beneficiaries' situation over the long term.¹⁷² Doubly so when we consider that a sovereign's responsibility to its own people includes future generations, whose interests must not be discounted simply because they are temporally distant.¹⁷³ The sovereign fiduciary's beneficiary

169. See, e.g., David Roberts, *The Paris climate agreement is at risk of falling apart in the 2020s*, VOX (Nov. 5, 2019) (discussing collective action problems hampering Paris, Kyoto, and Copenhagen efforts at international agreements to alleviate climate change); Noah M. Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?* 46 ECOLOGY L. Q. 865 (2019) and sources cited in *id.* at 870 n. 20 (discussing collective action problems in climate change mitigation efforts).

170. See Peter S. Goodman, *Inequality Fuels Rage of 'Yellow Vests' in Equality-Obsessed France*, N.Y. TIMES (Apr. 15, 2019), <https://www.nytimes.com/2019/04/15/business/yellow-vests-movement-inequality.html>.

171. Benvenisti, *supra* note 5, at 320–25. As he notes, this limitation corresponds to the requirement of weak Pareto efficiency.

172. Here I have in mind such everyday examples of fiduciary responsibility as a corporate board's balancing of short-term profits against long-term gains, or similar decisions by a trustee managing a minor's trust.

173. On this point, see Derek Parfit, *Energy Policy and the Further Future: The Social Discount Rate*, in ENERGY AND THE FUTURE 31 (Douglas MacLean & Peter Brown eds., 1983),

includes the grandchildren of current citizens—grandchildren who face threats to peace that grow more terrifying the longer governments delay managing them. But politicians notoriously focus on the near-term, not the further future—in part, no doubt, because the further future is hard to predict and therefore to plan for, but also for the less principled reason that unborn generations don't vote. And voters are unlikely to support tangible sacrifices on behalf of intangible descendants.

In that case, why not reject the idea that the democratic sovereign's responsibilities to its people includes distant generations, including distant generations of its own people?¹⁷⁴ To be sure, Edmund Burke wrote of "the great primeval contract of eternal society," calling it a "partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."¹⁷⁵ Burke's rhetoric is powerful, but is it true? Set aside the Burkean partnership with one's ancestors ("those who are dead"); our question is about the alleged partnership with one's descendants—"those who are to be born." Do the living really have a "partnership" or "primeval contract" with them? What if the living don't recognize any such partnership?

It seems clear, though, that most people do care about future generations, even if worries about the end of the month inevitably crowd that sentiment out of consciousness. Perhaps it is obvious that future generations matter to us, but, if not, then consider a thought experiment proposed by the philosopher Samuel Scheffler.¹⁷⁶ Imagine that you somehow learned that thirty days after your own death an asteroid would destroy all human life—the "doomsday scenario."¹⁷⁷ What effect would that knowledge have on the meaningfulness of your daily strivings—everything from saving for your children's education, to having children at all, to curing cancer, to voting, to prayer (other than prayer for a world-saving miracle that will spare humanity)? Scheffler believes that it would destroy that meaningfulness, even though the hypothetical is constructed so that the asteroid would have no personal effect on you.¹⁷⁸ If Scheffler is right, as seems plausible, the doomsday thought experiment dramatizes how much the fate of future generations matters to our current lives and projects, even if we barely

<https://wmpeople.wm.edu/asset/index/cvance/parfit>. Economists standardly discount the value of investments in the further future because of lost opportunities in the nearer future. Parfit shows that using such a "social discount rate" to devalue future harms inflicted by our current practices is morally indefensible on any of the main arguments that might support it. "The moral importance of future events does *not* decline at *n* percent per year. A mere difference in timing is in itself morally neutral." *Id.*

174. See generally EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1989); OBLIGATIONS TO FUTURE GENERATIONS (R. I. Sikora & Brian Barry eds., 1979).

175. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, ¶ 165 (many editions).

176. SAMUEL SCHEFFLER, DEATH AND THE AFTERLIFE 18–27 (2013).

177. *Id.* at 18–19.

178. *Id.* at 23–27.

recognize it.¹⁷⁹ Their fate matters to us, in the precise sense that Scheffler identifies: the meaningfulness of much that we do presupposes future generations.¹⁸⁰ Perhaps those that matter most are not the future generations of all people ("humanity"), but only "our" people—members of our own community, however broadly or narrowly we define it. That merely reinforces the point Burke was getting at: even though we cannot begin to guess how they will live or take up the heritage we bequeath them, the future generations of our community give meaning to our everyday projects.¹⁸¹

All this is to say that the Burkean contract with future generations expresses something deeply rooted in the human condition. Few doubt that a sovereign's responsibility to its people includes responsibility to those future generations—regardless of voters' and politicians' myopic short-termism. And so the argument that a democratic sovereign's responsibilities do not run to future generations falters, because it places weight only on voter's short-term preferences, excluding their less immediate but no less authentic tie to future generations.

But what if a State's own voters aren't on board with R2H because they are indifferent or hostile to outsiders? If a country's voters despise globalism, then R2H seems on a collision course with democratic self-governance. To this, too, there is a response: even under current international law there is no blanket right of democratic self-governance, if that implies that democratic majorities get to do whatever they want. If a country's voters want to launch an aggressive war or violate human rights, they cannot do it, regardless of their democratic will. Concededly, the "trustee of humanity" proposal is inconsistent with a robust right of democratic governance across the board. But there *is* no such a robust right. The examples of democratic majorities voting to launch aggressive war, or to massively violate human rights, show that international law recognizes no unrestricted and content-neutral human right of democratic decision-making: it depends on the decision.

When Thomas Franck wrote his pioneering article on the emerging right of democratic governance in international law, he understood it as a right to democratic multi-party elections, accompanying the rights to self-determination and free expression.¹⁸² He did not intend it as a right of democratic majorities to do whatever they choose, heedless of the interests of the rest of the world.¹⁸³

179. *See id.*

180. *Id.*

181. BURKE, *supra* note 175, at ¶ 165.

182. Thomas M. Franck, *The Emerging Right to Democratic Self-Governance*, 86 AJIL 63 (1992).

183. *Id.*

IX.

THE FALSE PROMISE OF REACTIONARY NATIONALISM

So far, I have argued that contemporary security threats require a different way of thinking about State responsibilities, and I have proposed responsibility to humanity as a political and legal reconception of sovereignty that embodies that way of thinking. Yet it would be obtuse to deny that in many countries nationalist fervor and mistrust of globalism push in just the opposite direction. The issue raised in the preceding Part about voter hostility to globalism requires us to consider in greater depth the allure of nationalism. If the preceding argument is right, nationalism in its present reactionary form is exactly the wrong direction for a realistic politics of peace.

By "reactionary nationalism," I mean a form of nationalism defined by most or all of the following:

1. An ethnic, racial, or religious definition of "nation" along the lines of the romantic view of the State, regardless of the ethnic mix that actually lives there.
2. An exaggerated focus on national pride and dignity, often paired with a prickly sense of (real or imagined) historical grievance.
3. A view of international affairs as overwhelmingly competitive and zero-sum, rather than cooperative, leading to . . .
4. . . . a mistrust of internationalism and globalism, often coupled with . . .
5. . . . a suspicion that internationalist projects, including international human rights and international criminal justice, are the handiwork of self-interested and predominantly Western elites, coupled with . . .
6. . . . a rejection of sovereignty as responsibility in favor of Westphalian sovereignty as control, including . . .
7. . . . a propensity to denounce all forms of external pressure, or even criticism from outsiders (especially about human rights), as an affront to sovereignty.
8. Illiberalism, receptiveness to strong-man rule, and concomitant disdain for rule-of-law values.
9. Cultural conservatism, especially anti-feminism, under the rubric of protecting the nation's religious and historical traditions.
10. Xenophobia.

