International Intervention in an Age of Crisis and Terror: U.N. Reform and Regional Practice

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 Recent international differences of opinion, first over the Iraq War and then over U.N. reform, have signaled competing national and regional perceptions of international security and military intervention across the globe. These perceptions go beyond policy to encompass the basic worldviews held by key international actors. Similar differences have been apparent in recent years in respect to a number of conflicts that have spawned humanitarian crises and called for military intervention. In the post-Cold War era, two related types of wars have particularly stirred this cauldron: military interventions for humanitarian purposes and allegedly defensive wars thought to be connected to the "war on terrorism." A central concern in these two areas where worldviews collide relates to the principles of sovereignty and nonintervention. The locus of the collision over the meaning of these concepts has generally been the United Nations Security Council. This Article offers three representative perspectives on sovereignty, those of the United States, China, and the European Union. I have labeled these "new sovereigntism," "old sovereigntism" and "transnationalism," respectively. The latter EU perspective has also been shared to a considerable degree by the U.N. leadership, as reflected in the recent U.N.-led efforts at reform best captured in the 2004 U.N. Report, A More Secure World: Our Shared Responsibility. The substantial failure of that effort in the 2005 World Summit well represents this collision of views. The way we deal with state collapse and resultant humanitarian crises has increasing implications for the broader questions of international security and human rights. The United Nations has often performed poorly in addressing such crises. This Article suggests a two-track effort to address this problem, embodying continuing global efforts at U.N. reform and, on the second track, a more vigorous "constitutive approach" at the regional level.

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I.   INTRODUCTION

     A dominant global paradigm of sovereign exclusivity and nonintervention, long embodied in the U.N. Charter, underlies much of the current regime on human rights, world peace, and international security. In recent years, with the "war on terror" and a variety of humanitarian crises demanding intervention, this paradigm has become a troubled one, stimulating many calls for reform. A late 2004 U.N. Report, *A More Secure World: Our Shared Responsibility* (*2004 U.N. Report*), examined many of these concerns and made policy recommendations for improvement.[1] These recommendations were advanced as part of a substantial reform agenda by U.N. Secretary-General Kofi Annan in his report to the U.N. General Assembly (*2005 U.N. Report*)[2] prior to the September 2005 World Summit (World Summit). His recommendations remained largely unrealized in the outcome statement of that high level plenary meeting of world leaders (2005 World Summit Outcome).[3]

     The World Summit had originally been called to address progress in achieving the goals of the 2000 Millennium Declaration.[4] While that Declaration had emphasized economic development issues related to social and economic rights,[5] events following the September 11, 2001, attacks imported a strong security dimension into this discussion. At the World Summit, key strategic actors in the international community faced critical decisions on suggested reforms of the international security and human rights regime. The 2005 World Summit Outcome failed to realize the high objectives of the *2005 U.N. Report*, leaving the world

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     1.   The Secretary-General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004), *available at* http://www.un.org/ secureworld (follow "Book format" hyperlink) [hereinafter *2004 U.N. Report*].
     2.   The Secretary-General, *Report of the Secretary-General—In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶¶ 153-212, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *2005 U.N. Report*]. The *2005 U.N. Report* embraced the *2004 U.N. Report* and offered an ambitious U.N. reform agenda as a plan of action to be addressed in the September 2005 World Summit. *Id.* ¶¶ 76-77, 153-212.
     3.   2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome].
     4.   United Nations Millennium Declaration, G.A. Res. 55/2, U.N. doc. A/RES/55/2 (Sept. 18, 2000).
     5.   *Id.*

community with a sense of crisis over future direction. The reform proposals that were placed before the international community clearly challenged deep-seated interests and views concerning world order in general and sovereignty and intervention in particular. U.N. members are likely to face continuing reform demands in the coming months and years. This Article will consider the competing views of three important strategic actors and suggest a two-track constitutive approach to address the problems we face in respect of humanitarian crises. This approach embodies avenues to prevent humanitarian crises and to address them when they occur.

A comparison of worldviews respecting sovereignty and intervention of the three key strategic actors addressed in this Article—the United States, China, and the European Union—offers a fruitful avenue for evaluating and developing a constructive reform agenda. I characterize their competing notions of sovereignty as "new sovereigntism," "old sovereigntism," and "transnationalism," respectively. These views each offer a different perspective on the theme of military intervention as is frequently presented to the United Nations Security Council. The Security Council is generally the locus of the collision between these three perspectives. As the alignments in the Iraq War suggest, each perspective also shares some common ground with other international actors. In this regard, I have set aside the case of the other permanent Security Council member, Russia, for which the current Chinese stance may in some context serve as a proxy.[6]

The notion of sovereignty that underlies this debate has taken on varied meaning in debates over the U.N. Charter and its reform. There is general agreement that sovereignty as the divine right of kings has been replaced in modern thought by some notion of popular sovereignty. When the discussion extends beyond the sources of sovereignty, many differences emerge. The classic "Westphalian sovereignty," advanced by the "old sovereigntist" perspective, has emphasized the exclusive control of states over their internal affairs.[7] This is the basis of the nonintervention norm in the U.N. Charter and has also been connected in international law to legal positivism. The emphasis on human rights, also contained in the U.N. Charter, raises questions as to the boundaries of

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6.   *See* Alexander Zhebin, *The Bush Doctrine, Russia, and Korea*, *in* CONFRONTING THE BUSH DOCTRINE, CRITICAL VIEWS FROM THE ASIA-PACIFIC 130, 133 (Mel Gurtov & Peter Van Ness eds., 2005); Steven R. Weisman, *At NATO Talks, Accord and Discord for U.S. and Russia*, N.Y. TIMES, Apr. 22, 2005, at A10.

7.   *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 4, 22, 118-21 (1999).

sovereign exclusivity. A growing number of international treaties have expanded the inclusive at the expense of the exclusive order. Accordingly, internationalist notions of sovereignty (advanced by the transnationalists in our current discussion) have depreciated the notion of sovereign exclusivity, emphasizing instead the sovereign right of states to participate in the international system.[8] These differences in emphasis have shaped differences in perception concerning the notions of sovereignty and nonintervention implicated in the current security debate.

The recent aggressive posture of the United States in the Iraq War has especially proven a grave challenge to America's allies. The "new sovereigntists" of the Bush Administration seemingly view the path to international security through proactive and largely unilateral projection of American power, rejecting international legal and institutional constraints. While multilateral interventions in Kosovo and Afghanistan appeared to stretch the international intervention regime in ways not fully addressed in the U.N. Charter, the notion of preemptive self-defense, as suggested in the September 2002 *National Security Strategy of the United States* and applied in the Iraq War, has stretched this intervention regime to the breaking point.[9] This has posed a challenge to "old sovereigntists" around the world, especially including China, who favor a strong nonintervention norm. But it poses even greater challenges to the transnationalist agenda of those who favor a strong multilateral regime to constrain the use of force and to promote human rights—a view shared by prominent continental European leaders and by Secretary-General Annan and his advisers.

Two recent kinds of wars have defined the post–Cold War international security situation. Military interventions for humanitarian purposes came early—most notably in the former Yugoslavia, Rwanda and East Timor—and more recently in Liberia and Darfur. For such humanitarian crises, the U.N. framework has generally proved inadequate.[10] Wars primarily based on claims of national security, in the

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8.   *See id.* Constructivists have emphasized the intersubjective understanding of sovereignty as an "artifact of practice." Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 412-13 (1992). In this Article, the concept of sovereignty being advanced by various protagonists will generally be apparent from its context.

9.   THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 15 (2002), *available at* http://www.whitehouse.gov/nsc/nss.html.

10.   After the tragedy of Rwanda we often heard the refrain "never again." *See* ALAN J. KUPERMAN, THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA (2001). A similar tragedy now seems to be unfolding with little international response in Darfur. Nicholas D. Kristof, *The Secret Genocide Archive*, N.Y. TIMES, Feb. 23, 2005, at A19.

face of extreme violence and terrorism, have grabbed our attention since September 11, 2001. While both kinds of wars raise their own set of challenges to human rights and global institutions, they generally have common origins in state failure and collapse.[11] They also appear to have underlying causes in underdevelopment, poverty, and communal conflict.[12] Both of these categories of war have posed severe challenges to the U.N. Charter regime and existing institutions for international security and human rights.[13] While the present analysis will give greater attention to humanitarian intervention, as a clear case with precise issues engaging differing worldviews, attention will also be given to the other primarily defensive category where appropriate to this analysis. It is generally accepted that defensive wars raise humanitarian concerns, and humanitarian interventions usually have strong security dimensions.

    Comparison of historical views concerning the system of states and its evolution offers a useful vantage point for comparing contemporary worldviews and their contribution to international law and politics. Part I.A of this Article will introduce the historical and theoretical contours of our current intervention regime. Such historical and theoretical analyses highlight the shared language and history of the current international debate. Part I.B then outlines the origin and elements of the current U.N. regime. This is followed in Part II by an analysis of differing and concurring perceptions within the three identified communities. The concluding Part III will then suggest an avenue for resolution of this debate, a comprehensive approach to global and regional crises prevention and response.

    The thesis developed in this Article favors a two-track approach. On one hand, we should focus on developing the global, U.N.-based regime with a normative commitment to a "responsibility to protect" and institutional reform along the lines suggested by the *2004* and *2005 U.N. Reports*. There is clearly a pressing need to improve the global regime, both in terms of shared norms and the capacity to coordinate global and regional responses. The *2004* and *2005 U.N. Reports* emphasize the

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    11.   Both of these types of wars have historical antecedents. *See* K.J. Holsti, *The Coming Chaos? Armed Conflict in the World's Periphery*, *in* INTERNATIONAL ORDER AND THE FUTURE OF WORLD POLITICS 283, 291-94 (T. V. Paul & John A. Hall eds., 1999). The claim here is merely that these wars have taken on new characteristics and have become defining phenomena in the current post–Cold War era. *Id.*

    12.   Part 2 of the *2004 U.N. Report*, in addressing the challenges of prevention, draws attention to these underlying concerns. *2004 U.N. Report*, *supra* note 1, ¶¶ 44-181.

    13.   *See* Mike Allen & Barton Gellman, *Preemptive Strikes Part of U.S. Strategic Doctrine; 'All Options' Open for Countering Unconventional Arms*, WASH. POST, Dec. 11, 2002, at A01.

relationship between economic development, human rights, and security in a regime of prevention and response.[14] The seeming failure to achieve the most pressing reform objectives in the 2005 World Summit Outcome, however, alerts us not to be sanguine about our efforts to reform the U.N. regime. This points to an urgent need to explore other avenues—in the present argument regional strategies—to reform. Even the *2004* and *2005 U.N. Reports* may have underestimated the potential U.N. role in developing regional capacity. The 2005 World Summit Outcome surely gives insufficient attention to this.

