



**NATIONALISM, HUMAN RIGHTS, AND THE PROSPECTS FOR PEACE:  
AN ESSAY ON SOVEREIGN RESPONSIBILITIES**

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# Nationalism, Human Rights, and the Prospects for Peace: An Essay on Sovereign Responsibilities

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*This essay examines novel threats to peace – social and political threats as well as military and technological. It worries that familiar conceptions of state sovereignty cannot sustain a legal order capable of meeting those threats, not even if we understand sovereignty as responsibility to protect human rights. The essay tentatively proposes that recent efforts to reformulate state sovereignty as responsibility to humanity offer a better hope. Under this reformulation, states must take into account the interests of those outside their sovereign territory as well as those of their own people – in particular, the shared interest in subduing dire threats to world peace.*

*Responsibility to humanity – here termed ‘R2H’ for short – raises difficult practical and philosophical questions. Some may fear that R2H would become a Trojan horse for powerful interests wishing impose their will on the less powerful. The essay argues that these fears misunderstand what R2H requires. Alternatively, R2H may sound utopian, in an era of waning trust in internationalism and an upsurge of reactionary nationalism. In response, I argue that reactionary nationalism is itself a dire moral and practical mistake – a symptom of our current ills, not a cure.*

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This essay originated as a keynote address at the 2017 IVR “Peace Based on Human Rights” congress in Lisbon, and again at the “Beyond the State” conference at McMaster University and the “Sovereigns as Trustees of Humanity: Stocktaking” conference at the Lauterpacht Centre for International Law, Cambridge University. I also presented it at the colloquium of the Center for Transnational Legal Studies. In this published version, I have tried to maintain some of the personal style of the spoken address.

Thanks are due to all who participated in these events and offered comments and critiques, and especially to Doyle Hodges, Sarah Nouwen, and Antje Wiener for detailed comments. Thanks as well to Katja Hering and David Wolitz for useful critique, and to Evan Criddle and Evan Fox-Decent for clarifications of their theory of fiduciary obligations in international law. My debt to Eyal Benvenisti will be apparent throughout the essay; he introduced me to his theory of sovereigns as trustees of humanity in 2011. Finally, I wish to thank colleagues at the U.S. Naval Academy’s Stockdale Center for Ethical Leadership: Charlotte Asdahl, Ed Barrett, Andrew Bell, Adam Betz, Chris Eberle, Marcus Hedahl, David Lefkowitz, Mitt Regan, Michael Skerker, and Cameron Wegener. Many of these ideas originated in our year-long research seminar on the future of armed conflict conducted at the Stockdale Center in 2016-17.

Near the end of the Cold War, the historian John Lewis Gaddis coined the phrase “the Long Peace” to name the surprising fact that there had been no wars among the great powers in forty years.<sup>1</sup> The Long Peace has now lasted more than seventy years, and during much of that time armed conflict and war deaths declined. Unhappily, since 2010 that trend has reversed, and violent conflicts have steadily become more frequent and more lethal.<sup>2</sup> The essay that follows is born of anxiety about novel threats to peace – social and political threats as well as military and technological. It worries that our familiar conceptions of state sovereignty cannot sustain a legal order capable of meeting those threats, not even if we understand sovereignty as responsibility to protect human rights. I tentatively propose that recent efforts to reformulate state sovereignty as responsibility to humanity offer a better hope. Under this reformulation, states must take into account the interests of those outside their sovereign territory as well as those of their own people – in particular, the shared interest in subduing dire threats to world peace.

Responsibility to humanity – I call it ‘R2H’ for short – raises difficult practical and philosophical questions, which I shall try to answer. Some readers may fear that R2H is a Trojan horse that would allow powerful interests to impose their will on those less powerful. I shall argue that these fears arise from a misunderstanding of what R2H requires. To others, such a utopian-sounding proposal may seem like exactly the wrong medicine, at a time of waning trust in internationalism and an upsurge of reactionary nationalism. In response, I argue that reactionary nationalism is itself a dire moral and practical mistake – a symptom of our current problems, not a cure.

My approach in this essay is historical, philosophical, and unapologetically speculative; but the threats I describe are all too real. I begin with a brief review of familiar history: the creation of the postwar international order, centered on peace and human rights, and the old and new concepts of sovereignty entangled with it (sections 1 through 3). Next I survey the landscape of contemporary threats to peace (sections 4 and 5). In sections 6 through 9 I introduce R2H and explore some practical and philosophical questions it raises. Finally, in section 10 I examine the dangers of reactionary nationalism.

### **1. The UN order and the rights-peace hypothesis**

The loveliest and most peaceful spot in my home city of Washington is an old mansion called Dumbarton Oaks. In 1940 its owners donated it to Harvard University, and today it is one of Washington’s beloved (if lesser known) tourist attractions. It houses a jewel-like museum of Byzantine and Pre-Columbian art and a large Mediterranean-style garden of surpassing beauty. Igor Stravinsky composed his Chamber Concerto in E Flat while he was a guest at Dumbarton Oaks.

In autumn of 1944, days from the end of World War II, Dumbarton Oaks hosted another kind of creation, aiming at another kind of peacefulness: there the first postwar conference to

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<sup>1</sup> John Lewis Gaddis, *The Long Peace: Inquiries into the History of the Cold War* (Oxford University Press, 1987).

<sup>2</sup> For the most recent data, see United Nations; World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (Washington, DC: World Bank, 2018), <https://openknowledge.worldbank.org/handle/10986/28337>, 11-19.

create the United Nations took place. Less than a year later, the UN Charter was adopted in San Francisco.

Chillingly, the Dumbarton Oaks meetings convened exactly two weeks after the United States dropped an atomic bomb on Hiroshima. Perhaps it was hypocrisy for peacemakers to meet in the capital of a country that had unapologetically dropped the bomb. But we know that hypocrisy is the homage that vice pays to virtue.

In the words of the UN Charter, the UN's aim is "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind." "Untold sorrow" was plain truth, not rhetoric. The Second World War killed 60 million people, three percent of the world's population; this, less than thirty years after World War I killed 15 million. Untold sorrow was written on landscapes and cenotaphs in five continents.

The Preamble goes on to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." The emphasis on human rights and human dignity was also exactly right: close to 12 million of the war deaths were intentional murders of helpless civilians and prisoners of war. And yet the significance of human rights was not immediately obvious, and giving human rights a central role came late in the Charter's drafting process. The Dumbarton draft barely mentioned human rights. At San Francisco, the South African diplomat Jan Smuts introduced human rights into the Preamble, and connected it with the "sanctity" of human life. Virginia Gildersleeve, of the U.S. delegation, changed "sanctity" to "dignity."<sup>3</sup> The Preamble draws no explicit connection between the peace and human rights pillars of the Charter.

Connection of a sort came four years later, when the UN's General Assembly adopted the Universal Declaration of Human Rights. The UDHR's Preamble begins as follows:

[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Why is respect for human dignity and human rights the foundation of peace? Presumably, the argument is that without such respect, nothing will constrain our aggressive drives except brute force and fear, undermining the Charter's prohibition on the threat or use of force.<sup>4</sup> The Declaration goes on to argue that without protection of their human rights, oppressed people will be "compelled to have recourse to rebellion." Rebellions are seldom a purely internal matter, and they jeopardize international peace in several ways. Tyrannies often try to forestall rebellions with distracting military adventures; then, when rebellions break out, neighboring states may become embroiled, sometimes to protect their own nationals in the conflict zone, sometimes to protect their borders from spill-over violence and waves of refugees. These are arguments that domestic respect for human rights is a necessary condition for peace, both domestically and internationally.