Another name for this syndrome might be "populism," which Jan Werner-Müller defines as anti-elitist, anti-pluralist movements that claim the right to speak for "the people" and demonize those who disagree as enemies of the people.¹⁸⁴ However, not all reactionary nationalisms are populist—some, notably

184. See JAN WERNER-MÜLLER, *WHAT IS POPULISM?* 3–4 (2016). See also WILLIAM GALSTON, *ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY* (2018).

Chinese nationalism, are top-down. Contemporary reactionary nationalism bears a notable resemblance to the deadly "tribal nationalism" analyzed by Hannah Arendt in *The Origins of Totalitarianism*.¹⁸⁵ Domestically, tribal nationalism expresses a "perversion of the state into an instrument of the nation and the identification of the citizen with the member of the nation."¹⁸⁶ By "nation," Arendt means the dominant nationality, rather than all the State's inhabitants.¹⁸⁷ In foreign affairs, "[n]ational sovereignty, accordingly, lost its original connotation of freedom of the people and was being surrounded by a pseudomystical aura of lawless arbitrariness."¹⁸⁸ "Ethno-nationalism" comes closer than "populism," although it is not entirely accurate. Today's reactionary nationalism in India, for example, focuses on the Hindu religion, not on ethnicity.

Some may protest that all these negative-sounding labels are unfair to nationalism. "Moderate self-preference is the moral core of a defensible nationalism," William Galston writes, and nothing is wrong with moderate self-preference.¹⁸⁹ But "nationalism" is a slippery word that changes its meaning over time, and its past meanings give it a better reputation than contemporary reactionary nationalisms deserve. I noted that early state-making involved not only consolidating territories, but forging a "people"—a nation to go with the nation-state.¹⁹⁰ Forging a nation-state meant overcoming local rivalries in the name of unification, and "nationalism" was a nineteenth-century label for national consciousness.¹⁹¹ Creating a nation-state also required dismantling the vestiges of fiefdoms and feudalism, a project that harmonized nicely with liberal revolutions and the rule of law. In other parts of the world, nationalism means subordinating tribal loyalties to larger loyalties. In anti-colonial struggles, nationalism meant independence and self-determination. Nationalism understood in any of these ways can be thought of as a progressive ideology, wholly

185. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 226–36 (3d ed., 2004). Arendt's analysis of tribal nationalism is remarkably relevant to modern-day reactionary nationalism.

186. *Id.* at 231.

187. *Id.* at 229–30.

188. *Id.* at 230.

189. GALSTON, *supra* note 184, at 5. Prominent defenses of non-reactionary nationalism include CHAIM GANS, *THE LIMITS OF NATIONALISM* (2003), DAVID MILLER, *ON NATIONALITY* (1995), and YAEL TAMIR, *LIBERAL NATIONALISM* (1995). Recently, Tamir published further reflections on nationalism in *WHY NATIONALISM* (2019). Tamir, who is both an academic and a former Israeli Labor Party politician, continues to defend nationalism, even as her own country increasingly rejects her liberal version in favor of reactionary nationalism. Tamir does not address nationalist foreign policy, and thus discussing her argument is beyond the scope of this Essay.

190. At the beginning of the sixteenth century, the inhabitants of France did not call themselves "the French." Their local identities as, say, Norman or Valois came first. By that century's end, they called themselves *bon français*. FREDERICK J. BAUMGARTNER, *FRANCE IN THE SIXTEENTH CENTURY* 4–7 (1995).

191. The OED finds the earliest English usages of "nationalism" in the nineteenth century. OXFORD ENGLISH DICTIONARY (1971), letter "N" at 31.

consistent with liberalism and the rule of law, and especially salutary when we recall the peacekeeping virtues of the nation-state.

But, with a few notable exceptions, the most assertive nationalist parties and movements today are reactionary, and there is nothing moderate about them.¹⁹² As the criteria listed above indicate, they are illiberal (criterion 8), and not at all friendly to the agenda of human rights (criterion 5). In those places where reactionary nationalism allies with traditionalist religions, it can be deeply anti-feminist or downright misogynist (criterion 9).¹⁹³ As for responsibilities beyond borders, reactionary nationalists recognize few or none (criteria 3-6). Borrowing an idea from Imre Lakatos's philosophy of science, I am tempted to describe nationalism with these characteristics as a *degenerating political program*, parallel to Lakatos's degenerating research programs—research programs that were once promising and productive, but are now dead ends.¹⁹⁴ Let me explain why.

The strongest arguments in favor of nationalism appeal to communitarian values such as civic affection for one's own people in one's own territory, an idea as old as Aristotle's proposition that friendship lies at the foundation of the polis. Unfortunately, contemporary realities don't align with this communitarian vision of nationalism. Today's reactionary nationalisms are not about expressing affection for one's own, but instead about exhibiting hatred towards others—militant anti-pluralism.¹⁹⁵ With few exceptions, reactionary nationalist parties arise in States with significant minority groups, distinguished from the majority by race or religion, that the nationalists wish to exclude from the nation as they define it.¹⁹⁶ The despised minority may be recent immigrants, but they need not

192. Prominent examples of reactionary nationalist parties and movements outside the United States are Germany's Alternative für Deutschland, France's National Front, Italy's Liga, Brazil's Aliança, the UK's Brexit Party, Jobbik and Fidesz in Hungary, Austria's Freedom Party, Yisrael Beytenu and Yamina in Israel, Poland's Law and Justice Party, and the Bharatiya Janata Party in India; needless to say, the examples could be multiplied. Examples of nationalist parties that are neither populist nor reactionary include the ruling Liberal Democratic Party in Japan, the social-democratic Scottish National Party, and the Chinese Communist Party (although the latter exhibits some of the characteristics of reactionary nationalism catalogued above—numbers 2 through 8).

193. A telling recent example is the Vox Party in Andalusia, the platform of which includes anti-immigrant measures as well as repeal of a gendered domestic violence law, prosecution of false complaints against men, suppression of radical feminist organizations, and an organic law that recognizes the "natural family" as an institution prior to the State. VOX, *100 medidas para la España Viva*, §§ 70–71, https://www.voxespana.es/biblioteca/espana/2018m/gal_c2d72e181103013447.pdf.

194. Imre Lakatos, *Criticism and the Methodology of Scientific Research Programmes*, 69 PROC. ARISTOTELIAN SOC. 149 (1969), reprinted in CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds., 1970).

195. This is a principal theme in WERNER-MÜLLER and GALSTON, *supra* note 184.

196. Significantly, under the anti-immigrant Trump administration, the United States changed the mission statement of its customs and immigration agency to delete a previous reference to "America's promise as a nation of immigrants" and substitute the mission of "protecting Americans, securing the homeland, and honoring our values" – values that apparently no longer include pride in

be. This ideology has little to do with civic solidarity, national history, or patriotism, except in a distorted form. It calls to mind a cynical definition of a nation sometimes attributed to Ernest Renan: "a group of people united by a mistaken view about the past and a hatred of their neighbors."¹⁹⁷ Today, that includes not only foreign neighbors, but also the family next door who speaks a different language at home or whose skin is a different color.

Defining "the nation" to exclude resident minority groups is fundamentally anti-communitarian. If I am right that the most powerful case for nationalism is a communitarian appeal to the State as a political expression of its people, possibly along the lines of the romantic view, then much of today's nationalism is a fraud.