On the other hand, at the regional level, we should pursue a constitutive approach embodying regional human rights and security agreements consistent with this global normative commitment. The term "constitutive" suggests an interactive process to build state, regional, and global capacity on multiple fronts, seeking both to prevent and address humanitarian crises. Such regional regimes should not aim to displace either the global or domestic regimes but to supplement and support both. At the same time, the United Nations should work actively to develop regional capabilities. Regional agreements may embody precommitment strategies for avoidance of and quick response to humanitarian crises and other security concerns. To achieve this, the second track requires not only a limited crisis response regime, but also a broad constitutive process that addresses political and economic development concerns. It is envisioned that this constitutive approach will increasingly build human rights and democracy into the nonintervention norm. Development of this two-track effort depends greatly on a proactive and complimentary efforts in the Atlantic Alliance and the existing regional communities in Europe, the Americas, and Africa. I accept that reform on this second track may be slow, as regions test different strategies and lead by example, but I believe this approach may ultimately prove more fruitful than the impasse now evident on the first track.

A.   The Historical Theoretical Debate

The debate over sovereignty and nonintervention has early and variable roots in the liberal philosophical tradition. The hard view equating sovereignty with nonintervention was largely developed in the eighteenth and nineteenth centuries. John Stuart Mill profoundly shaped the nonintervention principle, arguing that a country could not intervene to impose self-determination on others without defeating such self-

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14.   *See 2004 U.N. Report, supra* note 1; *2005 U.N. Report, supra* note 2.

determination.[15]   Self-help was the essence of self-determination, and nonintervention was central to this. More recently, Michael Walzer has argued that Mill's notion of sovereignty would allow exceptions for wars of liberation in states with multiple communal groups and for self-defense in case of invasion.[16]   Walzer points out that war is a rule-governed activity with a dual concern for both the reasons and means of fighting.[17]   This was true of the classic statist model as much as it is today. Within the "tyranny" of war, Walzer notes, "we have carved out a constitutional regime: even the pawns of war have rights and obligations."[18]

     Nineteenth-century positivist international legal doctrines on war in many ways track this Mill-Walzer view, though adding their own glaze with respect to principles of neutrality in case of civil war (along with further principles of intervention and counterintervention).[19]   Under this positivist legal paradigm, state sovereignty is in many respects the foundation of international law, and unilateral intervention is widely disfavored.   Building on this positivist legal paradigm to allow humanitarian intervention, Walzer argues that an exception to nonintervention should apply in cases where human rights violations are so extreme as to make examination of self-determination irrelevant.[20] This would appear to favor humanitarian intervention in extreme cases of ethnic violence and state collapse.

     Writing much earlier in time, Immanuel Kant went further, offering an argument that would linger as a challenge to the positivist legal paradigm.   Kant promoted a liberal model of perpetual peace built around a federation of republican states.[21]   Kant contested the emphasis

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     15.   3 JOHN STUART MILL, *A Few Words on Non-Intervention, in* DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 238, 258-60 (1882).

     16.   MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 96-108 (1977).

     17.   *Id.*

     18.   *Id.* at 40. This Walzerian form of analysis has recently been extended to the "war on terror" by Michael Ignatieff, who argues in his analysis of the "lesser evil" that international human rights standards must be factored into any response to terrorism that aims to maintain the commitments of liberal democracy—at least if we are to avoid descending into a state of nihilism that would undermine that which we seek to protect. MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 144 (2004). It would seem that a liberal democracy may not even intervene against terrorists in a way that disregards basic international legal commitments, though a gap may emerge between strict legality and moral legitimacy.

     19.   WALZER, *supra* note 16, at 96.

     20.   *Id.* at 90.

     21.   IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107-17 (Ted Humphrey trans., Hackett Publ'g Co. 1983) (1724-1804); *see also* Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 60-61

on exclusive sovereignty of the classic statist model and emphasized the importance of the domestic political condition of the state.[22] For Kant, peace, not sovereignty, is the fundamental purpose of international law.[23] Michael W. Doyle and others have picked up on this Kantian notion of liberal or democratic peace, advancing the argument that democracies will not fight one another.[24] These various liberal positions, by emphasizing self-determination, human rights, and democratic governance, challenge the nonintervention principle and encourage multilateral reform. Liberal international relations theory, though not aggressively interventionist, tends to see humanitarian intervention as "a natural concomitant of human rights law."[25]

     Clearly in the liberal camp, Secretary-General Annan has encouraged the development of appropriate principles for humanitarian intervention, arguing "State sovereignty . . . is being redefined by the forces of globalization and international cooperation."[26] A report by the Canadian International Commission on Intervention and State Sovereignty (*Canadian Report*), submitted to the United Nations, took the lead in responding to this challenge, offering up the notion of the "responsibility to protect."[27] The liberal democratic peace is not without its critics. These critics have recognized that not all democracies are equal, that some new democracies in transition from autocracy may even

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(1992) (discussing Kant's liberal model of perpetual peace built around a federation of republican states).

     22.   *See* Tesón, *supra* note 21, at 74.

     23.   *Id.*

     24.   Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1154-57 (1986); SPENCER R. WEART, NEVER AT WAR: WHY DEMOCRACIES WILL NOT FIGHT ONE ANOTHER 2-23 (1998); DEBATING THE DEMOCRATIC PEACE (Michael E. Brown, Sean M. Lynn-Jones, & Steven E. Miller eds., 1996). Some have even suggested a federal democratic peace, noting that the habits of interaction associated with democratic federalism favor peaceful behavior. Scott A. Silverstone, Federal Democratic Peace: Domestic Institutions, International Conflict, and American Foreign Policy, 1807–1860 (Sept. 1, 2002) (unpublished manuscript, *available at* http://www.isanet.org/archive/silverstone.html).

     25.   Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 ASIL 240, 246 (2000). *See generally* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997) (discussing liberal international relations theory).

     26.   Press Release, Secretary-General, Secretary-General Presents His Annual Report to the General Assembly, U.N. Doc. SG/SM/7136, GA/9596 (Sept. 20, 1999) [hereinafter U.N. Sept. 1999 Press Release]. Annan argues that the core challenge is to "forge unity behind the principle that massive and systematic violations of human rights—wherever they may take place—should not be allowed to stand." *Id.*; *see also* Thomas M. Franck, *Are Human Rights Universal?*, FOREIGN AFF., Jan.-Feb. 2001, at 191.

     27.   INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at xi (2001) [hereinafter CANADIAN REPORT]. It is interesting to note that at least this concept, though little else from the *Canadian Report*, was adopted in the 2005 World Summit Outcome. 2005 World Summit Outcome, *supra* note 3, ¶ 139.

be more war-prone, as are failed democracies moving back toward autocracy.[28] This observation places a premium on the processes and success of state formation.

In competition with the liberal paradigm, realists' international relations theory sees a world primarily driven by the actions of self-interested states.[29] Such a realist perspective would accept diminution of the sovereignty and nonintervention norms only on an ad hoc basis in the face of extreme crises. While classic realists were skeptical about the effectiveness of liberal international institutions, as are employed in an intervention regime, neorealists and neoliberals have taken a more optimistic view.[30] Mainstream legal positivist views generally favor the neorealist or neoliberal stance and would accept a limited regime of multilateral agreements where countries could consent to future interventions.[31] For legal positivists, the notion of sovereign consent is essential in a state-bound system of international law.

Constructivist theories have challenged these mainstream views. Though constructivists generally share with liberals the view that domestic institutions and political conditions are constructive of global practices, their analysis focuses more directly on the identity of participant communities and the role of nonstate actors in constructing international norms.[32] In the constructivist view, international norms such as sovereignty and nonintervention are not only constraints on actors with *a priori* interests, but also constitute the state and other

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28.   Edward D. Mansfield & Jack Snyder, *Democratization and the Danger of War*, INT'L SEC., Summer 1995, at 5, 6.

29.   *See* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (6th ed. 1985).

30.   Neorealists and so-called neoliberal institutionalists, though broadly within the realist paradigm of self-interested state actors, have greater regard for the structure of the international system (neorealist) or multilateral institutions (neoliberal institutionalist). Robert O. Keohane, *Institutional Theory and the Realist Challenge After the Cold War*, *in* NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE 270-71 (David A. Baldwin ed., 1993); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 60-67 (1979). Andrew Guzman has endeavored to explain international law in neoliberal terms. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

31.   Editorial Comments, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention,"* 93 AM. J. INT'L L. 824 (1999); David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 649-53 (1995).

32.   For an overview of current theoretical arguments, see NEW THINKING IN INTERNATIONAL RELATIONS THEORY (Michael W. Doyle & G. John Ikenberry eds., 1997); THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN INTERNATIONAL WORLD POLITICS (Peter J. Katzenstein ed., 1996); Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324, 325-26 (1998); Wendt, *supra* note 8, at 413.

multinational actors that engage this debate.[33] Norms and ideas construct the social environment of international practice and constitute state identity and interests. International institutions transform actors and construct state interests, making such interests variable over time and space. These debates entangle law and morality and confront a rapidly changing political landscape.[34] These dynamics produce different outcomes in different situations depending on the institutions and processes involved at both the international and domestic level.[35] The U.N. regime has afforded an important venue for this debate over sovereignty and intervention.

B.   Contemporary Practice and the U.N. Charter

The twentieth century witnessed the evolution of a global treaty regime for peace that in many ways tracks the highest hopes of the historical debate. The rights and obligations of those affected by war were specified in numerous agreements. In the mid-twentieth century, the U.N. Charter appeared to capture both wings of this debate, simultaneously offering a defense of sovereignty and a Kantian-like federation of free (though not yet republican) states with a commitment to human rights and peace. Borrowing from the classic legal positivist view of sovereignty, states were not to intervene in the internal affairs of other states.[36] Domestic order was generally considered an exclusive matter of the sovereign state. The United States famously took the lead in advancing this multilateral regime, Europe was reluctantly pulled in, and China resisted. Now, in many ways Europe has become the chief proponent of the Kantian peace (also reflected in the European Union), the United States has become the skeptic, and China has started to emerge as a late convert, though a reluctant one more concerned about sovereignty than multilateralism.