The UN's founders apparently didn't think that domestic respect for human rights is a sufficient condition for peace: their principal peace-keeping devices consist of the prohibition on the threat or use of force by states against other states, backed by Security Council powers to act

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<sup>3</sup> Sam Moyn, "Why Is Dignity in the Charter of the United Nations?", *Humanity Journal*, June 10, 2014, <http://humanityjournal.org/blog/why-is-dignity-in-the-charter-of-the-united-nations-2/>.

<sup>4</sup> UN Charter, art. 2(4).

against threats to peace.<sup>5</sup> But the prominent place of human rights in the Charter perhaps suggests that the framers saw domestic rights fulfillment as a contributor to peace, if only by damping down the discontents that motivate rebellion and war. Call the proposition that fulfilling human rights will contribute to peace the *rights-peace hypothesis*. Over the intervening decades, researchers have found at least some confirming evidence that states that do the best job of protecting human rights domestically are also less belligerent in foreign affairs.<sup>6</sup>

This is emphatically not to suggest that human rights have only instrumental importance, namely helping maintain peace (if they do). If human rights are supposed to be an “instrument” of anything, it is furthering human dignity and human well-being; some argue that the value of human rights is intrinsic, not instrumental.<sup>7</sup> Furthermore, viewing human rights through the lens of peace and its preservation could lead to lax enforcement of rights whenever enforcement threatens the peace – for example, under-enforcing the rights of refugees because full enforcement of their human rights provokes political turmoil in states whose citizens don’t want them. Peace and human rights are distinct pillars of the UN Charter for good reason.<sup>8</sup>

Even so, the UDHR, like the two binding human rights covenants, does assert that human rights recognition is “the foundation of peace in the world,” and that is the rights-peace hypothesis. Put in other words, even if protecting the peace is not the primary purpose of a human rights regime, it is very much a secondary purpose – a hoped-for collateral benefit.

Though they were loath to admit it, the UN’s framers no doubt understood that protecting human rights would require more than creating an international organization of states. It would require those states to cede at least a few of their sovereign powers.<sup>9</sup> Not only would they

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<sup>5</sup> It is worth remembering that in its original conception, the United Nations would have its own military forces, contributed by member states, under the supervision of a Military Staff Committee. UN Charter, art. 43-47. However, “Cold War dynamics and the early rejection of an autonomous, permanent UN military force prevented the MSC from fulfilling its intended purpose of serving as the UN’s global defence department.” Webpage of the UN Military Staff Committee, <https://www.un.org/sc/suborg/en/subsidiary/msc>.

<sup>6</sup> Mary Caprioli & Peter F. Trumbore, “Human Rights Rogues in Interstate Disputes, 1980-2001,” *Journal of Peace Research* 43(2) (2006): 131-48; Caprioli & Trumbore, “Identifying ‘Rogue’ States and Testing Their International Conflict Behavior,” *European Journal of International Relations* 9(3)(2003): 377-406; David M. Sobek et al., “The Human Rights Peace: How the Respect for Human Rights at Home Leads to Peace Abroad,” *Journal of Politics* 68(3)(2006): 519-29; Timothy M. Peterson & Leah Graham, “Shared Human Rights Norms and Military Conflict,” *Journal of Conflict Resolution* 55(2): 248-73; Michael Tomz & Jessica L. P. Weeks, “Human Rights and Public Support of War,” draft Nov. 2015, at <https://web.stanford.edu/~tomz/working/TomzWeeks-HumanRights-2015-11-17.pdf>. This evidence is at best suggestive, however.

<sup>7</sup> On this point, see the overview of instrumental versus non-instrumental justifications of human rights in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, “The Philosophical Foundations of Human Rights: An Overview,” in Cruft, Liao, and Renzo, eds., *Philosophical Foundations of Human Rights* (Oxford University Press, 2015), 11-18.

<sup>8</sup> The other preambular pillars are promotion of the international law and promotion of “social progress and better standards of life in larger freedom.” UN Charter, Preamble.

<sup>9</sup> It might be objected that joining the UN by ratifying its Charter has no effect on sovereignty. It is no different from joining any other treaty: both are consensual exercises of the sovereign privilege of entering into binding treaties, and whatever obligations states undertake should be regarded as exercises of their sovereign power, not limitations of it. See *S.S. Wimbledon (U.K. v. Japan)*, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17), at 35. Why is joining the UN different? The answer is twofold. First, the Charter requires UN member states to carry out decisions of the Security Council (art. 25), so in effect the member states have granted the Council legislative power – a point that alarmed observers in connection with Resolution 1373, the post-9/11 Security Council decision that dictated a detailed list of anti-terrorist measures that states were bound to enact. U.N. Doc. S/RES/1373 (2001). See Stefan Talmon, “The Security Council as World Legislature,” *American Journal of International Law* 99 (2005): 175-193. Second, obligations under the Charter take precedence over obligations under any other international agreement (art. 103).

henceforth “refrain from the threat or use of force” against one another, they would place at least some enforcement powers in the hands of the Security Council. Eventually, through the core human rights treaties, most states bound themselves to honor human rights domestically, and some of those treaties created mechanisms of external monitoring and enforcement. To abandon even these smidgens of sovereignty – the privilege of launching wars and the privilege of violating the human rights of their own people – required states to step back from the fiercest forms of nationalism.

Today, the United Nations is only one node of a vast network of international organizations, NGOs, tribunals, treaty regimes, and regional bodies that together make up the postwar international order. Some are creatures of the UN, but most are not. I nevertheless speak of “the UN order” for short, as a symbol or synecdoche of an entire postwar international order. The point is that this order shares the UN’s founding aims of peace and human rights.<sup>10</sup>

Now I admit that I have just told a naïve and idealized story. Anyone who studies the diplomatic history quickly understands that there was a great deal of ruthless Machiavellian calculation involved in the UN project. In 1945, imperial powers had no intention of relinquishing their colonies, and great powers had no intention of letting weaker powers tell them what to do, nor to raise claims of economic justice against them.<sup>11</sup> Not all states shared the founding faith in individual human rights, and in the General Assembly vote on the UDHR, ten states refrained from voting or abstained. The philosophical basis of human dignity and human rights remains as contestable as ever; Jacques Maritain, surveying intellectuals and spiritual leaders on what the UDHR should contain, commented that “we agree about the rights but on condition no one asks us why.”<sup>12</sup>

I nevertheless want to take the UN Charter and UDHR language seriously. Even the most ruthless cynics sitting in Dumbarton Oaks and San Francisco were genuinely horrified by the untold sorrow of the war and wanted to do something so a world war would not happen again. And I believe that at least some of those ruthless cynics were genuinely nauseated by the assaults the human dignity they had witnessed in the war. Even if they didn’t believe the noble words they put in the Preamble, millions of their own people did and still do, and that creates a political check on governments.<sup>13</sup>

Today, the UN is beset by problems; it is weak, politically fractured, underfunded, at least slightly corrupt, and often helpless. And the UN order is under attack from many directions. That raises two fundamental questions for any discussion of international governance issues that shares the UN order’s axiomatic treatment of peace and human rights: What are the prospects for peace and human rights today? And does the rights-peace hypothesis have any continued plausibility, as many hoped in the optimistic 1990s? All of us know that the world today is in retreat from what is alternatively called “globalism,” “cosmopolitanism,” and “liberal

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<sup>10</sup> Steven Ratner argues that peace and human rights are the twin pillars of all morally defensible contemporary international law. Ratner, *The Thin Justice of International Law* (Oxford University Press, 2015).