Perhaps the most prominent recent defense of nationalism along reactionary and romantic lines comes from Yoram Hazony's prize-winning book *The Virtue of Nationalism*.¹⁹⁸ It is worth examining his argument in some detail, especially because he claims that a world order of Westphalian nation-states is the best ever devised to banish violence and war "to the periphery of human experience."¹⁹⁹ Obviously, that runs directly contrary to the arguments of this Essay.

Hazony envisions a world of peaceable self-determining nation-states, united internally by civic affection for one's own, and harboring no aggressive ambitions toward other nation-states. In the most distinctive thesis of his book, Hazony contends that imperialism is the sole historical alternative to the system of national states.²⁰⁰ Imperialism, he warns, is the hidden agenda of internationalists and cosmopolitans.²⁰¹ That makes internationalism the enemy of the self-determination of peoples. Yet, as Daniel Luban points out, Hazony's nationalism/imperialism distinction is remarkably ahistorical: the three centuries of the nation-state system were also "the zenith of the great European empires."²⁰²

Nor is the self-determination of peoples a consistent and workable principle. The number of ethnicities far exceeds the number of States, and Hazony acknowledges that nation-states would be "protectorates" for their

ourselves as a nation of immigrants. Richard Gonzales, *America No Longer a 'Nation of Immigrants,' USCIS Says*, NPR (Feb. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>. There are exceptions to the rule that contemporary nationalism arises in reaction to significant minority groups, for example nationalist movements in Japan and Scotland.

197. It is not from Renan, but I have been unable to track down the original source.

198. YORAM HAZONY, *THE VIRTUE OF NATIONALISM* (2018). The book won the 2019 Conservative Book of the Year Award. <https://isi.org/blog/conservative-book-of-the-year-award/>.

199. *Id.* at 110.

200. *Id.* at 3, 16. Hazony explains that he avoids the term "nation-state," but only because it suggests "that the nation consists of those individuals living in a given state." *Id.* at 239 n. 9. The clear implication is that the nation consists only of some individuals living in the state, excluding others—although Hazony is not explicit on who is in and who is out.

201. *Id.* at 3–4.

202. Daniel Luban, *The Man Behind National Conservatism* (review of Hazony, *The Virtue of Nationalism*), *THE NEW REPUBLIC* (July 26, 2019), <https://newrepublic.com/article/154531/man-behind-national-conservatism>.

minorities²⁰³—reducing them to a status that is, in fact, a hallmark of empires.²⁰⁴ The self-determination Hazony extols is on his account a prize awarded to only a few militarily powerful peoples whose States will, when necessary, suppress restive minorities by force.²⁰⁵ A world of national States, as Hazony depicts it, will not be as peaceable as he claims, nor does history suggest it will be different in principle from empire in its treatment of minorities with their own aspirations.

For internationalists, there is an attractive alternative to nationalism and imperialism: federations of States, of which the European Union is an exemplar; Hazony traces the idea to Kant, Wilson, and Hayek among others.²⁰⁶ He therefore devotes a section to criticizing “the myth of the federal solution,” the argument of which is that federal structures are a Trojan horse for empires.²⁰⁷ Surely, however, to describe the European Union as an empire, as Hazony does, is hyperbole.²⁰⁸ This is doubly so given his warning that an imperial state “is always a despotic state.”²⁰⁹ The critique seems driven by theory, not reality. Hazony’s theory shoehorns every political arrangement into a simplistic nationalism-or-empire binary. In that case, the EU’s anti-nationalist federal structure must be an empire. Empires are despotic; ergo, the EU must be a despotism. No doubt the most rabid Euroskeptics and Brexiteers think in such apocalyptic terms. In reality, of course, the president of the European Commission is hardly a Caesar or Napoleon, and the EU has no military arm.²¹⁰ It would be even more hyperbolic

203. HAZONY, *supra* note 198, at 170, 183–84.

204. See Luban, *supra* note 202.

205. Political independence is only for “nations that are cohesive and strong enough to secure it.” HAZONY, *supra* note 198, at 176. Hazony’s ideal international order would be “parsimonious” about subdividing States into smaller units to accommodate minorities who desire self-determination. *Id.* at 182–83. And, he warns, if foreigners stir up “disaffection” among those minorities, “there is no choice but for the national [S]tate to use more rigorous measures to deprive imperialist and anarchic elements of their aspirations by force.” *Id.* at 183–84.

206. *Id.* at 141.

207. HAZONY, *supra* note 198, at 142 (asserting that “[t]he idea of an international federation simply is the idea of empire,” which “should be deplored and rejected”). Tellingly, Hazony regards Kant’s proposal for a federal structure as “yet another version of the German-led Holy Roman Empire,” in which “the national states of Europe were dismantled in favor of a single government.” *Id.* at 41. In reality, what Kant says is precisely the opposite. “The right of nations shall be based on a *federalism* of free states.” Kant, *Perpetual Peace*, *supra* note 47, at 8:354. Contrary to Hazony, Kant explains that this “league of nations” (*Völkerbund*) would not be a “State of nations” (*Völkerstaat*), for the latter would subordinate the nations and contradict the principle of federalism of free States, which “are not to be fused into a single state” (*nicht in einem Staat zusammenschmelzen sollen*). *Id.*

208. HAZONY, *supra* note 198, at 154 (describing the EU as “a German imperial state in all but name”).

209. *Id.* at 125, repeated at 139.

210. The president of the Commission is chosen by the governments of the Member States with Parliamentary consultation. European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, Feb. 7, 1992, Official Journal of the European Communities C 325/5 (Dec. 24, 2002), <https://www.refworld.org/docid/3ae6b39218.html>, art. 10. The president serves a five-year term that is renewable. *Id.* On the limited powers of the presidency, see EUROPEAN UNION, *EU Presidents—Who Does What?*, https://europa.eu/european-union/about-eu/presidents_en.

to describe an international order of sovereign States committed to reducing transnational threats to peace through mutual cooperation as a kind of empire.

Hazony knows this, but he replies that the absence of a powerful executive and military in the EU is nothing more than happenstance: Europe can afford a weak executive because US military might protects Europe.²¹¹ Indeed, the US president "in effect, plays the role of emperor in today's Europe."²¹² The alternative is "German rearmament and a German emperor," because already "[t]he European Union is a German imperial state in all but name."²¹³ Without the US military umbrella, "a strong European executive will be appointed by Germany," and "the reconstitution of the medieval German empire in Europe will be complete."²¹⁴ Hazony offers no supporting evidence for the exaggerated—and, it must be said, contradictory—propositions that the EU is a German imperial state and its emperor is the US President.

For Hazony, the United States is further proof that there can be no federalist halfway point between coercion and self-determination for more culturally homogeneous units ("tribes" in his terminology).²¹⁵ The culprit seems to be the Fourteenth Amendment, under which "the original promise of a broad self-determination at the level of states has been gradually revoked."²¹⁶ In the US, "the rights and powers" of "the federated tribes and subdivisions . . . will be reduced and abrogated, by coercion if necessary."²¹⁷ Hazony's rhetoric is that of states' rights champions who mistrust the federal government; so is his analogy of the federal government with an imperial structure.

Hazony is not being careless here. He defines imperialism as a political theory "which seeks to bring peace and prosperity to the world by uniting mankind, as much as possible, under a single political regime."²¹⁸ So defined, US federalism is, indeed, "imperialist" with respect to the US states, and *The Federalist Papers* must be thought of as a brief for imperialism. It hardly follows, though, that today's US federal system has the negative attributes we associate with imperial regimes—hungry expansionism, exaction of tribute from subordinated states and peoples, and despotism.²¹⁹ To anyone other than the most fevered government-haters, the United States should count as a proof that a federal structure with vertically divided sovereignty is possible, not that it is impossible.