In simple terms, the U.N. Charter advances the principle of nonintervention while preserving the right of individual and collective

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    33.   Checkel, *supra* note 32, at 327; Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L ORG. 1, 22 (2000).
    34.   *See* Jack Donnelly, *Genocide and Humanitarian Intervention*, 1 J. HUM. RTS. 93, 93 (2002).
    35.   The literature on international legal process has endeavored to put legal flesh on the bones of such dynamics by analyzing transnational legal processes, inclusive of both domestic and international practice. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 271-85 (1995); Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 334-37 (1999); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2649-51 (1997).
    36.   U.N. Charter art. 2, para. 7.

self-defense and provides an institutional commitment to maintaining peace under the control of the Security Council. Key clauses reflect a dual commitment to both peace and security and to human rights. The preamble, in addition to elaborating a commitment to peace and security, "reaffirm[s] faith in fundamental human rights."[37] Article 1, paragraph 3, lists among the purposes of the charter, "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[38] Article 2, paragraph 4, highlights the role of the nonintervention principle in the peace and security regime, prohibiting the use of force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[39]   Article 2, paragraph 7, continues:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[40]

What is "essentially within the domestic jurisdiction" is not made explicit and opens up interpretive room for Secretary-General Annan's argument for a more expansive intervention regime to deal with humanitarian crises, as does the Chapter VII enforcement regime. Article 51 preserves the "inherent right of individual or collective self-defence."[41]

   In its dual commitment to international peace and fundamental human rights, the U.N. Charter fails to resolve the question of sovereignty and nonintervention versus human rights. Uncertainty also surrounds the notion of self-defense and the status of the humanitarian intervention concept.[42] Liberals have worried that the U.N. Charter's emphasis on sovereignty is too much a product of the World War II–era belief that future conflicts would continue to be interstate in character.[43]

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37.   *Id.* pmbl.
38.   *Id.* art. 1, para. 3.
39.   *Id.* art. 2, para. 4.
40.   *Id.* art. 2, para. 7.
41.   *Id.* art. 51.
42.   Richard Falk, *The Complexities of Humanitarian Intervention: A New World Order Challenge*, 17 MICH. J. INT'L L. 491, 493 (1996).
43.   It should be noted in this regard that the U.N. Charter regime has been supplemented by a regime on individual criminal accountability, first in the Nuremberg Charter and most

Post-Cold War conflicts have instead generally been internal in origin, often arising out of communal conflicts and civil war. For some liberals, the article 2, paragraph 4, prohibition on the use of force against other states cannot mean that we stand by and do nothing in the face of a humanitarian crisis. Some have characterized interventions, such as the one that occurred in Kosovo, as illegal yet legitimate. For others, the U.N. Charter prohibition on the use of force against the territorial integrity of another state would not prohibit a humanitarian intervention in pursuit of the overriding purpose of the U.N. Charter to advance human rights.[44] For such analysts, the war in Kosovo was legal while the war in Iraq, which excessively expanded the notion of self-defense under U.N. Charter article 51, was not.

     As much as internationalists might prefer otherwise, U.N.-based efforts to address humanitarian crises and related developmental concerns have proven inadequate. The U.N. Charter regime faces three primary types of difficulties in responding to humanitarian crises: conceptual, political, and resource-based. The conceptual difficulties are concerned with whether domestically derived military conflicts qualify as threats to international peace to which the U.N. Charter regime applies.[45] But this difficulty has lately become less pronounced, as the Security Council has increasingly characterized internal wars and communal conflicts as threats to international peace. The *2004* and *2005 U.N. Reports* and the 2005 World Summit Outcome appear to adopt this position.[46]

     Politically, while the U.N. Charter provides a formal security regime requiring Security Council approval for armed peacekeeping and peace-enforcement missions, the allowance of veto power to the five permanent members of the Security Council often renders the U.N. Charter

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recently in the Rome Statute establishing the International Criminal Court. Both contain a crime against peace or of waging war. Charter of the International Military Tribunal at Nuremberg, art. 6, Aug. 8, 1945; Rome Statute of the International Criminal Court, arts. 5-8, July 17, 1998, 37 I.L.M. 1002. At Nuremberg, Justice Robert Jackson took the view that "no grievances or policies will justify resort to aggressive war." Robert H. Jackson, *Signing Statement of Robert H. Jackson*, DEP'T ST. BULL., Aug. 12, 1945, at 227. However, the precise definition of this crime under the Rome Statute remains for future determination.

     44.   Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1697 (2000).

     45.   U.N. Charter arts. 33, 39.

     46.   2005 World Summit Outcome, *supra* note 3, ¶¶ 71-72. Paragraphs 71 and 72 emphasize that, in an interdependent world, threats at the global, regional and national levels are interlinked. *Id.*

paradigm unresponsive to humanitarian crises.[47] This shifts the debate down to regional or national actors for whom inaction may not be a sensible option.[48] While the *2004* and *2005 U.N. Reports* sought to respond to the political difficulty by suggesting wider participation in an expanded Security Council, the recommendation left intact the veto power of the current five permanent members. Likewise, under the recommendation in the *2004 U.N. Report*, a regional response would still require prior Security Council approval—though it does appear to allow "in some urgent situations that authorization . . . be sought after such operations have commenced."[49] The 2005 World Summit Outcome fails to adopt these moderate reforms, abandoning entirely the Security Council expansion reform and offering only limited encouragement to regional peacekeeping and humanitarian efforts.[50] In this regard, the 2005 World Summit Outcome specifically encourages efforts to improve peacekeeping capacity in the European Union and the African Union (AU).[51] But full intervention decision authority remains with a Security Council that has often proven inadequate to the task.

     The resource difficulty is also quite serious. Most recently, this has been demonstrated in the paltry response to the ongoing genocide in Darfur, Sudan. With countries unwilling to commit substantial and sustained resources to peacekeeping efforts and reluctant to risk the loss of soldiers in areas where less than vital strategic interests are at stake, the United Nations faces excessive demands and a confidence crisis in its peace efforts. In practice, there has emerged a dichotomy between those who provide military support—often the poorest nations—and those who provide funding and logistical support—often the wealthiest countries. When a powerful military response in a vital strategic location is thought necessary, the United States may be the primary supplier of military force, while the European Union and Japan are looked to for resource and peace-building support. In Africa, as evident most recently in Liberia and the Sudan, the AU may be expected to mobilize troops while the West generally is expected to supply resources. The 2005 World Summit Outcome acknowledges this by supporting "the development

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     47.   U.N. Charter chs. VI-VII. Note that the inherent right of individual or collective self-defense under U.N. Charter article 51 may sometime come in to play to reduce this security gap. U.N. Charter art. 51.
     48.   U.N. Charter articles 52 through 54 allow for regional actions, but again explicitly require prior Security Council approval. In the face of Security Council immobility, this may increasingly be honored in the breach, as it was in Kosovo. U.N. Charter arts. 52-54.
     49.   *2004 U.N. Report, supra* note 1, ¶ 272.
     50.   2005 World Summit Outcome, *supra* note 3, ¶¶ 93, 139.
     51.   *Id.* ¶ 93.

and implementation of a ten-year plan for capacity-building with the African Union."[52] Most recently, in Darfur, a lack of resources meant a shortage of troops. Such "donor fatigue" is now most likely an indirect consequence of the war in Iraq. With all of its failings, given issues of relative competence, this pattern of role allocation will likely persist in the foreseeable future.

Given the incapacity of the United Nations to reform its security and intervention regime and the practical reliance on regional initiatives, regional action, authorized or not, may take on a greater role in the future. Faced with difficulties in obtaining Security Council approval for urgent military responses to humanitarian crises, concerned parties may opt to bypass the Security Council.[53] Unilateral national intervention is generally unacceptable. Contrary to the U.N. Charter requirement of Security Council approval, regional groupings such as the North Atlantic Treaty Organization (NATO), the AU, or the Organization of American States (OAS) may consider it necessary to take military enforcement measures—as occurred in Kosovo—even without the required U.N. approval beforehand. Of course, such measures will require the development of regional capacity. Such regional groupings may likewise increasingly find it necessary to develop the other preventive components of the "responsibility to protect"—here suggested as the elements of a constitutive approach.

Though the 2005 World Summit Outcome and the *2004* and *2005 U.N. Reports* fail to adequately provide for autonomous regional action, regional arrangements, if properly developed, may offer a creative vision for long-term normative solutions. Some regional communities in the Americas, Africa, and Europe appear to take the Kantian thesis even more seriously than the global community. Regional economic and developmental efforts already seek to build the kinds of developmental capacity highlighted in the *2004* and *2005 U.N. Reports*. The OAS and the EU/NATO have to a limited extent sought to enforce commitments to democracy.[54] Greater regional human rights enforcement efforts in

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52.   *Id.* ¶ 93(b).

53.   The U.N. Charter article 53 requirement that the Security Council authorize regional enforcement actions may sometimes be ignored, as it was in respect to Kosovo. U.N. Charter art. 53.

54.   *See* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 8-9 (Lori Fisler Damrosch ed., 1993). The Organization for Security and Cooperation in Europe (now the Commission on Security and Cooperation in Europe (CSCE)) process has likewise sought to enforce this democracy requirement, declaring democracy and other human dimension concerns to be legitimate matters of international concern, not "belong[ing] exclusively to the internal affairs of the State concerned." *See* DOCUMENT OF THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE 1 (1991), *available at* http://www.google.

Africa also point in this direction.[55] I have characterized the processes of building regional capacities to avoid and respond to humanitarian crises as a constitutive approach. This terminology emphasizes the way politics and institutions interact and are mutually constitutive; the ways the projects that interrelate development, human rights, and security are likewise constitutive of our capacity for intervention and coping with humanitarian crises. To the extent that the U.N. efforts at reform are stymied, regional constitutive processes are likely to occupy this space. Such processes are likely to construct the evolving security environment of the twenty-first century. If successful, the outcome of these efforts may ultimately embody a notion of nonintervention contingent on democracy and human rights—a move likely to be resisted by the old sovereigntists.

The existing international regime regarding communal conflicts deserves special mention here due to its contribution to humanitarian crises. Numerous recent humanitarian crises have been the result of state suppression of communal groups.[56] International law and practice in this area, in supporting both sovereignty and self-determination, offers a contradiction that tends to catalyze the escalation of communal conflicts. International law advances the values of self-determination and related rights while discouraging the exercise of such rights by communal groups within established states; sovereignty trumps self-determination and secession is not favored. This appears to be a recipe for increased communal conflict, insurgency, civil war, and state collapse, the sources of humanitarian crises and sometimes terrorism.

Classic legal principles regarding intervention on behalf of insurgents in civil wars bear this out, requiring nonintervention until the insurgents have taken substantial territory by armed rebellion and have acquired belligerent status. Such status affords a right to be treated on more equal terms with the state side of the conflict. Even at such a stage,

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com (search for title of this document; then follow "PDF" hyperlink). The CSCE has been particularly active in Central Asia. Likewise, within the OAS, the Andean Community (Bolivia, Colombia, Ecuador, Peru, and Venezuela) agreed in principle to a notion of humanitarian intervention in the 1980 Charter of Riobamba. The Santiago Declaration had long ago called for pressure to restore democracy when it had been deposed in an OAS member state. Org. of Am. States [OAS], *Representative Democracy Resolution*, AG/RES 1080 (XXI-0/91) (June 5, 1991), *available at* http://www.sap.oas.org/docs/general_assembly/1991/ag_res_1080_xxi_0_91_eng. pdf. A nascent effort at expanding the role dimensions of NAFTA also suggest a growing North American regional community. Rafael Fernandez de Castro & Rossana Fuentes Berain, Op-Ed., *Hands Across North America*, N.Y. TIMES, Mar. 28, 2005, at A17.

    55.   The recent case in Togo is illustrative. Lydia Polgreen, *African Nations To Step Up Pressure on New Togo Ruler*, N.Y. TIMES, Feb. 21, 2005, at A8.