<sup>11</sup> For a skeptical view of the UDHR’s world view, see Martti Koskenniemi, “The Preamble of the Universal Declaration of Human Rights,” in Gudmundur Alfredsson & Asbjørn Eide, eds., *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, 1999): 27-39.

<sup>12</sup> Jacques Maritain, *Human Rights: Concepts and Interpretations* (London: Wingate, 1949), 9.

<sup>13</sup> For careful assessment of the efficacy of human rights instruments, see Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press: 2009). Simmons argues that they are efficacious when they are able to mobilize locals.

internationalism.”<sup>14</sup> Some states commit grotesque human rights violations on a massive scale, without apology and with seeming impunity. Where does that leave us today?

One cause of anti-globalism is widespread fear that liberal internationalism poses a dark threat to national sovereignty. This has been a theme for Euroskeptics for many years, but we might date the rise of its political clout in Europe to June 2005, when in a national referendum Dutch voters rejected a proposed European constitution. This surprise was a first warning shot across the bows of a European unification project that until then had seemed nearly inevitable. On national sovereignty grounds, the United States bitterly rejects the ICC’s authority to prosecute U.S. nationals. Russia and China denounce criticism of their human rights records on sovereignty grounds.

Superficially, concern about sovereignty violations sounds like a legal objection, but it is really political rather than legal, because sovereignty is hardly a well-defined legal concept. In the complaint of one eminent international lawyer, Louis Henkin: “I don’t like the ‘S word.’ Its birth is illegitimate, and it has not aged well. The meaning of ‘sovereignty’ is confused and its uses are various, some even destructive of human values.”<sup>15</sup> Like it or not, though, the S word looms large in political discourse and the political imagination, and suspicion that a nefarious global order has plans to “take our sovereignty away” packs emotional power reminiscent of Freudian castration anxiety. Unsurprisingly, sovereignty conceptions sometimes drive legal arguments in unarticulated ways. It will be useful to delve more deeply into some of the varied meanings of sovereignty.

## 2. The sovereign state as peacekeeper

Three centuries before the construction of the UN order, another political innovation created an international order: the sovereign nation-state, epitomized in the Peace of Westphalia.<sup>16</sup> It too emerged from a horrific war and aimed to restore the peace. Even though it originated in Europe, the sovereign state proved easy to transplant: in the era of decolonization, former colonies understandably yearned for their own sovereignty. Today they guard it jealously, indeed just as jealously as the great powers guard theirs. The UN itself is based on the principle of sovereign equality.

Early state-making involved four elements: the consolidation of small political units into large ones; the accompanying creation (often by force) of an allegedly unitary “people” out of all the disparate local groups in the state’s territory; the replacement of overlapping jurisdictions by territorial states with exclusive and unlimited authority within their own territory; and the state’s monopoly over the legitimate use of violence. Hobbes called the result “that great LEVIATHAN, or rather, to speak more reverently, ... that *mortal god* to which we owe ... our peace and defence.”<sup>17</sup> By the nineteenth century, nationalism had become the ideology of the nation-state; it is the assertion of peoplehood and self-determination, and peoples without states yearn for mortal gods of their own. Sovereignty of this sort combines a domestic (or internal) principle giving the state the privilege not to be resisted by its own people with an international (or

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<sup>14</sup> For a pessimistic recent view, Bruce W. Jentleson, “The Liberal Order Isn’t Coming Back: What Next?”, *Democracy: A Journal of Ideas* 48, Spring 2018, <https://democracyjournal.org/magazine/48/the-liberal-order-isnt-coming-back-what-next/>.

<sup>15</sup> Louis Henkin, “That ‘S’ Word: Sovereignty, and Globalization, and Human Rights, Et Cetera,” 68 *Fordham L. Rev.* 1 (1999).

<sup>16</sup> Treaty of Münster, art. 64-65 (1648), [http://avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp).

<sup>17</sup> Thomas Hobbes, *Leviathan*, Michael Oakeshot, ed. (Oxford: Basil Blackwell, 1957), p. 112 (ch. 17).

external) principle granting states immunity against outside intervention. Together, domestic and international sovereignty constitute the two familiar faces of “Westphalian” sovereignty, sometimes labeled “sovereignty as control.” With it comes the consensualist model of international law that emerged in the 19<sup>th</sup> century, according to which states are bound only by those rules of international law to which they have consented.<sup>18</sup>

Nation-states waged brutal wars, but in fact the nation-state succeeded in reducing overall violence to an astonishing extent. There is surprising but powerful evidence that the modern era is the least lethal in human history, in no small part because of the efficacy of the nation-state in its Leviathan function of suppressing private violence as well as defending against public violence. Anthropological data indicates that death-rates from homicide were far higher in non- or pre-state societies than state societies.<sup>19</sup>

But, as we all know, the DNA of the sovereign state contained genes with deadly potential. Under the consensualist theory of international law, states retained the right to make war, unless they ceded the right of their own volition. With good reason, Kant likened international lawyers who endorsed this right to Job’s “sorry comforters” (Job 16:2), the three “friends” who explained to Job why his sufferings were justly inflicted.<sup>20</sup> Most dramatically, the state’s exclusive authority over its own people allowed it to turn against them and commit what we now call “crimes against humanity.” And the legal principle of sovereign equality (*par in parem non habet imperium*) meant that a state cannot be held to legal account by other states.<sup>21</sup> These enabled the nineteenth- and twentieth-century pathologies of sovereignty, culminating in the untold sorrow of the world wars, which the UN order, with its prohibition on the use of force, its emphasis on human rights, and its international tribunals, hoped to eradicate.

There are obvious and dramatic failures of the UN order to maintain the peace – in the 1990s Balkans, in Africa, in the Middle East, in Myanmar and the Philippines. But in comparison with other eras, the project of tweaking the DNA of Westphalian sovereignty succeeded. The databases compiled by the Oslo Peace Research Institute and the Uppsala Conflict Data Program show that both in number and deadliness, warfare declined dramatically in the UN era – although, as mentioned earlier, this trend has reversed since 2010. Annual battle

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<sup>18</sup> The standard, classic statement of the consensualist theory is the majority opinion in the *Lotus* decision of the Permanent Court of International Justice. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

<sup>19</sup> Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (Viking: 2011), Fig. 2-2, p. 49. Much in Pinker’s account is controversial. See, e.g., Herfried Münkler, “Steven Pinker: Gewalt: Alle Kurven weisen auf den ewigen Frieden,” *Frankfurter Allgemeine Zeitung*, Oct. 18, 2011; John Gray, “Steven Pinker is wrong about violence and war,” *The Guardian*, March 13, 2015. Among the best-known critiques is the claim by Nassim Taleb that Pinker is “fooled by randomness” and “the Long Peace is a statistical illusion” – see the technical papers by Taleb and his colleagues that he has posted at <http://www.fooledbyrandomness.com/longpeace.pdf>. Pinker posted a nasty response, “Fooled by Belligerence: Comments on Nassim Taleb’s ‘The Long Peace is a Statistical Illusion,’” [https://stevenpinker.com/files/comments\\_on\\_taleb\\_by\\_s\\_pinker.pdf](https://stevenpinker.com/files/comments_on_taleb_by_s_pinker.pdf). But the Pinker controversy mostly concerns his overall theory and interpretations of the data, not the data itself, and in particular not the data referred to here.