211. HAZONY, *supra* note 198, at 153.

212. *Id.*

213. *Id.* at 154.

214. *Id.* Note the phrasing: "will be complete" implies that the reconstitution of the medieval German empire in Europe is already underway.

215. *Id.* at 148.

216. *Id.* at 149, 266 n. 86.

217. *Id.* at 150.

218. *Id.* at 3.

219. This is not to deny that there have been episodes of each in US history.

The characteristic moral virtue associated with nationalism is patriotism, and readers may wonder whether the critique of nationalism is equally a critique of patriotism. The answer is an energetic no. Patriotism doesn't have to be xenophobic or reactionary. Love of one's country is inconsistent with identifying one sub-group within the country as "the people" and demonizing others.²²⁰ The appropriation of the label "patriot" by nationalists to tar liberals and internationalists as unpatriotic is nothing more than political propaganda.

On this point, Hazony is refreshingly forthright, and he does not resort to the patriotism dodge: "I will not waste time trying to make nationalism prettier by calling it 'patriotism,' as many do today in circles where nationalism is considered something unseemly."²²¹ Patriotism is "love or loyalty of an individual for his or her own independent nation"; nationalism is "something more."²²² Hazony's candor is admirable; what fails is his case for a nationalism that is something more than love of country. As we have seen, that "something more" consists of identifying the country with its dominant group.

We thus find ourselves in a perplexing and deeply frustrating situation. At a time when the gravest threats to peace—and to human rights—require an internationalist response, politics increasingly tilts toward reactionary nationalism.²²³ Nationalism of this sort seems attractive precisely because of the threats and confusion we see around us. Yet if I am right, reactionary nationalism is a symptom of those ailments, not their cure. The cure is adopting the standpoint of humanity and inventing political and legal institutions to make it real.

X.

HUMANITY AS A NORMATIVE PROJECT

To conclude, I wish to reflect on the philosophical question of what "humanity" might be; it's hard not to recall Carl Schmitt's warning that whoever

220. Or ignoring them. A striking feature of Hazony's book, which offers Israel as a central example of a successful nationalist State, is that not a single sentence so much as mentions the Palestinian citizens of Israel, who make up a fifth of the population. In a footnote, Hazony mentions in passing that Israel has faced "protracted internal conflict . . . in Arab-majority territories held by Israel" HAZONY, *supra* note 198, at 269 n. 104. This presumably refers to the occupied territories, whose Arab residents are not Israeli citizens. The text accompanying this footnote is Hazony's praise for "a majority nation whose cultural dominance is plain and unquestioned, and against which resistance appears to be futile." In his view, only such a nation can afford to give its minorities rights and liberties. *Id.* at 165.

221. HAZONY, *supra* note 198, at 6.

222. *Id.*

223. See the discouraging evidence marshaled by YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY 105–22 (2018), drawing on Roberto Stefan Foa & Yascha Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, 27(3) J. DEMOCRACY 5 (July 2016). The European and US polls Mounk cites show diminishing commitment to democracy and increasing openness to authoritarian alternatives, including military government, more so among the young.

invokes humanity wants to cheat.²²⁴ Is "humanity" anything beyond the aggregate of all human beings?²²⁵ The aggregate of all human beings is nothing more than a mathematical set of no independent normative interest. The set of all human beings has no shared language or culture or kinship or bond of common affection. As nationalists and communitarian philosophers remind us, communities are thick but "humanity" as a mere aggregation is pathetically thin. The set of all humans is not a community and is not the famous "family of man."

Yet there are ways to think of "humanity" as something more than the set of all humans. I will borrow a metaphor from the colonial model, odious though that may have been. I propose we think of humanity as an immature people, a people that has not yet recognized itself as such. This is akin to Kant's view that the construction of humanity is a historical process that has a long way to go towards its ideal end point of lawful foreign relations and just civic orders.²²⁶ For Kant, however, our immaturity (*Unmündigkeit*) means our self-imposed inability to think for ourselves, so that we turn to others for guidance.²²⁷ What I am calling our immaturity lies in our self-imposed reluctance to recognize commonality with each other and the responsibility that comes with it. "Humanity" names the normative project of making that recognition real through the practical activity of institutionalizing shared responses to shared threats.²²⁸ I call it a *project* to emphasize that it carries no guarantees of success; it depends on choices citizens as well as leaders make that are anything but inevitable.²²⁹ It is a *normative* project because it proposes a conception of sovereignty, which is an inherently normative and not purely descriptive political and legal concept.

The project emphatically does not require that at some future point we must have a world government reigning over all humanity. As philosophers, including Kant, have well understood, in practice, a world government would be a top-heavy

224. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 54 (George Schwab trans., 1996).

225. For present purposes, we can ignore the Burkean question of whether that set should consist of all human beings alive at any given time, or the trans-temporal set of human beings plus their ancestors and descendants.

226. Kant, *Idea of a Universal History with Cosmopolitan Purpose*, in *KANT'S POLITICAL WRITINGS* (Hans Reiss ed., H. B. Nisbet trans., 1970), especially propositions 5-7. *Id.* at 45-49. Kant regards humanity as "little beyond the half-way mark in its development." Proposition 7, 8:26.

227. Kant, *An Answer to the Question: What Is Enlightenment?*, in *KANT, PRACTICAL PHILOSOPHY* 8:35 (The Cambridge Edition of the Works of Immanuel Kant) (1996).

228. I explore this idea further, in the context of international criminal justice, in Luban, *The Enemy of All Humanity*, 47 *NETH. J. LEG. PHIL.* 8 (2018) and Luban, *On the Humanity of the Enemy of Humanity: A Response to My Critics*, 47 *NETH. J. LEG. PHIL.* 83 (2018). The former paper will also appear as a chapter in the *OXFORD COMPANION TO INTERNATIONAL CRIMINAL LAW*, (Kevin Jon Heller, Frédéric Mégret, & Sarah Nouwen eds., forthcoming).

229. In this way my proposal differs markedly from Kant's universal history, which carries a strong whiff of determinism, suggesting that achieving "a perfect political constitution" is "a hidden plan of nature." Kant, *supra* note 226, at 50.

imperial monstrosity.²³⁰ But a people can be a people without a government of its own, and that is how we should think about humanity.

"Humanity" would, in any event, never be a community sharing a distinctive way of life the way that local, thick communities do. On the contrary, it would be deeply pluralist, and that is a fundamental reason to reject the right-Hegelian proposition that a people only attains full self-recognition in its own State.²³¹ Humanity's self-recognition of the sort proposed here would consist solely in recognition that transnational threats require collective responses—put in other words, that the standpoint of humanity implies the acceptance of transnational responsibilities. The responsibility of sovereigns as trustees or fiduciaries, what I have called R2H, would be to act on that recognition.

Other actors, including international organizations, NGOs, businesses, and individuals can also adopt the practical stance of R2H, so the claim here is not that States are uniquely suited to that role. In fact, the argument has been the opposite: threats like the democratization of violence undermine the State's capacity to fulfill its protective role, and that is precisely why the concept of sovereignty must evolve. Sovereign fiduciaries will fulfill their obligation to humanity by collaborating with private as well as public actors, including civil society—assuming those distinctions continue to make sense in a world of democratized violence.

That brings us to an obvious objection to R2H: that it is hopelessly utopian. International Relations 101 realism teaches that the explanation of State behavior is the self-interest of sovereign States and their leaders, competing for survival, if not domination, in an anarchic world. Sentimental talk of "humanity" and fiduciary obligations to it will not make national self-interest go away.