    56.   *See* INTERNATIONAL LAW AND ETHNIC CONFLICT (David Wippman ed., 1998).

neutrality would be required unless others intervene, which frequently is the case. These principles appear to signal to resistance groups the need to escalate violence to a sufficient level to kick in this international solicitude.[57] Examples where militant resistance pays off have been legion, including the creation of Bangladesh, the breakup of key parts of the former Soviet Union, and the breakup of the former Yugoslavia. Overall, this tends to encourage armed rebellion since peaceful resistance will gain the insurgents little international support. At the same time, on the other side of the equation, a degree of international solicitude for the autonomy of such groups within a national context has evolved.[58]

II.   DIFFERING PERSPECTIVES ON SOVEREIGNTY AND INTERVENTION

A richer understanding of the different perspectives of major players on the world scene is essential to crafting or anticipating future solutions to the continuing problems of intervention. There is a need to anticipate how proposed solutions are likely to be perceived and, at the same time, appreciate the risk inherent in the stance taken. With pressing security concerns, as well as a variety of other developmental concerns in Eastern Europe, Central Asia, Africa, and the Middle East, neither the European Union, China, nor the United States can afford to allow these dysfunctional circumstances to persist. As the discussion below tends to show, tidy solutions within the U.N. framework may be out of reach. There is a need for some division of labor in response to emerging or potential crises, in ways that bring critical soft and hard power to bear at both the global and regional levels.

A.   The United States

The United States has long been a proponent of combining soft and hard power in multilateral institutions. Much of the multilateralism of the current age was built on earlier U.S. initiatives. American President Woodrow Wilson, in promoting the League of Nations, was famously the first major Kantian world leader. Nevertheless, as U.S. congressional rejection of Wilson's proposal shows, there has also been an isolationist strain in U.S. policy. This strain reveals a deep concern of some leaders about the alleged multilateral challenge to "democratic sovereignty."[59]

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57.   *See* ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 151-54 (1990).

58.   *See* Daniel Weinstock, *Constitutionalizing the Right To Secede*, 9 J. POL. PHIL. 182, 182 (2001).

59.   *See* Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321 (2001).

The Cold War undermined the full realization of Kantian multilateralism and fostered a distrust of international institutions. In spite of these obstacles, multilateralism flourished in the twentieth century, resulting in the adoption of a range of human rights and social order treaties; security arrangements such as the U.N. Charter and NATO; and the Bretton Woods financial and trade institutions. Even where the United States was sometimes reluctant to sign on, U.S. fingerprints could usually be detected in many multilateral agreements.

The current U.S. policy has veered sharply toward a robust projection of unilateral power—what this Article characterizes as "new sovereigntism." Many associate this with a combination of realist and "neo-conservative" influence on U.S. foreign policy.[60] In this view, compliance with international law is a matter of maximizing the immediate national interest. Using a rational choice analysis, Jack L. Goldsmith and Eric A. Posner argue that international law does not (and seemingly should not) pull states toward compliance contrary to their interests. They urge, "Powerful states may do better by violating international law when doing so shows that they will retaliate against threats to national security."[61] Jurisprudentially, some may question whether this narrow rational choice view underappreciates a number of jurisprudential considerations. For example, it may undervalue the moral dimension of international legal norms, the authority attached to procedures for deriving rules, the complexity of transnational legal processes, the role of institutions in developing interests, the legitimacy that attaches to a reputation for compliance, and the potential to internalize rules. Even constructivists acknowledge the importance of state interest but see it as variable and changing.[62] Has the Bush Administration narrowed its conception of American interest too much, undervaluing the importance of the soft power engaged by international institutions?

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    60.   William Wallace, *Europe, the Necessary Partner*, FOREIGN AFF., May-June 2001, at 16.

    61.   JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 103 (2005). The authors doubt that any state will follow an international law contrary to immediate interests. They particularly doubt that international human rights treaties have any exogenous influence on state behavior. *Id.* at 108. This view appears skeptical of the perspective that a commitment to human rights and its institutions provides a form of soft power at the center of U.S. foreign policy. Joseph S. Nye, *The Decline of America's Soft Power*, FOREIGN AFF., May-June 2004, at 16. Note that in order for their argument to offer a robust theory, their notion of interest has to be relatively narrow and immediate. An over-expansive notion of interest would fail the test of parsimony.

    62.   *See* MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996).

With respect to foreign policy, the Bush doctrine appears to argue that the United States "pick and choose the international conventions and laws that serve its purpose and reject those that do not."[63] Critic Peter J. Spiro notes:

> New Sovereigntism delivers three flawed lines of attack. The first impugns the content of the emerging international legal order as vague and illegitimately intrusive on domestic affairs. The second condemns the international lawmaking process as unaccountable and its results as unenforceable. Finally, New Sovereigntism assumes that the United States can opt out of international regimes as a matter of power, legal right, and constitutional duty.[64]

The new sovereigntists often invoke the specter of international bureaucrats and diplomats who lack accountability in opposition to democratic sovereignty.[65] But this risks a profound paradox of ignoring international law and imposing a form of superpower autocracy abroad in the name of democracy at home. The Bush Administration's policies on this front were quickly and prominently advanced upon taking office, in the form of attacks on the Kyoto accords and withdrawal of the U.S. signature on the Rome Statute of the International Criminal Court. This skepticism about international institutions appeared to increase after September 11, 2001, with political attacks on the United Nations.[66]

On defense issues, this new sovereigntist view advances a robust projection of American power. The trend of projecting American power to advance a perception of the common good with uncertain regard for international obligations was, it should be acknowledged, already on display in the Kosovo intervention of the Clinton Administration and

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63.   Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000, at 9.

64.   *Id.*

65.   A variant of this concern exists within the United States Supreme Court (Scalia vs. Breyer). Concern over undemocratic foreign influence intruding into the fabric of the U.S. constitutional debate was recently on display in the United States Senate hearings to confirm now-Chief Justice John G. Roberts. Chief Justice (then Judge) Roberts invoked democratic theory as a constraint on considering foreign precedent. *See 'I Believe That No One Is Above the Law Under Our System,'* N.Y. TIMES, Sept. 14, 2005, at A26.

66.   In a recent display of contempt for international law, the administration withdrew U.S. consent for International Court of Justice (ICJ) jurisdiction to determine compliance with the Vienna Convention on Consular Relations. *See* Linda Greenhouse, *Bush Decision To Comply with World Court Complicates Case of Mexican on Death Row*, N.Y. TIMES, Mar. 29, 2005, at A14. The Administration went further, apparently trying to avoid a Supreme Court ruling in *Medellin v. Dretke*, 544 U.S. 916 (2005), by directly ordering state courts to comply with an ICJ order of effective review and reconsideration of the cases embodying the violation. The Administration supported the United States Court of Appeals for the Fifth Circuit determination that the right had been waived. Greenhouse, *supra.*

NATO. Many have questioned the unsanctioned NATO action and the legality of the war in Kosovo.[67] The Iraq War has elevated this concern dramatically. Secretary-General Annan has characterized the 2003 Iraq invasion as illegal.[68] The Iraq War prominently displays this policy of projecting power and disregarding international law—this time with the language of terrorism and preemptive self-defense replacing humanitarian concerns. While the Bush Administration spoke of weapons of mass destruction and terror links in its Iraq policy, statements from Administration supporters before the invasion seem to suggest a policy guided by a vision of *pax Americana*—what some scholars have labeled the "new American imperialism."[69] One scholar sent around the world to promote the Bush Administration view argued that "Baghdad was on the road to Palestine," an assertion that use of American power forcefully in Iraq would enable America to solve the Palestinian question.[70] This view may underestimate the potential for increased Arab resistance to the U.S. hegemonic agenda.[71] Does a notion of empire dressed up in the clothes of democracy risk discrediting democracy?

    The U.S. new sovereigntist view was prominently on display in the 2005 World Summit Outcome. As the United States, through its U.N. Ambassador John R. Bolton, submitted several hundred criticisms and suggested revisions at the last minute before the World Summit, it

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    67. Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841, 841-42 (1999). Some scholars and even a study by the Independent International Commission of Kosovo effectively split hairs by saying the war was "'illegal, but legitimate.'" *See* Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 591 (2003) (citation omitted).

    68. Patrick E. Tyler, *U.N. Chief Ignites Firestorm by Calling Iraq War 'Illegal,'* N.Y. TIMES, Sept. 17, 2004, at A11.

    69. *See* G. John Ikenberry, *America's Imperial Ambition*, FOREIGN AFF., Sept.-Oct. 2002, at 44; G. John Ikenberry, *Illusions of Empire: Defining the New American Order*, FOREIGN AFF., Mar.-Apr. 2004, at 144; Robert Jervis, *The* Compulsive *Empire*, FOREIGN POL'Y, July-Aug. 2003, at 83; Sebastian Mallaby, *The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire*, FOREIGN AFF., Mar.-Apr. 2002, at 2.

    70. Michael Scott Doran, *Palestine, Iraq, and the American Strategy*, FOREIGN AFF., Jan.-Feb. 2003, at 19. This view seemed to discount the risk of increased resistance that has since ensued. *See* Michael Hirsh, *Bush and the World*, FOREIGN AFF., Sept.-Oct. 2002, at 18. At this writing it appears that the death of the Palestinian President Yasir Arafat may have advanced the peace process independent of events in Iraq.

    71. *See* Marc Lynch, *Taking Arabs Seriously*, FOREIGN AFF., Sept.-Oct. 2003, at 81. *But see* Fouad Ajami, *The Falseness of Anti-Americanism*, FOREIGN POL'Y, Sept.-Oct. 2003, at 52 (arguing that anti-Americanism is already entrenched in the world's psyche); Barry Rubin, *The Real Roots of Arab Anti-Americanism*, FOREIGN AFF., Nov.-Dec. 2002, at 73 (arguing that anti-Americanism is not a response to U.S. politics but rather the product of "self-interested manipulation by various groups within Arab society").

appeared that the aim was to derail the proposed reforms.[72] This was seemingly how these revisions were viewed, as the Non-Aligned Movement, for example, quickly responded with its own list of revisions.[73] The result was a watered-down 2005 World Summit Outcome. While a new Human Rights Council was endorsed (and has since been established), earlier recommendations in the *2004 U.N. Report* to give it more elevated status within the U.N. organizational chart were largely abandoned, as were more robust controls over its membership.[74] The attempt to change the makeup of the Security Council failed entirely. Though the notion of "responsibility to protect" was embraced, it was practically denuded of content; and, likewise, little was left of the administrative reforms. Though Ambassador Bolton attempted an about face on the U.N. development goals, the U.S. President ultimately backed down on this, reiterating the U.S. endorsement of those goals. Overall, the 2005 World Summit Outcome left plenty of room to continue to operationalize the U.S. "new sovereigntist" stance.

    The overall view of the new sovereigntists appears to suggest that America is the only superpower and that it should use its power. International law and related institutions are profoundly distrusted in this security equation. Other long-established commitments to transparency are also under challenge. Even before the Iraq War, the United States Department of Defense seems to have advocated a lesser commitment to truth. In the interest of security, public disinformation was acceptable policy. On the humanitarian front, this disregard for international law seemed to produce disregard for human rights constraints and the Geneva

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    72.   U.S. Amendments to the Revised Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly of September 2005 Submitted by the President of the General Assembly (Aug. 25, 2005), http://www.globalpolicy.org/msummit/millenni/m5outcome docindex.htm. The US proposed several hundred changes and, as an alternative, suggested that the thirty-eight-page draft document be replaced by a three-page statement. *See* Colum Lynch, *Bolton Voices Opposition to U.N. Proposals; White House Fears Effort Would Inhibit U.S. Authority*, WASH. POST, Sept. 1, 2005, at A23; Stevenson Swanson, *Bolton Throws a Wrench; Envoy's 750 Proposals To Reshape Reforms May Thwart UN Plans*, CHI. TRIB., Sept. 14, 2005, at C3. This *Chicago Tribune* report highlighted an earlier 1994 quote of Mr. Bolton: "The United States makes the UN work when it wants it to work, and that is exactly the way it should be because the only question—only question—for the United States is what's in our national interest." Swanson, *supra*.