<sup>20</sup> Immanuel Kant, *Toward Perpetual Peace* (1795), 8:355, in Kant, *Practical Philosophy (The Cambridge Edition of the Works of Immanuel Kant)*, Mary J. Gregor ed. and trans., (Cambridge University Press: 1996), 326.

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

deaths have fallen off by 90% since the late 1940s.<sup>22</sup> Today's conflict-ridden world remains, astonishingly, among the most peaceful in recorded history.

An important caution is in order here. The absence of direct physical violence (so-called negative peace) by no means indicates the absence of structural violence (positive peace).<sup>23</sup> My claim that today's world is among the most peaceful in recorded history refers solely to negative peace; we are still a long way away from positive peace.

### 3. Sovereigns as robbers, gods, and protectors

We might think that the state is an improbable instrument for keeping peace. One classic view holds that a state is nothing but a criminal enterprise that has defeated other criminal enterprises and been legitimated by time and habit. In *The City of God*, Augustine writes: "What are kingdoms but great bands of robbers? What are bands of robbers themselves but little kingdoms? ... If ... [a band of robbers] acquires territory ... and subjugates peoples, it assumes the name of kingdom more openly."<sup>24</sup> David Hume concurs: "Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both." In Hume's eyes, people obey Leviathan out of unreflective habit, not consent, and Leviathan secures its dominion "by employing, sometimes, violence, sometimes false pretences."<sup>25</sup> Charles Tilly updates Augustine's robber theory with a different criminal analogy: "If protection rackets represent organized crime at its smoothest, then war risking and state making – quintessential protection rackets with the advantage of legitimacy – qualify as our largest examples of organized crime."<sup>26</sup> States put their people at risk of war and then extort wealth and obedience as the price of protection.

Call this cynical line of thought the *deflationary view of the state*. It certainly corresponds with one strand of international law – the doctrine that sovereignty over a territory requires effective control, with no additional requirement of good governance or even mediocre governance.<sup>27</sup> Even deflated states with no concern for their residents' well-being or rights enjoy sovereign equality with other states so long as they effectively control their territory and people.

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<sup>22</sup> Pinker, p. 302. See the UDCP/PRIO data summarized by Pinker on pp. 298-305. See also Katherine Sikkink, *Evidence for Hope: Making Human Rights Work in the 21<sup>st</sup> Century* (Princeton University Press, 2017), 186-88. For detailed data on intrastate wars, see Jeffrey S. Dixon & Meredith Reid Sarkees, *A Guide to Intra-State Wars: An Examination of Civil, Regional, and Intercommunal Wars, 1816-2014* (Sage Publications, 2016), a product of the long-running Correlates of War project.

<sup>23</sup> On the distinction between negative and positive peace, see, e.g., Devon Curtis, "Introduction: The Contested Politics of Peacebuilding in Africa," in Devon Curtis & Gwinyayi A. Dzinesa, eds., *Peacebuilding, Power, and Politics in Africa* (Ohio University Press, 2012), 6.

<sup>24</sup> *The City of God*, Bk. IV, ch. 4, R. W. Dyson, ed. & trans. (Cambridge UP: 1998), 147-48.

<sup>25</sup> Both quotes from David Hume, "Of the Original Contract," in *Essays: Moral and Political*, Eugene F. Miller ed. (Liberty Classics: 1985), 471.

<sup>26</sup> Charles Tilly, "War Making and State Making as Organised Crime," in *Bringing the State Back In*, Peter Evans, Dietrich Rueschemeyer, & Theda Skocpol, eds. (Cambridge UP: 1985), 169.

<sup>27</sup> The classic legal statement is Max Huber's *Island of Palmas* arbitral decision, 2 R. Int'l Arb. Awards 869 (Perm. Ct. Arb. 1928). The dispute is noteworthy: it was an argument between the United States and the Netherlands over who owns this tiny island (also known as Miangas) located between the Philippines and Indonesia. The U.S. argument was based on the idea that Spain "discovered" the island in 1526 and claimed it, ceding it to the United States after the Spanish-American War. The Dutch claim was that it had ruled the East Indies, including Miangas, since 1677. Huber found for the Netherlands because it had exercised effective control; and by that (he explains) is meant effective protection of foreign interests. Even the bare hint that the 750 residents of Miangas should have a

At the other extreme from the deflationary view are those who identify the state with the nation (that is, the people), and view it with reverence, as if it were a god – a political theology closely identified with nationalism.<sup>28</sup> Call this the *romantic view of the state*, although one might also label it the *overinflated view of the state*. All too frequently, the opposites meet: tyrants and kleptocrats invoke the romance of the nation-state as a smokescreen for what is in reality a large criminal enterprise.

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

State sovereignty, in its most basic sense, is being redefined .... The State is now widely understood to be the servant of its people, and not vice-versa. At the same time, individual sovereignty – and by this I mean the human rights and fundamental freedoms of each and every individual -- ... has been enhanced.<sup>29</sup>

This view of state legitimacy through human rights is usually called “conditional sovereignty,” or “sovereignty as responsibility” (the latter term coined by Francis Deng three years before Annan's speech).<sup>30</sup> These are subtly different concepts, but for our purposes we can treat them both as articulations of Annan's reformulation of sovereignty.<sup>31</sup> The condition of sovereignty under this conception is that states are servants of their peoples, and in particular, protectors of their human rights; and sovereign responsibility is a responsibility to respect, protect, and fulfill its own peoples' rights.

An important caveat is in order. Deng's and Annan's reformulation of sovereignty as responsibility does not mean that despotic states that violate the condition will not enjoy international recognition of their statehood. Diplomacy with despotic or otherwise illegitimate governments is just as crucial as it is with those that are servants of their people. The criteria of statehood must therefore remain those of the 1933 Montevideo Convention: a permanent population in a defined territory, a government (good, bad, or ugly), and capacity to enter into relations with other states.<sup>32</sup> But recognizing a despotism as a state is not the same as conceding a sovereign right of its government to behave despotically.<sup>33</sup> Like all states, despotisms are protected under the Charter from military aggression, so declaring that they fail the test of sovereignty as responsibility does not license a free-for-all for invaders. But they cannot invoke

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say is absent from the decision – as is the idea that effective control might require good governance from the inhabitants' point of view.

<sup>28</sup> Some have argued that statism is not a secularized theology but the opposite: a deification of the secular state. E.g., Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton UP, 1957); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922); Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia UP: 2011) and *Sacred Violence: Torture, Terror, and Sovereignty* (U. Michigan Press: 2009).