The right response to this objection—which has undeniable merit—is that *all* sovereignty concepts are utopian and anti-realist. That includes Westphalian sovereignty as control, as Steven Krasner (an arch-realist) argued forcefully twenty years ago.²³² In a world of unequal power, wealth, and resources, lesser powers will always be pushed around by great powers; Krasner might have added that in a world where asymmetric conflict becomes ever more sophisticated, the converse is sometimes true as well.²³³ Thus the Westphalian principle of sovereign equality is, in a realist sense, entirely utopian, no less so than R2H.

But that obvious fact is not an objection: it merely highlights that "sovereignty" in all its historical conceptions is an intrinsically normative concept,

230. Kant, *Toward Perpetual Peace*, *supra* note 47, at 8:354 (explaining why the right of nations must be based on a federalism of free states, not a single world-state, which would institute the relation of a superior to inferiors). Arendt puts the point forcefully, describing a world government as a "forbidding nightmare of tyranny." HANNAH ARENDT, *MEN IN DARK TIMES* 81 (1968). She attributes the thought to Karl Jaspers. *Id.*

231. *E.g.*, GIOVANNI GENTILE, *GENESIS AND STRUCTURE OF SOCIETY* (H. S. Harris trans., 1960).

232. Steven D. Krasner, *Sovereignty: Organized Hypocrisy* (1999).

233. *See* Goldsmith & Russell, *supra* note 119, at 8.

setting out some idealized picture of international politics as it ought to be. Sovereignty concepts are realist only in the sense that their idealized pictures respond to real-life disasters and the threat of their repetition; this was vividly so in 1648, 1946, and 2001. In response to the Thirty Years' War, the Peace of Westphalia imagined an order of States that make their own decisions about domestic ordering and foreign policy without outside interference.²³⁴ In response to World War II, the UN Charter imagines a world where equal sovereign States renounce the first use of force against one another, policed by the international community acting through a Security Council. And in response to the Balkan Wars and the Rwandan genocide, the R2P doctrine calls for States that effectively protect their own peoples from massive rights violations, again with the assistance of the international community. Each proposed remedy came in the wake of horrifying conflicts that exposed pathologies of sovereignty as previously understood. Each responded by reimagining the meaning of State sovereignty.

The lesson should be clear. Whenever the law takes up the S-word, explicitly or implicitly, and draws out legal consequences of State sovereignty in answering concrete practical questions, it assumes some normative ideal or other; but so long as power politics exists, the assumption that that ideal describes the actual world is untrue. Every sovereignty concept is in that sense utopian, and in a juridical context, "sovereignty" is a legal fiction. In this respect, sovereignty as responsibility to humanity is no different, and no more utopian, than sovereignty as responsibility to protect human rights, or for that matter Westphalian sovereignty. Today, however, it is far more urgent.

EPILOGUE: COVID-19 AND R2H

This Essay was already in the editing process by the time Coronavirus Disease 2019 (COVID-19) became a global pandemic; the editors and I agreed that it is important to add something about the current pandemic even though the world is still in the midst of it, with little insight into what the future holds. The Essay itself warns that pandemics are one of many threats to global security that require international cooperation.²³⁵ What are the implications of sovereignty concepts to the COVID-19 pandemic? Does the current global emergency support or fail to support R2H? What are the likely effects of the pandemic on security and human rights? These are the guiding questions.

By the end of November 2020, there were nearly 60 million reported COVID-19 cases and 1.37 million deaths.²³⁶ In the early months of the pandemic, events were unfolding with startling swiftness; each day's developments overtook the previous days' faster than most of us could process the news; it is fair to

234. *See supra*, Part II.

235. *Supra*, text accompanying note 95.

236. JOHNS HOPKINS UNIV., *Coronavirus Case Tracker*, <https://coronavirus.jhu.edu/map.html> (Nov. 21, 2020) [hereinafter JHU Case Tracker] (showing 57,952,904 cases and 1,378,063 deaths).

describe the mood of millions or perhaps billions of people as panic. The pace of events (and, thankfully, the level of COVID-19 panic) have slowed since then, but even so the comments that follow will inevitably be dated by the time of this Essay's publication. Bearing these caveats in mind, some observations nevertheless seem in order. I will focus especially (but not entirely) on the early months of the pandemic.

A major theme of this Essay is the importance of international cooperation in managing threats to peace and security. Sovereignty as responsibility to humanity—R2H—encompasses more than peace and security concerns, and, indeed, more than human rights concerns; sovereignty conceptions influence all areas of international law. But threats to peace and security, both military and social (including pandemics), have been this Essay's chief motivating illustration of why R2H matters. R2H is an outward-facing conception of state sovereignty, in the sense that it incorporates a duty to take the interests of outsiders—"humanity"—into account in national decision-making, and as a legal characteristic of national sovereignty.

Perhaps it seems paradoxical that the primary COVID-19 public health duty to others is discharged not by reaching out, but by staying away from them. This is obviously true on the individual level, but on the State level, preventing travel to and from hotspots also makes sense. Thus, an outward facing "responsibility to humanity" comes in the peculiar and unsociable guise of acquiescing to heightened border policing. Even if this looks more like isolationism than solidarity, it is no less a responsibility to humanity.

It may also seem that the pandemic is irrelevant to the theme of heightened military threats. Again, the appearance is deceptive. A distracting global health crisis provides an opportunity for States to flex muscles and seek military gains over their rivals. Early in the crisis, China stepped up naval activity in disputed South China Sea waters,²³⁷ and, reportedly, China and Russia launched COVID-19 disinformation campaigns "to aggravate the public health crisis in Western countries."²³⁸

237. See, e.g., Brad Lendon, *Coronavirus may be giving Beijing an opening in the South China Sea*, CNN (Apr. 7, 2020), <https://www.cnn.com/2020/04/07/asia/coronavirus-china-us-military-south-china-sea-intl-hnk/index.html>; Sean Quirk, *Water Wars: Coronavirus Spreads Risk of Conflict Around the South China Sea*, LAWFARE (Apr. 7, 2020), <https://www.lawfareblog.com/water-wars-coronavirus-spreads-risk-conflict-around-south-china-sea>.

238. See sources cited in note 116, *supra*. The quoted language comes from Emmott, *supra* note 116. In addition, Human Rights Watch's China director, Sophie Richardson, believes that China was "exploiting the Covid-19 pandemic" in its crackdown on Hong Kong. HUM. RTS. WATCH, *Hong Kong: Crackdown Amid Covid-19*, (Apr. 20, 2020), <https://www.hrw.org/news/2020/04/20/hong-kong-crackdown-amid-covid-19>. Notably, China has also increased its military presence at the contested border with India, leading to several violent brawls in May and June of 2020. Jeffrey Gettleman, Hari Kumar & Sameer Yasir, *Worst Clash in Decades on Dispute India-China Border Kills 20 Indian Troops*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/world/asia/indian-china-border-clash.html>.