    73.   Non-Aligned Movement, *Proposed Amendments by the Non-Aligned Movement to the Draft Outcome Document of the High-Level Plenary Meeting of the General Assembly* (2005), http://www.globalppolicy.org/msummit/millenni/2005/0901nam.pdf.

    74.   *Compare 2004 U.N. Report*, *supra* note 1, ¶¶ 282-291, *with 2005 World Summit Outcome*, *supra* note 3, ¶¶ 157-160. For a discussion of the Human Rights Council, see Hillel C. Neuer, *So Far, a Profound Disappointment: UN Human Rights Council*, INT'L HERALD TRIB., Sept. 8, 2006, at 8.

Conventions in the treatment of prisoners in Afghanistan and Iraq.[75] Such disregard for international law at the highest level of government no doubt contributed to the lax view on display by ordinary soldiers at Abu Ghraib and in other prisons in Iraq and Afghanistan. On the home front, the U.S. Patriot Act may be the face of disregard for civil liberties. As evident in the last presidential election, the American people appear to be divided over these issues. Only time will tell whether this new sovereigntism becomes the established American worldview or just an unconventional view within a single U.S. administration.[76] It is noteworthy that President Bush began his second term by trying to mend frayed relations with the European Union, and he has confessed to some policy errors in the lead up to the November 2006 mid-term elections, though there is little evidence so far of actual policy change respecting the intervention in question. Bush's key appointments in his second Administration, especially John Bolton, belied such intention.

In the 2004 U.S. presidential debates, President Bush challenged Senator John Kerry's assertion of international standards in the decision to use American military force. In arguing that American defense will not be left to the decisions of others, the President advanced a dichotomy that is challenged by both transnationalists and old sovereigntists.[77] The U.N. Charter in article 51 has long permitted countries to act unilaterally in self-defense from imminent attack. Otherwise, it has generally been felt necessary to justify the use of military force. The "just war doctrine" that Kerry may have invoked dates back beyond the seventeenth century (St. Augustine, Thomas Aquinas, etc.) to the writings of Grotius, the father of international law.[78] The U.N. Charter is in many respects the modern embodiment of this doctrine. The U.N. Charter says yes to self-defense, but no to unjustified aggression. The outcome of the war and the continuing security problems in Iraq may demonstrate the wisdom of this thinking.

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    75.   *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). The Bush Administration has since tried to override the *Hamdan* decision by enacting new antiterror legislation to allow interrogation and trial policies much like those that were struck down in *Hamdan*. Sheryl Gay Stolberg, *Bush Signs Measure on Interrogations; Law Opens Way To Resume CIA Program*, INT'L HERALD TRIB., Oct. 19, 2006, at 4.
    76.   *See* Robert Kagen, *Power and Weakness*, POL'Y REV., June-July 2002, at 3.
    77.   Elisabeth Bumiller & David M. Halbfinger, *Bush and Kerry, Feeling Like Winners, Go to Las Vegas*, N.Y. TIMES, Oct. 15, 2004, at A21.
    78.   HUGO GROTIUS, DE JURE BELLI AC PACIS [THE LAW OF WAR AND PEACE] (Louise R. Loomis trans., Walter J. Black, Inc., 1949) (1625).

B.   China

     China presents one of the closest contemporary examples of "old sovereigntism." The legal positivist, nineteenth century form of sovereignty embraced by China places primary emphasis on nonintervention. While this approach was historically suspicious of multilateralism, China has become a skeptical convert to active participation in the multilateral order as a counterweight to American hegemony, a vehicle for promoting multipolarity, and a strategy for guarding its rising economic interests.[79] China's role as a permanent member of the Security Council with veto power largely explains its conversion to multilateral support of the U.N. regime on security. Its fear of American encroachment and its resulting commitment to multipolarity have likewise encouraged a more robust multilateral engagement at the Asian regional level. China appears to be promoting multilateralism in the name of sovereignty and nonintervention. This engagement has included cooperative agreements with the Association of Southeast Asian Nations (ASEAN), cooperative naval exercises with India and Pakistan, and the founding of the Shanghai Cooperation Organization engaging several countries in Central Asia.[80] China's central role in the six-party negotiations over North Korea may even offer up the elements of a rather testy future Northeast Asia security community.[81] But even in this new strategic environment, sovereignty and nonintervention are often the primary guiding values of Chinese foreign policy. China's views in this regard are representative of a number of developing countries in Asia— most prominently those included in ASEAN, for whom nonintervention has always been a central regional organizational premise.

     The central plank of Chinese foreign policy, since the founding of the current regime, has been to aggressively defend a robust notion of sovereignty and nonintervention on nearly every occasion where it is at

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     79.   Jing-dong Yuan, *Chinese Perspectives and Responses to the Bush Doctrine*, *in* CONFRONTING THE BUSH DOCTRINE; CRITICAL VIEWS FROM THE ASIA-PACIFIC, *supra* note 6, at 108, 109; Zheng Bijian, *China's "Peaceful Rise" to Great-Power Status*, FOREIGN AFF., Sept.-Oct. 2005, at 18; David Zweig & Bi Jianhai, *China's Global Hunt for Energy*, FOREIGN AFF., Sept.-Oct. 2005, at 25.
     80.   Peter Van Ness, *China's Response to the Bush Doctrine*, WORLD POL'Y J., Winter 2004, at 38. Prior to 9/11, as the Bush Administration pursued national missile defense (NMD), China perceived itself as a primary target of American defense strategy. This perception has eased after 9/11, as the war on terrorism has taken center stage and China, which has offered a moderate level of cooperation, has diminished somewhat in the U.S. security equation. *Id.*
     81.   Wang Jisi, *China's Search for Stability with America*, FOREIGN AFF., Sept.-Oct. 2005, at 39. While any security arrangement that flowed from North Korean nuclear negotiations would surely witness strange bedfellows there is a common interest in a peaceful non-nuclear Korean peninsula.

issue. Throughout much of the post-World War II period, this meant great distrust of foreign intentions and multilateral institutions.[82] Human rights treaties were looked upon with suspicion, and intervention on behalf of human rights consistently condemned.[83] Until the emergence of the Bush Doctrine, security arrangements were unilateral and always emphasized claims of nonintervention.[84] There were no multilateral trade arrangements until well after the "reform and open" policy began in the early 1980s,[85] and these were negotiated only with great difficulty—with negotiations over the World Trade Organization (WTO) entry taking over fifteen years.[86]

China's commitment to nonintervention appears to be grounded in colonial experience and a tradition of mutual distrust with respect to the political leadership of other leading powers. Its resistance to multilateralism has eased in the past decade, with the signing of human rights treaties, the creation of the above noted Shanghai Cooperation Organization, a more proactive approach to relations with ASEAN and the European Union, negotiations on the Korean Peninsula, and China's entry into WTO.[87] The 1984 Hong Kong Agreement likewise displayed a more nuanced stance by inviting international solicitude over Hong Kong's autonomy.[88] With respect to security related issues, however, the Chinese worldview remains substantially defined by distrust of outside intentions and emphasis on sovereignty and nonintervention—with multilateralism now advanced on behalf of its nonintervention cause. In a recent hearing of the U.N. Commission on Human Rights on the right of self-determination, the Chinese delegate worried that people with a hidden agenda may use the right to self-determination as a pretense for splitting up sovereign states.[89] Even the five principles of peaceful

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82.   *See* KUANG-SHENG LIAO, ANTIFOREIGNISM AND MODERNIZATION IN CHINA, 1860-1980 (1990).
83.   ANN KENT, BETWEEN FREEDOM AND SUBSISTENCE: CHINA AND HUMAN RIGHTS (1993).
84.   *See* Van Ness, *supra* note 80.
85.   Chinese interest in multilateral trade arrangements essentially emerged after it began to open up to the outside world under reforms launched in the early 1980s. Bijian, *supra* note 79.
86.   Hong Kong Trader, China Secures WTO Membership (Nov. 2001), http://www. hktrader.net/200111/200101/200101s5.htm.
87.   *Id.*; Van Ness, *supra* note 80; Human Rights Watch, China Signs Rights Treaty but Implementation Is Key (Oct. 5, 1998), http://hrw.org/English/docs/1998/10/05/china1369.htm; People's Daily, China Sincere in Fulfilling Obligations Under Human Rights Treaties (Apr. 18, 2000), http://english.people.com.cn/english/200004/18/eng20000418_39113.html.
88.   *See* Michael C. Davis, *Constitutionalism Under Chinese Rule: Hong Kong After the Handover*, 27 DENV. J. INT'L L. & POL'Y 275 (1999).
89.   U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Summary Record of the 13th Meeting, ¶ 8, U.N. Doc. E/CN.4/2005/SR.13 (Apr. 1, 2005).

coexistence that China advances as the most fundamental principles of its foreign policy are essentially five versions of nonintervention.[90]

    China's testy relationship with the outside world may be attributed in part to China's authoritarian system of governance. Most multilateral initiatives of the twentieth century are concerned with human rights and a more transparent and democratic world order. These ideals may rarely be realized but they do have a normative force in international affairs. In this respect, the value systems of the emerging international human rights and humanitarian order are fundamentally at odds with the Chinese system of governance. In the U.N. General Assembly, when Secretary-General Annan advanced his thesis that "[s]tate sovereignty . . . is being redefined by the forces of globalization and international cooperation" as part of his argument for a more interventionist response to humanitarian crises,[91] China took the lead in resisting this notion and arguing for the preeminence of sovereignty and nonintervention.[92] Until more substantial political reform occurs in China, it is doubtful one will see a fundamental change in the official Chinese worldview on global order issues such as humanitarian intervention and preemptive self-defense. Since China has seemingly perfected an ability for resisting political reform while sustaining rapid economic development, the prospects for short-term change in these circumstances remain dim.[93]

    Chinese doubts about humanitarian intervention and preemptive self-defense are also guided by specific strategic considerations. Beyond the colonial experience and issues of authoritarian governance, China has faced challenges to its historical claims to vast territory on its periphery. For many, China has appeared as an old empire in the clothing of a modern state. This has raised doubts about the quality of its territorial claims to historical tributary states in Central Asia or the island of

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    90.   These five principles include "(1) mutual respect for sovereignty and territorial integrity; (2) mutual nonaggression; (3) mutual noninterference in internal affairs; (4) equality and mutual benefit; and (5) peaceful co-existence." Samuel S. Kim, *Sovereignty in the Chinese Image of World Order*, *in* ESSAYS IN HONOR OF WANG TIEYA 425, 428 (Ronald St. John Macdonald ed., 1994).
    91.   U.N. Sept. 1999 Press Release, *supra* note 26.
    92.   Barbara Crossette, *China and Others Reject Pleas That U.N. Intervene in Civil Wars*, N.Y. TIMES, Sept. 23, 1999, at A5.
    93.   Bruce Bueno de Mesquita & George W. Downs, *Development and Democracy*, FOREIGN AFF., Sept.-Oct. 2005, at 77. Mesquita and Downs emphasize that economic development alone will not likely transform a country like China which has perfected a model of resisting political reform in the face of developmental success. *Id.* This seemingly suggests any change in China's political system will require a concerted effort to propel China toward developing what the authors call "coordination goods," essentially the ingredients of democratic reform and human rights. *Id.*

Taiwan.[94] These doubts have generally put Beijing on the defensive in international relations. A regime with tenuous claims to legitimacy has used every opportunity to vigorously resist outside challenges to its territorial claims.[95] At the same time, the regime's weak international standing and the issues of trust discussed above have meant that China places great value on its international reputation. The task of reconciling these competing concerns has preoccupied Chinese foreign policy and determined its sovereign identity.