<sup>29</sup> Secretary General Address, Sept. 20, 1999, at <https://www.un.org/press/en/1999/19990920.sgsm7136.html>.

<sup>30</sup> Francis M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings, 1996).

<sup>31</sup> “Conditional sovereignty” suggests that the baseline concept of sovereignty remains Westphalian, with side-constraints – conditions – layered onto it. “Sovereignty as responsibility” is closer to Deng's and Annan's idea, that baseline sovereignty itself has metamorphosed away from Westphalian sovereignty.

<sup>32</sup> Montevideo Convention on the Rights and Duties of States (1933), art. 1.

<sup>33</sup> I am grateful to Miriam Gur-Arye and Carlos Vazquez for suggesting this clarification.

sovereignty to shield them from lesser forms of international pressure, for example “outcasting” them for their human rights failings.<sup>34</sup>

The Deng-Annan formulation of sovereignty is contemporary, as is the focus on human rights; but the idea is much older. Earlier I quoted Augustine’s memorable description of kingdoms as great bands of robbers – but I intentionally left off the beginning of his sentence: “*Justice removed then, what are kingdoms but great bands of robbers?*” Just kingdoms are a different matter. James Turner Johnson has argued that the notion of sovereignty as responsibility for the common good has medieval roots.<sup>35</sup>

Even so, sovereignty as responsibility struck many as a dramatic change from the conception of sovereignty that had prevailed for more than a century. The diplomats in the audience for Annan’s speech gave it a chilly reception – perhaps the best evidence of how novel it seemed.

#### 4. The new threats to peace

Can the sovereign state, under either conception of sovereignty, maintain the peace under present conditions? My answer is no. As I will argue, today’s threats to peace transcend the boundaries and powers of states, even states committed to human rights. To respond to them, we need a third conception of sovereignty, which expands state responsibilities to include a responsibility to cooperate across borders to control transnational threats to peace.<sup>36</sup>

What are those threats? To answer that question, I draw from demographers, futurologists, but above all from writings by people whose business it is to foresee future threats to peace: military planners looking twenty or more years out.<sup>37</sup> My discussion focuses on two factors: social conditions that generate armed conflicts, and new military technologies.

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<sup>34</sup> Oona A. Hathaway & Scott J. Shapiro, “Outcasting: Enforcement in Domestic and International Law,” *Yale Law Journal* 121 (2011): 252-349.

<sup>35</sup> James Turner Johnson, *Sovereignty: Moral and Historical Perspectives* (Georgetown University Press, 2014), 9. See, for example, the passages from Aquinas quoted on pp. 38-39.

<sup>36</sup> By transnational threats I don’t mean solely exogenous threats emanating from foreign sources. Transnational threats include endogenous behaviors that induce other states to respond in such a way that the result harms the prospects for peace. For example, a high-consuming developed state might promote commercial practices in weaker, resource-cursed developing states that elicit violence and instability – in which case the seemingly-exogenous threat emanating from a civil war in the weaker state could also, and rightly, be regarded as endogenous to the developed state. My thanks to Sarah Nouwen for emphasizing this point.

<sup>37</sup> The most useful I have found is the UK Ministry of Defence’s *Global Strategic Trends – Out to 2045*. Fifth edition, 2014, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/348164/20140821\\_DCDC\\_GST\\_5\\_Web\\_Secured.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/348164/20140821_DCDC_GST_5_Web_Secured.pdf). I also draw on similar documents produced by the U.S. intelligence community and think-tanks: U.S. Joint Chiefs of Staff, *Joint Operating Environment 2035 (JOE 2035): The Joint Force in a Contested and Disordered World*, July 14, 2016, at [http://www.dtic.mil/doctrine/concepts/joe/joe\\_2035\\_july16.pdf](http://www.dtic.mil/doctrine/concepts/joe/joe_2035_july16.pdf); David T. Miller, *Defense 2045: Assessing the Future Security Environment and Implications for Defense Policymakers*, Center for Strategic and International Studies (CSIS)(Rowman & Littlefield: Nov. 2015), at [https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/151106\\_Miller\\_Defense2045\\_Web.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/151106_Miller_Defense2045_Web.pdf); Atlantic Council, *Global Risks 2035: The Search for a New Normal* (2016), at [http://www.atlanticcouncil.org/images/publications/Global\\_Risks\\_2035\\_web\\_0922.pdf](http://www.atlanticcouncil.org/images/publications/Global_Risks_2035_web_0922.pdf); U.S. National Intelligence Council (NIC), *Global Trends 2030: Alternative Worlds* (Dec. 2012), at [https://www.dni.gov/files/documents/GlobalTrends\\_2030.pdf](https://www.dni.gov/files/documents/GlobalTrends_2030.pdf). Long-range forecasts are almost certain to be unreliable – on this point, see Philip Tetlock and Dan Gardner, *Superforecasting: The Art and Science of Prediction*

I begin the story with what surely counts as one of the greatest human rights achievements in history: the dramatic fall in global poverty in the last half-century. In 1970, 60% of the world's population lived in extreme poverty; today it is less than 10%.<sup>38</sup> The fall in poverty can be attributed to industrialization, technology, and advances in agriculture. Not only has poverty fallen, life expectancies have risen dramatically. For example, a Frenchwoman today has a life expectancy 40 years longer than a century ago.<sup>39</sup>

As economies shift from agriculture to industry and service, another noteworthy change occurs: having many children transforms from an economic benefit to the family into an economic cost. In a traditional agricultural economy children can do farm work from an early age. In an urban, technological economy, children require longer periods of education and training before they enter the workforce – fifteen to seventeen years, according to the United Nations.<sup>40</sup> A ten-child family changes from a source of wealth into a source of poverty.<sup>41</sup>

One consequence is the remarkable fall in fertility in most of the world that defused the Malthusian “population bomb” predicted in the 1960s. Another consequence is that women no longer spend their entire lives bearing and rearing children, freeing them to pursue other ambitions – an economic and material condition that helps fulfill the UN order's commitment to the equal rights of women.<sup>42</sup> This is not only a human rights advance, but also a benefit for peace: there is evidence that states with greater gender equality are less likely to resort to first use of force in international crises than states where domestic gender inequality is greater.<sup>43</sup> One analyst offers women's enfranchisement as a partial explanation: women voters are less supportive of warfare than men – five to fifteen percent less, according to surveys in Western democracies. That is enough to make politicians responsive.<sup>44</sup>

Yet these advances generate new threats to peace, in the form of unintended consequences, and these are what I want to focus on. Better health and greater longevity allow older workers to work longer. But that has the unintended consequence of freezing youth out of job markets – and youth unemployment is a source of social unrest and a trigger of violence. Automation likewise kills low-skill jobs, and this will become even more pronounced as artificial intelligence becomes more sophisticated. Competition from women in the workforce puts an additional squeeze on the prospects of young men – and young men have always been the most violent segment of humanity.

One result is a backlash against women's rights, typically encouraged by traditional religions with their obsessive focus on sexual morality and the control of women. Another is hatred of immigrants and resentment of foreigners, who are seen (often wrongly) as economic

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(Broadway Books, 2015). So these studies should be regarded as projections of current trends rather than predictions.