A more genuine challenge to R2H is that in a time of local shortages of medical and safety equipment, notably during the early months of the pandemic, national leaders may rightly believe that their first duty is to secure them for their own people, not to provide them to outsiders.²³⁹ In this environment, competitive rather than cooperative behavior embodies the notion that the primary responsibility to protect the human rights of nationals falls on their own State. Here, at any rate, R2P—understood as State responsibility to protect the human rights of the State's own people—and responsibility to outsiders seem to conflict, with the advantage going to the former. A remarkable illustration of such competitive behavior is Israel's use of the Mossad, its highly effective spying and covert action service, to procure medical gear on global markets.²⁴⁰ Using tradecraft to procure medical supplies graphically illustrates the extent to which competition supplanted cooperation in the global scramble for health resources.²⁴¹

This Essay argues that accepting R2H as a sovereignty concept is in the long-term enlightened self-interest of States. But in a short-term emergency like the current pandemic, where R2H has not yet become an operative concept, nationalism comes to the fore. States, in effect, found themselves facing a kind of one-shot prisoner's dilemma, in which defecting from cooperation was arguably more rational than cooperative strategies. The *New York Times* reported in April that "[a]t least 69 countries have banned or restricted the export of protective equipment, medical devices or medicines."²⁴² Correspondingly, nationalist sentiments have intensified, most visibly in the acrimonious US-China blame game.²⁴³ President Donald Trump terminated US funding for the World Health

239. Jane Bradley, *In Scramble for Coronavirus Supplies, Rich Countries Push Poor Aside*, N.Y. TIMES (Apr. 9, 2020) (describing the difficulty faced by developing countries in acquiring protective equipment because richer countries are buying it up and imposing export controls), <https://www.nytimes.com/2020/04/09/world/coronavirus-equipment-rich-poor.html>.

240. Ronen Bergman, *Israel's Not-So-Secret Weapon in Coronavirus Fight: The Spies of Mossad*, N.Y. TIMES (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/world/middleeast/coronavirus-israel-mossad.html>.

241. In mid-April, Israel had fewer than half the COVID-19 fatalities of countries with comparable numbers of reported cases. JHU Case Tracker, *supra* note 236, (Apr. 15, 2020). Israel, with 12,200 confirmed cases at that time, reported 126 deaths. Ireland, India, and Sweden, each with fewer than 12,000 confirmed cases, reported 396, 406, and 1,203 deaths, respectively. *Id.*

242. Peter S. Goodman et al., *A New Front for Nationalism: The Global Battle Against a Virus*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/business/coronavirus-vaccine-nationalism.html>.

243. President Donald Trump insists on calling the coronavirus "the China virus," and the United States torpedoed a joint G-7 cooperation statement because other States would not use the term "Wuhan virus." Conor Finegan, *Pompeo pushes 'Wuhan virus' label to counter Chinese disinformation*, ABC NEWS (Mar. 25, 2020), <https://abcnews.go.com/Politics/pompeo-pushes-wuhan-virus-label-counter-chinese-disinformation/story?id=69797101>. US Secretary of State Pompeo was responding to a Chinese conspiracy theory that the virus originated in the United States and the US Army brought it to Wuhan. Ben Westcott & Steven Jiang, *Chinese diplomat promotes conspiracy theory that US military brought coronavirus to Wuhan*, CNN (Mar. 13, 2020), <https://www.cnn.com/2020/03/13/asia/china-coronavirus-us-lijian-zhao-intl-hnk/index.html>.

Organization (WHO), blaming it for being "China-centric," and subsequently withdrew the United States from the WHO.²⁴⁴ In China, coronavirus-related xenophobia and nationalist fervor are reportedly on the rise.²⁴⁵ In Europe as well, nationalism and old north-south tensions, dating from the debt crisis of a decade ago, again came to the fore in the early months of the pandemic.²⁴⁶

The breakdown in cooperation, however, is self-defeating and shows the virtues of R2H, with its normative thumb on the scale on behalf of cooperation. Predictably, competition for medical resources drove up prices, a phenomenon apparent as well among US states scrambling for ventilators and protective gear.²⁴⁷ Moreover, as one public health expert commented, "[t]he export bans are not helpful" because they "can disrupt supply chains of some products that are actually needed everywhere."²⁴⁸ Here, we see the mark of a genuine prisoner's dilemma: mutually cooperative conduct has a higher payoff than mutual defection, but rational actors find themselves driven to defect.

244. BBC Reality Check team, *Coronavirus: Is President Trump right to criticise the WHO?*, BBC (Apr. 15, 2020), <https://www.bbc.com/news/world-us-canada-52294623>; Michael D. Shear & Donald G. McNeil, Jr., *Criticized for Pandemic Response, Trump Tries Shifting Blame to the W.H.O.*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/coronavirus-trump-who-funding.html>. Blaming China appears to be at least in part a political strategy. Jonathan Martin & Maggie Haberman, *A Key G.O.P. Strategy: Blame China. But Trump Goes Off Message*, N.Y. TIMES (Apr. 19, 2020), <https://www.nytimes.com/2020/04/18/us/politics/trump-china-virus.html>

245. Vivian Wang & Amy Qin, *As Coronovirus Fades in China, Nationalism and Xenophobia Flare*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/world/asia/coronavirus-china-nationalism.html>.

246. See DEUTSCHE WELLE (DW), *Coronavirus and the EU: The nation versus the union?*, (Mar. 19, 2020), <https://www.dw.com/en/coronavirus-and-the-eu-the-nation-versus-the-union/a-52848640> (describing EU members' unilateral rather than cooperative pandemic measures); Loveday Morris & Michael Birnbaum, *European leaders warn coronavirus could lead to the breakup of their union*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/world/europe/coronavirus-europe-unity/2020/04/02/4c9ed8c0-743e-11ea-ad9b-254ec99993bc_story.html (describing competitive rather than cooperative behavior of EU members); Yaroslav Trofimov & Bojan Pancevski, *Coronavirus Crisis Threatens to Split an Already Fractured EU*, WALL ST. J. (Apr. 10, 2020), <https://www.wsj.com/articles/coronavirus-crisis-threatens-to-split-an-already-fractured-eu-11586525523>. See also Matina Stevis-Gridneff, *As Europe Confronts the Coronavirus, What Shape Will Solidarity Take?*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/world/europe/eu-coronavirus-aid.html> (same) Keith Johnson, *Fighting Pandemic, Europe Divides Again Along North and South Lines*, FOREIGN POL'Y, (Mar. 30, 2020), <https://foreignpolicy.com/2020/03/30/coronavirus-pandemic-europe-north-south-eurobond/> (same). Germany and the Netherlands initially rejected a proposed coronavirus bond to help bail out Italy. DEUTSCHE WELLE (DW), *Coronavirus shakes foundations of the EU*, (Mar. 28, 2020), <https://www.dw.com/en/coronavirus-shakes-foundations-of-the-european-union/a-52948776>.

247. Clary Estes, *States Are Being Forced Into Bidding Wars To Get Medical Equipment To Combat Coronavirus*, FORBES (Mar. 28, 2020), <https://www.forbes.com/sites/claryestes/2020/03/28/states-have-are-being-forced-into-bidding-wars-to-get-medical-equipment-to-combat-coronavirus/#6329b2a61cde>; Nathaniel Weixel, *Shortage of medical gear sparks bidding war among states*, THE HILL (Mar. 30, 2020), <https://thehill.com/homenews/state-watch/490263-shortage-of-medical-gear-sparks-bidding-war-among-states>.

248. Goodman et al., *supra* note 242.

Or do they? It has become commonplace to liken the current pandemic to war. Economic historian Jamie Martin notes that a similarly ruinous competition for resources beset the Allies in World War I—but they were able to solve the problem by creating institutions to make joint purchases, circumventing the market.²⁴⁹ (Governors of US states took steps toward similar purchasing consortia during this pandemic, although, in the end, it proved unnecessary.²⁵⁰) Martin notes that several officials administering these joint-purchase institutions later moved into posts at the League of Nations and, later still, the EU—no coincidence, he believes.²⁵¹ They were internationalists.