The difficult balancing act of vigorously resisting incursions on sovereignty while carefully guarding its international reputation has been nowhere more evident than in China's policies on intervention. The Taiwan issue factors into nearly every exercise of diplomacy, where territorial imperatives run into issues of national reputation. The Taiwan question is therefore present in nearly all cases where diplomacy seeks to deal with the intervention question. The recent Chinese enactment of an Anti-Secession Law targeting Taiwan is yet another demonstration of the centrality of this issue.[96] In the Security Council, China rarely uses its veto power unless the Taiwan issue lurks behind an intervention question.[97] China usually voices its disapproval through abstention. A veto may be used in circumstances where a humanitarian intervention proposal is at stake. There seems to be a fear that if a broad norm of humanitarian intervention were to emerge, it may justify a similar intrusion if China were to use military force against Taiwan. Outside criticisms of China's policies toward Hong Kong and Tibet draw similar objections, though to a lesser degree.

China would surely object to international efforts to enforce autonomy arrangements or even to the emergence of standards in this regard. In the case of Kosovo, China objected up front,[98] and NATO simply did not approach the Security Council. In East Timor, China made similar objections until Jakarta consented to intervention.[99] This

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    94.   Kishore Mahbubani, *Understanding China*, FOREIGN AFF., Sept.-Oct. 2005, at 49; Michael C. Davis, *The Case for Chinese Federalism*, J. DEMOCRACY, Apr. 1999, at 124.

    95.   *Id*.; *see also* Sally Morphet, *China as a Permanent Member of the Security Council: October 1971-December 1999*, 31 SEC. DIALOGUE 151, 152 (2000).

    96.   In the face of this bellicose behavior over Taiwan, Robert Kagan doubts recent claims of a new multilateral Chinese subtlety. Robert Kagan, Editorial, *Those Subtle Chinese*, WASH. POST, Mar. 10, 2005, at A21.

    97.   In the first twenty years of its U.N. membership, China appeared to use its veto four times, twice in 1972 and twice in 1997-99, largely with a Taiwan concern lurking in the background. *See* Morphet, *supra* note 95, at 152.

    98.   Bates Gill & James Reilly, *Sovereignty, Intervention and Peacekeeping: The View from Beijing*, SURVIVAL, Autumn 2000, at 41; Bijian, *supra* note 79.

    99.   Gill & Reilly, *supra* note 98.

suggests the general principle that interventions into internal conflicts will be supported only if the sovereign power consents.   The most prominent current problem arises out of the alleged genocide in Darfur, Sudan.   As in the previous cases of East Timor and Liberia, it seemed that the best strategy to gain Chinese concurrence for any humanitarian intervention was to gain the Sudanese regime's consent.   Such consent to U.N.-sponsored AU troops was effectively given in the January 2005 peace agreement and embraced by China in the March 24, 2005, U.N. resolution authorizing 10,000 troops.[100]   With such consent, it seems unlikely Beijing would block a U.N. initiative.   China's willingness to support interventions in respect of international armed conflicts is somewhat broader.   Interventions into cross-border incursions would be more acceptable if they either meet the accepted principles of self-defense—not preemptive self-defense—or have the clear approval of the Security Council.

      China's concern with its international reputation has meant that in recent years it has become involved in international peacekeeping operations approved by the United Nations.   On this front, because of the objections discussed above, China's contribution has generally been at a token level.   But this token engagement marks a significant step from China's nearly total disengagement a couple decades earlier.   China has served on the U.N. Special Committee on Peacekeeping Operations and has contributed about 1% of its budget.[101]   From 1989 to 2000, China contributed around 650 military observers and 800 engineers to peacekeeping operations.[102]   It recently volunteered to send 125 security personnel to Haiti to help with law enforcement.   Some suspected that

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      100.   Both Chinese consent and American consent to three U.N. resolutions on Darfur—to provide troops, sanctions and war crimes prosecutions—were ultimately achieved, after months of inaction, by separating the U.N. initiative into three parts.   Warren Hoge, *10,000 Peacekeepers To Be Sent to Sudan, U.N. Council Decides*, N.Y. TIMES, Mar. 25, 2005, at A8.   On March 29, 2005, a second resolution authorizing economic sanctions but excluding oil sanctions was approved over the abstentions of Algeria, China, and Russia.   Warren Hoge, *U.N. Council Approves Penalties in Darfur*, N.Y. TIMES, Mar. 30, 2005, at A6.   On March 31, 2005, the third resolution authorizing reference of prosecutions for war crimes in Darfur was passed—with the US, China, Brazil, and Algeria abstaining—by excepting countries who have not signed the ICC.   BBC News, *UN Backs Darfur War Crimes Move* (Apr. 1, 2005), http://news.bbc.co.uk/1/hi/world/africa/4399487.stm.   The total U.N. response package to Darfur is still clearly inadequate, but the passage of these three difficult resolutions after long inaction tends to show that great power cooperation in this area is achievable if there is a genuine commitment.   Unfortunately, in the face of continuing Sudanese resistance, U.N. initiatives have not been implemented.

      101.   Gill & Reilly, *supra* note 98.

      102.   *China's National Defense White Paper* (2002), http://www.fas.org/nuke/guide/china/doctrine/natdef2002.html.

this was an effort to reach out to Haiti, which had diplomatic relations with Taiwan.[103]

China continues to be unable to resolve the tension between its aggressive posture on sovereignty and nonintervention and its preference to have an improved reputation in world affairs. Though it has made proactive efforts to develop regional ties, its neighbors may see it as a necessary, but not necessarily trusted, partner. China serves as an important counterweight to other diplomatic ventures its partners may have. Few countries, however, seem willing to invest substantial diplomatic capital in relations with China, especially when such relations compete with great power relations. China's partners in Europe and North America may share similar problems of trust. Of course, these difficulties add to China's own anxieties about foreign intentions and reinforce its policies on sovereignty and nonintervention.

It seems that without resolving its fundamental contradictions at the national, regional, and global level, China will be unable to resolve this underlying tension. For China, the big risk of not being fully engaged in efforts to develop norms for humanitarian intervention is that it will be marginalized and its voice will be left out. Given the importance of the same set of issues that concern the European Union and the United States—in Central Asia, Eastern Europe, Africa, and the Middle East— such disengagement will surely be at a price. The standard Chinese diplomatic recognition bargain, requiring recognition of its sovereign claim to Taiwan and the isolation of the government in Taipei, already imposes a cost on nearly every Chinese diplomatic outing.

C.   The European Union

The EU presents a stark contrast to both China and the United States. European views on sovereignty and intervention have generally embodied a refined notion of "transnationalism," including substantial engagement in a range of supranational and multilateral institutions. For a variety of reasons, the European Union's transnationalism has been characterized by a high level of intervention on multiple nonmilitary channels, leading John Ruggie to describe the European Union as a "multiperspectival polity" likely to remain international.[104] Beyond Europe's borders, there have been robust relations in trade and aid, but a rather timid approach to military intervention. Debates over the

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    103.   Bill Gertz, *China Will Send Troops to Haiti*, WASH. TIMES, Sept. 6, 2004, at A1.
    104.   John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, INT'L ORG., 139, 172 (1993).

development of the "Eurocorp," a transnational EU military force, have revealed a European sensitivity about its weak military posture but otherwise strong orientation to nonmilitary channels of interaction.[105] This has allowed the European Union to make a significant contribution to peacekeeping and peace building in several areas in Africa, the former Yugoslavia, and Afghanistan.

    At its highest ideal, the European vision which favors putting out fires both before they grow (conflict prevention) and after they have raged (peacemaking and state building), might offer an important complement and counterweight to the more aggressive posture of the United States. With some moderation of the U.S. stance, as suggested below, the continued value of the Atlantic Alliance to address development and peace building concerns in areas vital to the United States and the European Union is apparent.[106] Andrew Moravcsik has suggested that Europe and its American partners abandon the notion of military competition and focus on "complementarity."[107] By this, he means a partnership that emphasizes European attention to development, peacemaking, peace building, and American military intervention as appropriate under multilateral constraints. European support has long lent legitimacy and public credibility to American policy. At the same time, American participation has lent greater strength to European initiatives. Though success seems out of reach, such a combination is currently on display in negotiations over Iran.

    For this "complementarity" vision to materialize, both the European Union and the United States would need to modify their current approach to security issues. For the European Union, this may require more active engagement on security matters and more earnest coordination with its allies with respect to allocation of peace building and state building resources. For example, unilateral EU lifting of the current arms embargo against China in exchange for certain trade opportunities does not seem very prudent, given the volatility on the Taiwan Strait.[108] At the same time, coordinated efforts over Iran offer the

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        105.   Jeffrey L. Cimbalo, *Saving NATO from Europe*, FOREIGN AFF., Nov.-Dec. 2004, at 111.
        106.   *See* Ronald D. Asmus, *Rebuilding the Atlantic Alliance*, FOREIGN AFF., Sept.-Oct. 2000, at 20.
        107.   Andrew Moravcsik, *Striking a New Transatlantic Bargain*, FOREIGN AFF., July-Aug. 2003, at 74.
        108.   Joseph Kahn, *Europe's Shift on Embargo Places Taiwan at Center Stage*, N.Y. TIMES, Mar. 23, 2005, at A7; *Setting Limits on Weapons for China*, INT'L HERALD TRIB., Feb. 26, 2005, at 8. On this front, it does not help that the US has taken a cavalier attitude that seems to say "do as I say, not as I do" in selling arms to Pakistan and India. Somini Sengupta, *Courting a Pair of South Asia Partners*, N.Y. TIMES, Mar. 27, 2005, § 1, at 4.

only hope of constraining Iran's nuclear initiatives.[109]   Strategic development of military capacity that directly targets peace and state building offers significant prospects for dealing with future humanitarian crises. The current crisis in Darfur may be just such a case. On the American side, more genuine consultation with the European Union is vital. One would hope—but perhaps not expect—that after the Iraq disaster American leaders gain new appreciation of multilateralism. Given the large scope of common concerns across a wide spectrum of security and developmental areas, it would certainly be advantageous to both sides to revitalize the Atlantic Alliance. For this to occur, America must be persuaded to renew its commitments to the constraints of multilateralism and international law. Renewed ability to wield soft power to address a variety of difficulties around the globe would be the reward. This need certainly highlights the flawed vision of new sovereigntism.