<sup>38</sup> See, e.g., *The Visual History of World Poverty*, slide 12, at <https://ourworldindata.org/slides/world-poverty/#/declining-world-poverty-1820-2015-step1>; World Bank Poverty and Equity Data, at <http://povertydata.worldbank.org/poverty/home/>. Not only is the percentage living in extreme poverty lower, the absolute numbers have fallen by two-thirds since 1970.

<sup>39</sup> National Institute of Aging, WHO, et al., *Global Health and Aging* (2011), Figure 4, at [https://www.nia.nih.gov/sites/default/files/global\\_health\\_and\\_aging.pdf](https://www.nia.nih.gov/sites/default/files/global_health_and_aging.pdf).

<sup>40</sup> George Friedman, *The Next 100 Years: A Forecast for the 21<sup>st</sup> Century* (Anchor Books: 2009), p. 55.

<sup>41</sup> Friedman, p. 56.

<sup>42</sup> Friedman, 55-61.

<sup>43</sup> *Global Strategic Trends – Out to 2045*, 5-6.

<sup>44</sup> Azar Gat, *War In Human Civilization* (Oxford University Press: 2006), 606-07.

competitors. In the developed world, unemployed young men threaten social stability; in the developing world, demobilized soldiers and militiamen who have no skills except fighting pose a perpetual menace. Meanwhile, the aging population strains the resources of the developed world.

Next consider the world-wide tendency toward intense urbanization. Already, city-dwellers outnumber rural populations, and by 2030 sixty percent of the world's population will live in cities. The Chinese government forecasts that in China alone, somewhere between 250 and 300 million people will move from rural to urban areas in the next fifteen years.<sup>45</sup> The number of mega-cities with populations over 10 million has tripled in the last quarter century, and the UN predicts that by 2030 there will be 41 mega-cities, mostly in the global South.<sup>46</sup>

The problem is that many of these cities will contain vast slums and shantytowns, with distressed infrastructures and bad water. In regions where central governments are weak, these slums will be nearly ungovernable, plagued by crime and violence, and filled with desperate, restless people. Overcrowding makes disease more likely to spread, and travelers can turn local epidemics into global pandemics. Pandemics are not only a devastating threat to well-being, they are a threat to stability as well, carrying the possibility of panics and military responses.

By now we are all familiar with the threat that climate change poses not only to well-being but also to peace. In broadest terms, climate change will make some parts of the Earth, especially the poorest, unable to sustain their human populations. Coastal plains will flood; semi-arid regions will become deserts. If catastrophic storms proliferate, ever-larger numbers of people will be internally displaced. Other forms of environmental degradation and pollution threaten water supplies. One research team claims that two-thirds of the world's people currently face severe water shortages.<sup>47</sup> Already, the Chinese government reports that four-fifths of the well water in China is unfit to drink or bathe in.<sup>48</sup>

The threat to peace arising from these developments is obvious: environmental and climate refugees will flee from unlivable regions into countries that don't want them, and in some cases cannot support them – an invitation to violence, confinement, or even genocide. Those who cannot leave may plunge their countries into civil conflicts, as in Darfur during the drought of the early 2000s.<sup>49</sup> Obviously, civil conflicts themselves can and do create mass migrations of refugees. Today there are more than 20 million refugees, and twice that number of internally displaced persons.<sup>50</sup>

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<sup>45</sup> *Global Strategic Trends – Out to 2045*, 17.

<sup>46</sup> United Nations, Department of Economic and Social Affairs, Population Division, *The World's Cities in 2016 – Data Booklet* (ST/ESA/SER.A/392), pp. ii, 2, [http://www.un.org/en/development/desa/population/publications/pdf/urbanization/the\\_worlds\\_cities\\_in\\_2016\\_data\\_booklet.pdf](http://www.un.org/en/development/desa/population/publications/pdf/urbanization/the_worlds_cities_in_2016_data_booklet.pdf).

<sup>47</sup> Nicholas St. Fleur, "Two-Thirds of the World Faces Severe Water Shortages," *New York Times*, Feb. 12, 2016, <https://www.nytimes.com/2016/02/13/science/two-thirds-of-the-world-faces-severe-water-shortages.html>.

<sup>48</sup> "Four-fifths of China's water from wells 'unsafe because of pollution,'" *The Guardian*, April 12, 2016, <https://www.theguardian.com/environment/2016/apr/12/four-fifths-of-chinas-water-from-wells-unsafe-because-of-pollution>.

<sup>49</sup> United Nations Environment Programme (UNEP), *Sudan: Post-Conflict Environmental Assessment* (2007), 8, at [https://postconflict.unep.ch/publications/UNEP\\_Sudan.pdf](https://postconflict.unep.ch/publications/UNEP_Sudan.pdf). This report can be faulted for ignoring the political and social causes of the conflict.

<sup>50</sup> UNHCR, *Figures At A Glance*, <http://www.unhcr.org/en-us/figures-at-a-glance.html>.

Growing economic inequality between rich and poor states is likely to intensify migration. For that matter, growing inequality within states is a world-wide phenomenon.<sup>51</sup> Endemic corruption in many parts of the world contributes to inequality. A U.S. military forecast warns that weak states will collapse into failed states through “a mix of real or perceived corruption, economic inequality, and ethnic/religious discrimination.” As a result, “violence is likely to occur in the form of sectarian strife, insurgency, or civil war.”<sup>52</sup>

The final threat to peace that I want to discuss is the development of new military technologies. In doing so, I will set to one side the dangers of nuclear war – not because these are unimportant, but because they are obvious.<sup>53</sup> Instead, I will focus on a different set of developments: the proliferation of inexpensive, dangerous, and small-scale technologies outside the control of states. Gabriella Blum and Ben Wittes have labeled this proliferation *the democratization of violence*.<sup>54</sup> I will borrow their phrase.

The most obvious democratizers of violence are small arms and explosives – hardly novel technologies. But advanced hacking tools are a relatively new development, and the more societies come to depend on computers to control their infrastructures, the more vulnerable they become to hackers.<sup>55</sup> Cybertheft and ransomware already assault individuals and businesses. Internet predators extort sex by threatening to release images stolen from their victims’ social media – a crime common enough to have acquired its own name: sextortion. These are all threats to individual rights, but they are also threats to peace if states suspect that hackers might be hostile states concealing themselves as private criminals, or if hacker host-states are unwilling to repress their activity. State-against-state cyberwarfare has so far proven impossible to regulate, for both technical and strategic reasons.<sup>56</sup> If carried out on a large scale, hack attacks on hospitals, power grids, cell phone networks, GPS systems, aircraft, and computer-regulated dams and water stations could create mass casualties – and both state and non-state actors could carry out such attacks. On an entirely different technological front, biological weapons that attack food crops could cause famines, and the science needed to develop them is available to non-state actors.<sup>57</sup> Electromagnetic pulse weapons may be capable of disabling communications satellites and GPS devices, as well as shutting down electrical grids.

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

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<sup>51</sup> Thomas Piketty & Emmanuel Saez, “Inequality in the Long Run,” *Science* 344 (May 23, 2014), 838-43, <http://science.sciencemag.org/content/344/6186/838.full>.

<sup>52</sup> JOE-35, p. 8.

<sup>53</sup> What is far from obvious is whether the existential deterrence that worked in the bilateral world of the Cold War can also work in a world with multilateral nuclear antagonists. That issue is beyond the scope of this essay.