The EU response to the current pandemic is a useful illustration. Although the internationalism of the EU faltered in the first months of the pandemic, as some member States proved reluctant to come to the aid of others, the EU eventually righted itself and negotiated a collective response and rescue plan.²⁵² EU Commission President Ursula von der Leyen apologized to Italy for the EU's slow initial response and vowed European solidarity: "The real Europe is standing up, the one that is there for each other when it is needed the most. . . . The one where paramedics from Poland and doctors from Romania save lives in Italy. Where ventilators from Germany provide a lifeline in Spain."²⁵³ Multilateral institutions like the EU in effect pre-commit their constituent States to more cooperative behavior. In this way, they instantiate R2H, which includes among the sovereign obligations the responsibility to take into account the interests of other States in the global condominium.²⁵⁴ Multilateral institutions are one mechanism for realizing R2H (not necessarily the only one). Creating cooperative norms like R2H is itself a way out of prisoner's dilemmas.²⁵⁵ And yet, in

249. Jamie Martin, *This Is Not the Time to Let the Market Decide*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/15/opinion/coronavirus-trade-medical-supplies.html>. Professor Martin cites ELIZABETH GEENHAIGH, *VICTORY THROUGH COALITION: BRITAIN AND FRANCE DURING THE FIRST WORLD WAR* (2009).

250. Kristen Holmes, *Governors working on multi-state consortium to secure supplies*, CNN POL. (Apr. 9, 2020), <https://www.cnn.com/2020/04/09/politics/governors-supply-chain/index.html>.

251. Martin, *supra* note 249.

252. EUROPEAN COMM'N, *Coronavirus response*, https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response_en (last visited Aug. 17, 2020).

253. DEUTSCHE WELLE (DW), *Coronavirus: EU apologizes to Italy for initial response*, (Apr. 16, 2020), <https://www.dw.com/en/coronavirus-eu-apologizes-to-italy-for-initial-response/a-53142603>. Along the same solidaristic lines as von der Leyen's statement, see EUROPEAN UNION EXTERNAL ACTION (EUEA), *The Coronavirus pandemic and the new world it is creating*, (Mar. 23, 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/76379/coronavirus-pandemic-and-new-world-it-creating_en (stating it is "vital that the EU show it is a Union that protects and that solidarity is not an empty phrase"). The EUEA is the EU's diplomatic service.

254. Benvenisti, *supra* note 5, at 295.

255. EDNA ULLMAN-MARGALIT, *THE EMERGENCE OF NORMS* (1978) (explaining the origin of norms as solutions to prisoner's dilemmas and other games). Under some conditions, dynamic evolutionary models demonstrate that cooperation can be the optimal strategy in prisoner's dilemmas. Alessandro Bravetti & Pablo Padilla, *An optimal strategy to solve the Prisoner's Dilemma*, NATURE SCI. REPS. (Jan. 31, 2018), <https://www.nature.com/articles/s41598-018-20426-w>.

November 2020 the EU plan was at least temporarily stalled by vetoes from Hungary and Poland—two States whose reactionary nationalist governments object to attaching rule-of-law requirements to the budget.²⁵⁶

In a pandemic, the most obvious way for States to discharge their responsibility to humanity is fast and transparent sharing of knowledge—precisely what critics accuse China of not doing in the crucial winter months of 2019–20. Efficient equipment sharing is another, and so is the spreading of risks associated with financial disaster.

To illustrate, consider a legal issue on which R2H provides a useful perspective. This is the question of whether, under international law, China owes reparations for its early concealment of the COVID-19 crisis, which some argue was responsible for loosing coronavirus on the world.²⁵⁷ It is a politically incendiary issue that came to prominence in late March and early April of 2020. Much of the #ChinaMustPay agitation in the United States came from the political right.²⁵⁸ But the main legal argument is not a political one. It was set out by legal scholar James Kraska on March 23.²⁵⁹ China is a State party to the International Health Regulations (IHR), which legally obligates States parties to report in a timely manner "evidence of an unexpected or unusual public health event in its territory . . . which may constitute a public health emergency of international concern."²⁶⁰ China conspicuously failed to do so. Under the 2001 *Responsibility of States for Internationally Wrongful Acts*, which arguably represents customary international law, a State bears responsibility for breaches of its international legal

256. DEUTSCHE WELLE (DW), *EU leaders clash over Hungary and Poland budget veto* (Nov. 19, 2020), <https://www.dw.com/en/eu-leaders-clash-over-hungary-and-poland-budget-veto/a-55664684>.

257. By early April there were already domestic class actions against China filed in US courts, which will almost certainly go nowhere because of sovereign immunity. See Chimène Keitner, *Don't Bother Suing China for Coronavirus*, JUST SEC. (Apr. 8, 2020), <https://www.justsecurity.org/69460/dont-bother-suing-china-for-coronavirus/>. Meanwhile, Chinese lawyers sued the US Center for Disease Control in Chinese courts, alleging a "coronavirus coverup." RADIO FREE ASIA, *Chinese Lawyers Sue U.S. Over 'Coronavirus Cover-up'*, (Mar. 26, 2020), <https://www.rfa.org/english/news/china/wuhan-lawsuit-03262020122653.html>.

258. See, e.g., Matthew Henderson et al., *Coronavirus Compensation? Assessing China's Potential Culpability and Avenues of Legal Response*, HENRY JACKSON SOC'Y (Apr. 5, 2020), <https://henryjacksonsociety.org/publications/coronaviruscompensation/>; Lewis Libby & Logan A. Rank, *To Protect the Future, Hold China to Account*, NAT'L REV. (Mar. 21, 2020) [https://www.nationalreview.com/2020/03/coronavirus-pandemic-hold-china-accountable/#slide-1](https://www.nationalreview.com/2020/03/coronavirus-pandemic-hold-china-accountable/#slide-1;).; Marc A. Thiessen, *China should be legally liable for the pandemic damage it has done*, WASH. POST (Apr. 9, 2020), <https://www.washingtonpost.com/opinions/2020/04/09/china-should-be-legally-liable-pandemic-damage-it-has-done/>; John Yoo & Ivana Stradner, *How to Make China Pay*, NAT'L REV. (Apr. 6, 2020), <https://www.nationalreview.com/2020/04/how-to-make-china-pay/>. Fox News ran several episodes on this theme.

259. James Kraska, *China is Legally Responsible for COVID-19 Damage and Claims Could Be In the Trillions*, WAR ON THE ROCKS (Mar. 23, 2020), <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/>.

260. Int'l Health Regulations, 3d ed. (2005) [hereinafter IHR], art. 7.

obligations and is required to pay reparations.²⁶¹ This is the gist of Kraska's argument: China breached an international treaty obligation, inflicted horrific harm on other States by doing so, and owes reparations under the law of State responsibility. There are other legal arguments for reparations as well,²⁶² but Kraska's seems like the most significant.

There are obvious problems with establishing causation, however, given the belated, haphazard, and inadequate responses to the pandemic by other States, conspicuously including the United States and United Kingdom. If other States had acted earlier and more decisively, the damage would be far less—there is, in the language of domestic tort law, comparative or contributory negligence. The International Law Commission explains that under the articles of State responsibility, full reparation must be made only for "the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."²⁶³ Ascribing consequences to an omission, when there is plenty of blame for State omissions to go around, would be daunting (not to mention hypocritical).