The European Union's combination of robust multilateral capabilities and weak military projection capabilities may put the European Union at odds with the United States on the issue of intervention but put it in a somewhat ambivalent posture towards China. In this triadic relationship, both the European Union and China tend to have their primary relationship with the United States, though they may occasionally play each other off against the United States on trade issues when it proves convenient. One can see in this delicate balance some opportunity for the Atlantic Alliance to be turned firmly in the direction of a more substantial liberal multilateral intervention regime. This might be along the lines suggested by the *2004* and *2005 U.N. Reports*, though clearly not achieved in the 2005 World Summit Outcome. The failings of the U.N. efforts may also suggest avenues for regional developments, as suggested in the next Part.

The tension in the Atlantic Alliance was most prominently on display over the Iraq War, when a multilateralist European Union, led by France and Germany, contested the largely unilateralist policies of the United States and Britain. The presence of Britain and other European countries on the American side of this dispute signals that the European stance is far from monolithic. This dispute displayed a palpable difference in worldviews across the Atlantic. While America appears to envision multilateralism in European acceptance of American hegemony, Europe questions the value of alliance on such terms.[110]

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109.   Elaine Sciolino, *Iran and Europeans Open a New Round of Negotiations*, N.Y. TIMES, Dec. 14, 2004, at A17.

110.   Robert Kagan, *America's Crisis of Legitimacy*, FOREIGN AFF., Mar.-Apr. 2004, at 65.

One should be careful not to exaggerate the differences. The American political elite are nearly equally divided between liberal multilateralists and supporters of the current policies, while the intellectual elite have been highly critical of recent policy. In Europe, it is important to recall that leading European protagonist France was not always committed to multilateralism. During the Cold War, it had long displayed a cantankerous go-it-alone approach to security.[111] The French commitment to multilateralism appeared to ratchet up at the end of the Cold War with the unification of Germany and the emergence of Eastern Europe. With growing multilateral institutions and the expansion of the European Union to twenty-five (and soon more) member states, it is difficult to be European today without a substantial regard for transnationalism and substantial commitment to consensus building on a wide range of issues.[112] The 2005 collapse of efforts toward a European Constitution at the same time demonstrates that this effort is likely to remain multinational.[113] Its multinational status may be its greatest value to the current analysis, confirming its viability as a multilateral model for other regions and the world in ways that an emerging federal European state would not. Multilateral habits of consensus building within Europe surely offer a vigorous example of transnationalism.

The European Union has, however, not been able to come up with a security consensus. Philip H. Gordon has contrasted the "intergovernmentalist" vision of Europe's future, offered by Britain, with a "functionalist" view more committed to building common institutions and interests, led by France and Germany.[114] Kalypso Nicolaïdis characterizes the latter camp as supranationalist, emphasizing greater purposefulness than mere functionalism.[115] A truly European version of international security has been largely stillborn along with the European constitution. Efforts at building a common foreign and security policy within the EU have often been hamstrung by the competing views of its members on other aspects of integration and, at its base, by a lack of commitment to building European military power. Neoconservatives in

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    111. Anand Menon, *From Independence to Cooperation: France, NATO and European Security*, 71 INT'L AFF. 19, 19 (1995).
    112. Kalypso Nicolaïdis, *"We, the Peoples of Europe . . .,"* FOREIGN AFF., Nov.-Dec. 2004, at 97.
    113. Craig S. Smith, *Europe's Direction Is Unclear, Much as Germany's Is After Vote*, N.Y. TIMES, Sept. 20, 2005, at A9.
    114. Philip H. Gordon, *Europe's Uncommon Foreign Policy*, INT'L SEC., Winter 1997-98, at 74. The basic vision of functionalism is that people enter into agreements for functional economic purposes, but there is a spill over into politics.
    115. The supranationalists want to create a European demos. Nicolaïdis, *supra* note 112. Nicolaïdis favors an intermediate position of "transnational pluralism." *Id.*

America are only too happy to point to this dysfunction in advancing their more robust interventionist thesis.

On this basis, Europe has been cast in a largely reactive position to the more aggressive United States. While the tragic consequences of America's aggressive policies in Iraq could serve to reinvigorate transnationalism, more traction in the European Union's transnational security commitments will surely be essential. This might better be targeted toward peacekeeping efforts. Work to build a more forceful EU intervention regime to deal with humanitarian crises would surely advance this effort. A common ground with liberals in America and a dialogue with Asia will be essential. Without more forceful engagement, the European Union risks its own marginalization in the growing intervention debate. If China is also marginalized, the danger that the United States will continue to go it alone on the development of intervention norms is great. With this in mind, it is important to consider the leading options for transforming the intervention regime.

III. "CONSTITUTIVE APPROACH": THE TWO-TRACK SOLUTION

As noted above, this Article offers up a two-track model for addressing humanitarian crises: reform of the U.N. regime at the global level and, on the second track, the constitutive development of regional institutions. At the global level, any effort to devise an improved intervention regime should begin with the various studies and reports leading up to the 2005 World Summit. Though the outcome of that summit has not lived up to the hopes embodied in these reports, there can be little doubt that the multiyear and multinational effort leading up to the summit produced the best effort at addressing differences discussed above on a global level.

The most substantial formal conceptual effort to resolve the debate over humanitarian intervention is embodied in the "responsibility to protect," first articulated in the *Canadian Report*.[116] After global consultations, a blue-ribbon panel of leading international experts recommended shifting the emphasis in the humanitarian intervention debate from a negative focus on exclusion—nonintervention—to a positive emphasis on the responsibilities that attach to principles of sovereignty and nonintervention.[117] It was felt that by elevating the "responsibility to protect" and deemphasizing the permissibility of

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116. *See* CANADIAN REPORT, *supra* note 27; *see also* Gareth Evans & Mohamed Sahnoun, *The Responsibility To Protect*, FOREIGN AFF., Nov.-Dec. 2002, at 99.

117. Evans & Sahnoun, *supra* note 116.

intervention, the objectionable quality of humanitarian intervention may be reduced.[118]   This is done by first emphasizing the responsibility of individual states to protect their own citizens and people within their territory.[119]   It is recognized that only when there is a failure in this respect, either by the state harming its own people or by failing to protect them from violence perpetrated by others, should the international community become involved in exercising the responsibility to protect. This international collective responsibility is to be exercised where possible by U.N. institutions in accordance with the U.N. Charter. This notion of responsibility to protect has now been embraced, if in a somewhat thin version, by the United Nations in the 2005 World Summit Outcome and may now point to a way forward that combines elements of the old sovereigntism with European transnationalism.[120]

        The *Canadian Report* also recognized that sometimes the Security Council may be immobilized by the veto power of the five permanent members.[121]   In such cases, the *Canadian Report*—and the *2004* and *2005 U.N. Reports*, though not so explicitly the 2005 World Summit Outcome—recommends that the permanent members of the Security Council agree to withhold the use of their veto power unless one of the permanent member's vital interests is at stake.[122]   If this admonition fails to secure an adequate response to a pending humanitarian crisis, the *Canadian Report* acknowledges that a regional response may be legitimate, but only after first seeking and failing to get Security Council approval.[123]   In such regard, the *Canadian Report* appears to open the door to acting first and requesting approval only after the regional actor has exercised its responsibility to protect through intervention. It articulates a variety of standards in determining the occasions for such intervention.[124]   Shifting the emphasis from intervention to responsibility moves the argument forward. It is not clear, however, if this will be enough to satisfy the most ardent objections of countries such as China and Russia, which seek to defend a strong notion of sovereignty and a central role for the Security Council.

        The "responsibility to protect" thesis was taken up in the *2004* and *2005 U.N. Reports*.[125]   This language was also adopted in the 2005 World

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    118.   *See id.*
    119.   *See id.*
    120.   2005 World Summit Outcome, *supra* note 3, ¶¶ 138-139.
    121.   CANADIAN REPORT, *supra* note 27, at 6.19-.21.
    122.   *Id.* at 8.29.
    123.   *Id.* at 6.31-.35.
    124.   *Id.* at 4.18-.43.
    125.   *2004 U.N. Report, supra* note 1; *2005 U.N. Report, supra* note 2.

Summit Outcome, though in a rather thin textual version.[126] One should understand this adoption to include the earlier elaborations in the reports where the concept was invented and given meaning. Given the concept's pedigree, it likely represents the best vision for U.N. reform under the current global circumstances. The product of a blue-ribbon commission appointed by Secretary-General Annan, the *2004 U.N. Report* was a response to the perceived crisis of confidence in the United Nations after the Iraq debacle. While its scope broadened from the humanitarian-crises focus of the *Canadian Report* to the issue of international security, the *2004 U.N. Report* largely concurs with the *Canadian Report*'s conclusions. The *2004 U.N. Report* emphasizes that the principle of nonintervention "cannot be used to protect genocidal acts or other atrocities."[127]   It also broadens the notion of threats to international security to which the Security Council might respond. In their full elaboration of this concept, the *2004* and *2005 U.N. Reports* list five criteria to be considered in authorizing an intervention: "seriousness of the threat," "proper purpose," "last resort," "proportional means," and "balance of consequences."[128]

The *2004* and *2005 U.N. Reports* offer further reforms that were not taken up in the 2005 World Summit Outcome but seem minimal to devising an effective global intervention regime. Both the *2004* and *2005 U.N. Reports* include a recommendation for reform of the Security Council, either by creating a second tier of permanent members or by expanding the overall nonpermanent membership, in both cases increasing the overall membership to twenty-four.[129] The reports urge, in accordance with U.N. Charter article 23, that participation in decision-making should be greater for those who contribute most to the United Nations.[130] Though the *2004* and *2005 U.N. Reports* offered an improved consensus model, they still came up short. The problem is that they both appear timid when it comes to altering the veto powers of the existing five permanent members—one of the chief sources of U.N. immobility. They essentially recommend that such veto power be left intact and that

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126.   2005 World Summit Outcome, *supra* note 3, ¶¶ 138-140.

127.   *2004 U.N. Report*, *supra* note 1, ¶ 200.

128.   *Id.* ¶ 207; *2005 U.N. Report*, *supra* note 2, ¶ 126.

129.   *2004 U.N. Report*, *supra* note 1, ¶¶ 252-253; *2005 U.N. Report*, *supra* note 2, ¶¶ 169-170. Two models in the alternative were advanced: Model *A* would create six new permanent members (in addition to the existing five) with no veto and three new two-year term nonpermanent seats for a total of twenty-four; Model *B* provides for no new permanent members but creates a new category of eight four-year renewable-term seats and one new two year nonpermanent (and nonrenewable) seat for a total of twenty-four. *2005 U.N. Report*, *supra* note 2, ¶ 170.