<sup>54</sup> Benjamin Wittes & Gabriella Blum, *The Future of Violence: Robots and Germs, Hackers and Drones* (Basic Books: 2015), 115.

<sup>55</sup> Wittes & Blum, 54.

<sup>56</sup> The group of legal experts who wrote the most thorough treatment of international law and cyberwarfare, the Tallinn 2.0 Manual, left many areas of disagreement, even on the foundational question of whether respect for state sovereignty is a binding legal rule rather than a non-binding principle.

<sup>57</sup> Tom Daschle & Richard B. Myers, “A Threat to the Food System,” *U.S. News & World Report*, Oct. 17, 2016), <https://www.usnews.com/opinion/articles/2016-10-17/americas-food-supply-and-national-security-are-at-risk-to-bioterrorism>. On the more familiar issue of bioterrorism against humans, see, e.g., Christopher Chyba, “Biological terrorism and public health,” in *Survival* 43(1)(2001): 93-106.

very fact that these technologies are matters of public knowledge itself contributes to a manipulable mistrust of shared public reality.

As for state-on-state wars, they are likely to be quick and lethal.<sup>58</sup> Missiles fly fast, and short-range missile defense systems like Israel's Iron Dome will respond by becoming automated, creating the prospect of machine-driven escalations comparable to machine trading duels on the stock market.

Next consider robotics. Miniaturized drones the size of insects already exist; I found one for sale on the Internet for \$119.<sup>59</sup> Soon they will be equipped with surveillance cameras or, potentially, with weapons such as poison. Governments will have them, but so will extremist groups and mafias. For that matter, so will your creepy neighbor who uses his mini-drone to watch you on his smart phone as you undress, and then posts the video on Facebook.<sup>60</sup>

Militaries are researching biological enhancers that can make soldiers stronger, faster, unsleeping, and nearly impervious to pain. Cognitive enhancements and drugs that deaden sympathetic emotions are also on the table. I have no idea whether my own government is pursuing such weapons; but three years ago a U.S. defense official stated that “our adversaries quite frankly are pursuing enhanced human operations and it scares the crap out of us, really. ... We're going to have a big, big decision on whether we're comfortable going that way.”<sup>61</sup> Once enhancements come into state military use, it will be impossible to keep them out of the hands of warlords, mercenaries, and crime cartels. Non-state actors will churn out weapons with 3D printers. Their enhanced foot soldiers will wear night-vision goggles and lightweight graphene body armor stronger than steel. States may respond with autonomous weapons systems that choose their own targets – so-called “killer robots” whose regulation UN-sponsored experts are only beginning to explore.<sup>62</sup>

Welcome to my nightmares.

On the other hand, defensive capabilities will also be widely dispersed among private actors.<sup>63</sup> Governments already rely on private security firms to fight hackers, and NGOs operating in conflict zones hire private military contractors to protect them. You can defend yourself against insect drones with an electric fan or a fly-swatter (if you know the drone is there).

The net result of all these developments is an enormous challenge to the sovereign nation-state's monopoly on the legitimate means of violence. As Hobbes foresaw, that monopoly rests on a promise that Leviathan will protect our security. But what if it can't, and what if private entities almost can? Blum and Wittes ask a cogent question: “Can the state endure once it

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<sup>58</sup> In this connection, the sobering techno-thriller *Ghost Fleet: A Novel of the Next World War* (Eamon Dolan: 2016), co-written by military analysts P. W. Singer and August Cole, offers a fictional glimpse, and a full set of footnotes documenting the technologies it discusses.

<sup>59</sup> Jon Gabay, “Tiny, insect-like drones may be the future of surveillance,” *Electronic Products*, Mar. 30, 2017, at [http://www.electronicproducts.com/Robotics/Futurism/Tiny\\_insect\\_like\\_drones\\_may\\_be\\_the\\_future\\_of\\_surveillanc\\_e.aspx](http://www.electronicproducts.com/Robotics/Futurism/Tiny_insect_like_drones_may_be_the_future_of_surveillanc_e.aspx).

<sup>60</sup> Blum & Wittes, 44.

<sup>61</sup> Bob Work, “Deputy Secretary of Defense Speech, CNAS Defense Forum,” Dec. 14, 2015, at <https://www.defense.gov/News/Speeches/Speech-View/Article/634214/cnas-defense-forum/>.

<sup>62</sup> The Convention on Conventional Weapons (CCW) has convened an expert group that, after three meetings, has come up with only tentative suggestions and inconclusive results.

<sup>63</sup> Blum & Wittes, chapter 3.

is unable to prevent the electrical grid from being shut down, the lethal spider drone from attacking you in the shower, or new or manipulated biological agents produced in garages anywhere in the world from threatening your health?”<sup>64</sup> Within a few years, the answer may be no.

The fact is that territorial sovereignty and the public-private distinction, both basic conceptual features of the sovereign nation-state, have already eroded to a significant degree. In many states, including strong states, traditional public functions are contracted out to private corporations; and large multinational corporations don't respect territorial boundaries. Neither, for that matter, do transnational criminal networks (some of which perform some of the social-welfare functions of the state). While states will remain the pre-eminent actors on the world stage for the foreseeable future, the image of more or less self-contained territorial sovereigns is no longer accurate.

This, I fear, would be true *even if states did their best to keep the promise of respecting, protecting, and fulfilling their citizens' human rights*. The threats to peace brought on by climate change, mass migration, pandemics, and the democratization of violence transcend national boundaries. Other social generators of conflict – youth unemployment, intense urbanization in failing states, rising inequality, and the traditionalist backlash against women's rights – may lie beyond the powers of any state to control unilaterally.

## 5. Two objections

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

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

I accept that violence can sometimes be just; elsewhere I have argued that the struggle for basic human rights can be a just cause for war.<sup>65</sup> But it hardly follows that the violence arising from the forecasts I've catalogued will be in the service of justice. Ransomware hackers are not freedom fighters. Biologically enhanced mercenary soldiers will fight for whoever pays them to fight. Criminal gangs armed with hi-tech weapons will kill for the reasons criminal gangs have always killed. And states have never waged wars to rectify economic injustices.

Furthermore, righteous anger does not always lead to righteous violence. Violence is less rational than that. Urban rioters furious over injustice sometimes burn and loot their own neighborhoods. Unemployed, despairing men may take out their rage on the women who defy

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<sup>64</sup> Ibid., 107. On this same theme, see Martin van Creveld, *The Rise and Decline of the State* (Cambridge University Press: 1999), especially 354-414.

<sup>65</sup> Luban, “Just War and Human Rights,” *Philosophy & Public Affairs* 9 (1980).

them, or on immigrants. Civil wars become wars of ethnic extermination; rebellions sometimes replace one set of kleptocrats with another. The point is not that justified violence couldn't happen – it's that much of the violence that *will* happen, even in a just cause, will not be justified. Indeed, it may be nearly impossible for a just rebellion to succeed without inflicting unjustified violence – for example, by forcibly conscripting footsoldiers, deliberately provoking government atrocities, or murdering rival leaders.<sup>66</sup> And even a just war or rebellion waged in accordance with the *jus in bello* will be a human rights catastrophe. Homes are ruined, health care collapses, and decades of economic development are destroyed in a matter of weeks.