But, as David Fidler explains, the chief obstacle to reparations is a diplomatic one, rather than a legal and evidentiary difficulty: in more than a century of infectious disease treaties, States have never been willing to call each other out by reporting another State to treaty-based dispute resolution mechanisms. States "understand that, tomorrow, the shoe could be on the other foot, which creates a collective incentive among countries to avoid being legalistic about reporting obligations."²⁶⁴ Significantly, no State has reported China or any other State to the IHR dispute settlement mechanism.²⁶⁵ Even if they had, that dispute settlement mechanism merely calls on States to seek to settle disputes through "peaceful means of their own choice," such as "good offices, mediation or conciliation."²⁶⁶ The IHR contains no reparations clause.

In fact, neither of the plausible international legal mechanisms for a reparations claim—the International Court of Justice (ICJ) and the Permanent

261. United Nations, *Responsibility of States for Internationally Wrongful Acts* (2001), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, art. 31 (duty of reparation).

262. Russell Miller & William Starshak, *China's Responsibility for the Global Pandemic*, JUST SEC. (Mar. 31, 2020), <https://www.justsecurity.org/69398/> (finding China responsible under international law principles established in the 1941 *Trail Smelter Arbitration* between Canada and the United States).

263. Int'l Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Nov. 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 <https://www.refworld.org/docid/3ddb8f804.html>, at 92, cmt. 9 on Article 31.

264. David Fidler, *COVID-19 and International Law: Must China Compensate Countries for the Damage?*, JUST SEC. (Mar. 22, 2020), <https://www.justsecurity.org/69394/>. Fidler notes, for example, that the H1N1 virus may have originated in the United States, where the first case was reported.

265. *Id.* This continues to be true six months later.

266. IHR, *supra* note 260 art. 56(1).

Court of Arbitration—has compulsory jurisdiction (and neither China nor the United States accepts the ICJ's compulsory jurisdiction).²⁶⁷ Under the traditional consensualist theory of international law, this is as it should be: sovereign States have the right not to submit themselves to tribunals to which they have not consented.²⁶⁸ For this reason, two writers have decried the ineffectiveness of international institutions and proposed US self-help to obtain reparations.²⁶⁹ They propose seizing Chinese assets. This, however, seems dangerously provocative, especially given that the United States owes over a trillion dollars of sovereign debt to China, and it is not surprising that the United States has made no move in that direction.²⁷⁰

What is the relevance of R2H to the reparations issue? It suggests, first of all, that insofar as China concealed vital coronavirus information, it breached not only the International Health Regulations, but also its fundamental responsibility to humanity. Second, the issue highlights an infirmity of Westphalian sovereignty: the incapacity of international institutions to enforce obligations. Lack of State accountability to other States is a feature, not a bug, of traditional Westphalian sovereignty: *par in parem non habet imperium*. Under R2H, lack of accountability is a bug.

It does not follow that if States recognized responsibilities to humanity, they would establish a compulsory reparations mechanism. That might or might not be a wise idea; I suspect it is the latter, and would up the temperature of nationalism and the unraveling of R2H. But compensation through tort-like mechanisms is only one way of spreading catastrophic global losses—such as those created by the COVID-19 pandemic—so that they do not fall most harshly on the most

267. ICJ, Declarations recognizing the jurisdictions of the Court as compulsory, <https://www.icj-cij.org/en/declarations>. Other potential enforcement mechanisms seem much less plausible. For discussion of such potential routes, see Henderson et al., *supra* note 258, at 23–27 (discussing actions before the World Trade Organization, and under bilateral investment treaties and the United Nations Convention on the Law of the Sea).

268. The exception is tribunals authorized by the UN Security Council under its Chapter VII powers, which were the basis for establishing the International Criminal Tribunal for Former Yugoslavia (established under UNSCR 827, S/RES/827 (1993)) and the International Criminal Tribunal for Rwanda (established under UNSCR 955, S/RES/955 (1994)). Obviously, any Security Council resolution to create a compulsory restitution tribunal could be vetoed by any member of the P-5. Readers will note that my comment in the text is similar to US complaints against the ICC that it is imposing legal obligations on States that are not parties, and in doing so is violating their sovereignty. *See supra* note 34. Lest it appear that I am endorsing this US argument, let me make clear that I think it is specious. The ICC Prosecutor is investigating only US crimes alleged to have taken place in the territories of ICC members, which possess undisputed territorial jurisdiction over such crimes and have in effect delegated that jurisdiction to the ICC by joining the Rome Statute. *See Luban, supra* note 34. No treaty or rule of customary international law prohibits such delegation. Even if, counterfactually, there had been a customary prohibition against delegating criminal jurisdiction to an international tribunal, the fact that 123 States have joined the ICC would prove that the prohibition is no longer customary international law because State practice and *opinio juris* no longer support it.

269. Yoo & Stradner, *supra* note 258.

270. U.S. DEP'T OF THE TREASURY, *Major Foreign Holders of Treasury Securities*, <https://ticdata.treasury.gov/Publish/mfh.txt>.

vulnerable people. Social insurance is a recognized alternative to tort in domestic law,²⁷¹ and at a time of catastrophe affecting many millions of vulnerable people the world over, the responsibility of States to humanity seems more pressing than it has in decades. A competitive scramble in which rich nations shoulder aside poor nations would be utterly antithetical to R2H.²⁷² Thus, a legal regime featuring R2H would almost certainly create some mechanism of shared responsibility for the horrific costs of pandemics.

In addition, the pandemic also poses a threat to human rights—most obviously, the simultaneous health and economic catastrophes jeopardize the economic and social rights of millions. But there is also a threat to civil and political rights, as autocratic leaders increasingly invoke emergency powers with sketchy or non-existent sunset provisions.²⁷³ These include surveillance and censorship measures that can easily survive the pandemic. Fionnuala Ni Aolain, the UN Special Rapporteur on Counterterrorism and Human Rights, warns, "[w]e could have a parallel epidemic of authoritarian and repressive measures following close if not on the heels of a health epidemic."²⁷⁴ Here, too, a capacious conception of sovereignty as responsibility to humanity will include human rights responsibilities, and an international community that resists opportunistic authoritarian assaults on civil and political rights.

In short, R2H seems like exactly the right medicine for the current pandemic. As we have seen, the COVID-19 crisis may initially seem irrelevant to the peace and human rights concerns that motivate R2H, but it is not so. One can perhaps hope that its reality will make R2H seem less utopian, and more a matter of pressing necessity.

271. Workers' compensation is perhaps the oldest form of insurance as an alternative to tort, and New Zealand famously substituted social insurance for tort liability in both workplace injury and auto accident cases. *See, e.g.*, Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 *YALE L. & POL'Y REV.* 187 (2008). A classic treatment is Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 *NYU L. REV.* 537 (1952). Holmes regarded strict enterprise liability as the equivalent of social insurance because companies will pass along their costs to consumers. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 467 (1897).

272. *See* Bradley, *supra* note 239.

273. Michael Birnbaum & Terrence McCoy, *As leaders seize powers to fight coronavirus, fear grows for democracy*, *WASH. POST*, (Apr. 13, 2020), https://www.washingtonpost.com/world/the_americas/coronavirus-democracy-orban-hungary-surveillance-israel/2020/04/12/ecdf214-729b-11ea-ad9b-254ec99993bc_story.html; Selam Geprekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, *N.Y. TIMES* (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html>. Much attention has focused on Hungary's Victor Orbán, the reactionary nationalist champion of "illiberal democracy." *See, e.g.*, Laura Livingston, *Understanding Hungary's Authoritarian Response to the Pandemic*, *LAWFARE BLOG* (Apr. 14, 2020), <https://www.lawfareblog.com/understanding-hungarys-authoritarian-response-pandemic>.

274. Quoted in Geprekidan, *supra* note 273.