130.   *2005 U.N. Report*, *supra* note 2, ¶ 169(a).

any new permanent members not be given such power.[131]   At the same
time, the seeming expansion of regional options that sometimes go
around the Security Council, as suggested in the *Canadian Report*,
appear diminished—even more so in the 2005 World Summit
Outcome.[132]   The *2004* and *2005 U.N. Reports* outline a more proactive
role for regional institutions under U.N. guidance, but do not appear very
proactive in efforts to expand regional regimes and capacity.[133]

     Respecting the right of self-defense under U.N. Charter article 51,
both the *2004* and *2005 U.N. Reports* and the 2005 World Summit
Outcome held the line on the American efforts to expand the notion of
preemptive self-defense to a dangerous level of unilateralism.[134]   Such
military adventurism—of the type advanced in the new sovereigntism—
is precisely what the U.N. Charter has long aimed to avoid.   The *2004
U.N. Report* acknowledges that the right of self-defense from imminent
attack has long existed under the current language of the U.N. Charter,
"as long as the threatened attack is *imminent*, no other means would
deflect it and the action is proportionate."[135]   For defense from
nonimminent future attacks, the report suggests that Security Council-
approved preventive intervention is the best route.[136]

     Though highlighting many of the important factors that contribute
to current international security problems and making moderate
suggestions for improvement, the *2004* and *2005 U.N. Reports* appear to
come up short in suggesting the kinds of substantial changes required to
seriously address the United Nations' current response limitations.   The
2005 World Summit Outcome does even less.   In my view, these
limitations were not evident in the Security Council's failure to support
the U.S. invasion of Iraq—where withholding support seemed entirely
appropriate based on the evidence presented—but are evident in
circumstances such as the current humanitarian crisis in Darfur, Sudan.
The Security Council has sometimes been immobilized by the veto of the
permanent members and by the resource difficulties discussed above.
The *2004* and *2005 U.N. Reports* and the 2005 World Summit Outcome
fail to sufficiently address these problems by attacking the causes of that

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     131.   *2004 U.N. Report*, *supra* note 1, ¶ 256; *2005 U.N. Report*, *supra* note 2, ¶ 170.
     132.   The *2004 U.N. Report* does appear to anticipate regional responses with prior Security
Council approval, though "recognizing that in some urgent situations that authorization may be
sought after such operations have commenced." *2004 U.N. Report*, *supra* note 1, ¶ 272(a).
     133.   *2004 U.N. Report*, *supra* note 1, ¶¶ 270-273; *2005 U.N. Report*, *supra* note 2, ¶¶ 213-
215.
     134.   *2004 U.N. Report*, *supra* note 1, ¶ 188; *2005 U.N. Report*, *supra* note 2, ¶ 124.
     135.   *2004 U.N. Report*, *supra* note 1, ¶ 188.
     136.   *Id.* ¶¶ 189-191; *2005 U.N. Report*, *supra* note 2, ¶ 125.

immobility or by opening up more fully regional avenues around it. A significant reform in both U.N. reports and ultimately in the 2005 World Summit Outcome is the establishment of a new Peacebuilding Commission and a Human Rights Council.[137] But the project of giving life to these institutions remains.

Overall, the *2004* and *2005 U.N. Reports* provide a more thorough analysis of the causes of conflict and tend to point the way forward. While the 2005 World Summit Outcome comes up considerably short of this vision, the vision remains for future deliberation at a time when U.N. members feel a greater sense of urgency. The limitations of these efforts to date have clearly been shaped by the different worldviews of the major powers discussed above. This was immediately evident by the reluctance of the major powers to degrade their level of ultimate control embodied in the veto power of the five permanent members of the Security Council. China and the United States quickly rejected meaningful reform of the Security Council.[138] The failure to adequately address the resource difficulties may likewise be a consequence of skepticism about expanding the intervention regime in the context of humanitarian crises. The U.S. "new sovereigntist" objection to constraints on the notion of "preemptive" or "preventive" self-defense also poses a challenge to proposed U.N. reforms. The continued objection of the United States, China, and Russia to the International Criminal Court is part and parcel of this resistance. The proposed U.N. reforms, though likely the best-case reform scenario, seem set to remain out of reach for some time to come. Other crises that now plague the United Nations—for example, the crisis over the Iraq oil-for-food program—have certainly facilitated resistance to reform.[139] After the 2005 World Summit, the limitations of the current U.N. reform agenda are apparent. This points to the merits of the two-track solution suggested in this Article: continued efforts at

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137. *2004 U.N. Report*, *supra* note 1, ¶¶ 261-265; *2005 U.N. Report*, *supra* note 2, ¶¶ 114-119; 2005 World Summit Outcome, *supra* note 3, ¶¶ 157-160. The abolition of the Human Rights Commission and its replacement by a Human Rights Council, as originally proposed in the *2005 U.N. Report*, if implemented in the full spirit of that report, can go a long way toward addressing concerns that give rise to humanitarian crises. *2005 U.N. Report*, *supra* note 2, ¶¶ 181-183.

138. Warren Hoge, *China Rejects Plans To Expand Security Council*, N.Y. TIMES, Apr. 7, 2005, at A3. This move was no doubt motivated by Chinese concern with an increased Japanese role. One would hope for future flexibility.

139. *See* INDEP. INQUIRY COMM. INTO THE U.N. OIL-FOR-FOOD PROGRAMME, SECOND INTERIM REPORT (2005), http://iic-offp.org/documents/InterimReportMar2005.pdf. There have been some worries that Secretary-General Annan undermined his reform efforts with these problems. Warren Hoge, *Some Question Annan's Viability at U.N.*, N.Y. TIMES, Mar. 31, 2005, at A6. The problem of who would be selected as permanent members to the Security Council also appeared to undercut reform—for example, China's objection to Japan. Joseph Kahn, *If 22 Million Chinese Prevail at U.N., Japan Won't*, N.Y. TIMES, Apr. 1, 2005, at A4.

global reform at the U.N. level more or less in accordance with the *2004 and 2005 U.N. Reports* and regional constitutive initiatives.

In the face of the persistent limitations of the best-case U.N. reform agenda and the historical global regime, a supplemental reform route—on the second track—is to focus on more proactive security and development alliances at the regional level.[140] This constitutive approach, as with the broader U.N. initiative, envisions broad-based constitutive initiatives at the regional level that go beyond just addressing standards for the use of force. A broad-based approach to human security that includes human rights and political and economic development must underlie any regime to anticipate and address humanitarian crises and other security issues. Such proactive engagement of regional states and institutions in constructing security communities can supplement global reform efforts. Foundations for such regional reform efforts have already been laid in the EU, the AU, and the OAS, as well as in subregional communities. At this stage, a more concerted effort at both the global and regional level to construct security communities with specific standards of intervention and support is needed. A developed region such as the EU and the Atlantic Alliance will surely be able to move forward on its own and set an example for others. Other regions will require considerable support, including developmental support and humanitarian initiatives at the global U.N. level.

States in several regions have already agreed in considerable detail on regional standards of behavior regarding human rights and their enforcement. More specifically, in the security area, such agreements may specify concerted responses and ostracism for regimes that overthrow existing democracies within the regional community. Such agreements may eventually set up specific regional standards for intervention that relate sovereign rights of nonintervention to the maintenance of democracy and human rights. Soft intervention may more typically be employed, but such agreements may go further, specifying the possibility of military intervention in the face of humanitarian crises.

One may characterize this as a constitutive approach because it frames in advance the conditions for addressing urgent regional concerns and crises. Such a constitutive approach may embody the notion of a

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140. *See* FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); Doyle, *supra* note 24, at 1151-56; Louis E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance To Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329 (1995); Wippman, *supra* note 31.

"responsibility to protect" and specifically address regional standards for humanitarian intervention when that responsibility is not satisfied. These standards may also embody requirements respecting democracy and human rights, as these norms are the contemporary embodiment of the classic notion of self-determination that underlies the classic nonintervention principle.

In some ways, this constitutive approach addresses the concerns of all three camps discussed in this Article. It both specifies a basis for nonintervention and constructs a multilateral community for proactive responses to crises and security threats. Some supporters of the "new sovereigntist" paradigm in the United States have admired the EU, as a constitutive model for a pre-state in the American federal tradition.[141] Such highly developed regional institutions may address neorealist and neoliberal concerns with the potential of effective institutional constraints on self-interested autonomous state behavior. The use of prior consent by sovereign states, in the legal positivist paradigm, may also address the sovereign nonintervention concerns of such "old sovereigntist" as China. Of course, this model represents the best efforts of the transnationalist paradigm and offers opportunity for constructive responses to security concerns of the developed North. With its higher level of political and economic development, the Atlantic Alliance could be in the front row of shaping this development. Until significant numbers of states are liberal democracies, however, such standards will remain variable and developmental in orientation for much of the developing world.

In conceptual terms, the constitutive approach combines the Kantian notion of a federation of republics committed to peace and Mill's commitment to self-determination and nonintervention, with certain intervention exceptions that justice and the just war tradition permit. A community of democratic states would be able to limit principles of nonintervention in respect of states that do not maintain basic freedoms and have committed or allowed atrocities. As highlighted in the *2004* and *2005 U.N. Reports*, precommitment strategies would allow a regional community to address the causes of humanitarian crises before they occur. Democracy and human rights can contribute measurably to conflict avoidance and nonviolent means of resolution. At the same time, a democratic state with full protection of rights would be less likely to commit atrocities at home. Local citizens might be deemed to want democracy to be restored if it were lost.

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141. *See* GOLDSMITH & POSNER, *supra* note 61, at 126.

Where a foundation has been laid to insure a reliable process of application, members of democratic regional alliances may be better suited to take actions against states that do not maintain democracy and slip into humanitarian crises. They certainly have the greatest interest in the outcome, provided there are sufficient safeguards in application. Underdeveloped regions will still require considerable outside resource support. Under this argument, nonintervention would survive—as would sovereignty—but its full protection within a community of states would be contingent on requirements of democratic governance and human rights protection. Regional institutions could be developed to monitor these requirements. In the worst case scenario, even a regional criminal court may offer avenues to dealing with impunity in a regionally sensitive way.

IV. DEVELOPING CONSENSUS IN A DISPARATE WORLD

The differing worldviews reflected in this discussion pose a great challenge to any efforts to construct a better common global response to humanitarian crises. It seems that the Chinese/Asian worldview is the most conservative and committed to the classic legal positivist notions of sovereignty and nonintervention—what I have labeled the "old sovereigntism." The United States and some of its allies seem guided by a similar realist and legal positivist worldview. The "new sovereigntist" view, though still very much contested in America, offers up a defense of sovereign prerogatives but one little constrained by the nonintervention principle, at least as to actions by the only superpower. This concurs with parts of the Chinese/Asian view but is severely at odds with it in respect to international intervention. In this competition of ideas, a conflicted European Union (along with the political opposition in America) offers the most Kantian worldview. The challenge for the European Union and those committed to the multilateral norms that accompany this view is to put more traction behind this perspective both regionally and globally. For the European Union, this means consensus building and a willingness to stake resources behind this project. Such consensus must begin at home.

The untenable character of the aggressive "new sovereigntist" approach favored by the current U.S. administration is obvious. Unilateral action and disregard for international law by a great power may undermine the credibility and even legitimacy of its moral position. This new sovereigntist position at once challenges extreme or even terrorist action by communal groups while engaging in aggressive and occasionally indiscriminate attacks or enforcement measures on its own.

It seems to hold others to the standards of international law while excusing itself. This hypocritical aspect brings particular resonance to claims by countries like China that promotion of human rights and interventionist attempts to override sovereignty are merely Western imperialism. In doing so, it certainly undermines the global commitment to democracy and human rights that the United States frequently professes. It also undermines the potential for collective action and its embodiment in effective international law.