But, the second objection runs, all the scary trends I've described are fundamentally human rights problems. Economic rights, environmental rights, and the right to nationality are human rights on a par with rights to security against violence. If threats to these human rights are the future causes of violence and warfare, then the solution is what the UN order already aims at: respect, protect, and fulfill those rights. Recall that the rights-peace hypothesis claims that human rights will contribute to peace. Rather than challenging the rights-peace hypothesis, one might argue that today's threats confirm it.

Again, it is hard to disagree in the abstract, although I suspect that labeling climate change or pandemics human rights violations is not a helpful extension of the core concept of human rights. Even if it were, the problem is that the UN order of conditional sovereignty envisages that each state will keep its own human rights house in order, with the international community functioning only as a complementary backstop – a point I elaborate in section 7 below.<sup>67</sup> This model is palpably inadequate when the future threats to peace are thoroughly transnational. Whatever political structures evolve to cope with these threats will require a different way of conceptualizing state sovereignty and state responsibility.

## 6. Sovereign responsibility to humanity: R2H

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

A few international lawyers have begun to conceptualize sovereignty along these lines. One proposal is Eyal Benvenisti's conception of sovereigns as trustees of humanity.<sup>68</sup> Evan

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<sup>66</sup> I take these points from Allen Buchanan, "The Ethics of Revolution and Its Implications for the Ethics of Intervention," *Philosophy & Public Affairs* 41(4) (2013): 294-303.

<sup>67</sup> I use the word "complementary" deliberately. In the Rome Statute of the International Criminal Court, "complementarity" means that states themselves are the first resort for investigating and prosecuting ICC crimes committed on their territory or by their nationals. See art. 1, 17. The ICC can admit only those cases that states are unwilling or unable to prosecute. In the same way that the ICC is "complementary to national jurisdiction" (art. 1), the UN scheme of conditional sovereignty envisages international human rights enforcement solely as a complement to national enforcement.

<sup>68</sup> Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders," *AJIL* 102 (2013): 295-333.

Criddle and Evan Fox-Decent have developed a closely related proposal under the title “fiduciaries of humanity.”<sup>69</sup> There are differences between these proposals: Criddle and Fox-Decent focus principally on international organizations as fiduciaries of humanity, while Benvenisti focuses on states.<sup>70</sup> As a legal matter, the concept of fiduciary responsibilities has wider scope than that of trusteeship, which exists only when a legal trust is formally established. For philosophical purposes, though, this difference is not crucial, because the heart of the responsibility is more or less the same: it involves responsibility to care for the interests of outsiders beyond the duty not to inflict unjustified harm, and beyond ordinary market relations between the parties.<sup>71</sup>

In Benvenisti’s imagery, “In past decades the predominant conception of sovereignty was akin to owning a large estate separated from other properties by rivers or deserts. By contrast, today’s reality is more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families.”<sup>72</sup> Living in a global apartment building imposes responsibility on each resident to others in the condominium, as well as mutual stewardship of the condominium as a whole.<sup>73</sup> What those responsibilities entail may be unclear, but I suggest that at the very least, the residents are responsible for working together to alleviate threats to peace.

The question for us to consider is whether concepts like “trustee of humanity” or “fiduciary of humanity” offer a cogent expression of these responsibilities. Some critics have complained that the concept of trusteeship reeks of colonialism and empire. Historically, it was the legal excuse for greedy European powers to rule the lives and territories of indigenous people. The foreign trustee governed a territory for the supposed benefit of an allegedly “immature” native population, until it gained the maturity for self-determination. In reality trusteeship was a system of exploitation and condescension, masquerading as benevolence.<sup>74</sup>

But I think it’s only the historical connotations of the word “trusteeship” that are objectionable, not the concept itself. That’s because the model changes dramatically once we think of sovereigns as trustees not of a colonized people, but of *humanity*. Crucially, today those former colonies are themselves sovereign states. Like all other states, they would exercise sovereignty over their own territory; but as trustees of humanity, they would do so with regard for the legitimate interests of outsiders – as would all other states. To say sovereigns are trustees

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<sup>69</sup> Evan J. Criddle & Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford UP, 2016).

<sup>70</sup> On international organizations, see *ibid.*, pp. 283-317. Criddle and Fox-Decent do allow that under existing international law, sovereign states can be thought of as fiduciaries of humanity in certain contexts. These include international humanitarian law, pp. 171-74; the law governing detention of foreign nationals, pp. 212-14; and refugee law, pp. 265-81. See also Criddle & Fox-Decent, “Guardians of Legal Order: The Dual Commissions of Public Fiduciaries,” in Criddle, Fox-Decent, et al., *Fiduciary Government* (forthcoming), available on SSRN at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3040152](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040152).

<sup>71</sup> I am grateful to Criddle and Fox-Decent for clarifying the relationship. Private communications, Dec. 11, 2018.

<sup>72</sup> Benvenisti, p. 295.

<sup>73</sup> In conversation, Benvenisti has proposed “stewardship” as an alternative word for “trusteeship,” and I gratefully take the word from him.

<sup>74</sup> Evan J. Criddle & Evan Fox-Decent, *Fiduciaries of Humanity*, 15-16; Evan Fox-Decent & Ian Dahlman, “Sovereignty as Trusteeship and Indigenous Peoples,” *Theoretical Inquiries in Law* 16(2) (2015), 511-18; Andrew Fitzmaurice, “Sovereign Trusteeship and Empire,” *Theoretical Inquiries in Law* 16(2) (2015): 447-71. Benvenisti responds to these critiques in “The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks,” *Theoretical Inquiries in Law* 16(2) (2015): 535-48.

of humanity means that each and every state is now the trustee, not only the beneficiary, in the relationship. Sovereign trustees of humanity are therefore nobody's colonial or imperial subject, and so the fear of imperialism or colonialism is unfounded.

Whatever the terminology, the root idea is an understanding that sovereignty entails responsibilities to humanity. I will use the abbreviation "R2H" for short, in parallel to the "R2P" abbreviation for the Responsibility to Protect doctrine. My focus is on one special case of R2H responsibilities: the responsibility to cooperate transnationally to manage threats to peace. But the more generalized conception of sovereignty underlying R2H seems well worth elaborating.

## 7. From R2P to R2H

It will assist our understanding to compare R2H with R2P. The responsibility to protect doctrine originated with a 2001 report by a Canada-sponsored international group of experts (the International Commission on Intervention and State Sovereignty, "ICISS" for short) on the issue of humanitarian military intervention by outsiders in internal armed conflicts. This was a pressing issue in the wake of the Balkan Wars and Rwandan genocide. One key question was whether outside intervention can be reconciled with respect for the sovereignty of the conflict-ridden state, and ICISS answered yes. Echoing Deng and Annan, it argued that the UN order has transformed the Westphalian concept of sovereignty-as-control to sovereignty-as-responsibility, in particular responsibility to protect against gross violations of human rights.<sup>75</sup> Sovereignty under either conception implies that states themselves bear primary responsibility to prevent humanitarian catastrophes within their borders, to react when they happen, and to rebuild in their wake. But under sovereignty-as-responsibility, the international community serves as a backstop when the state itself fails, with outside military intervention as a remedy of last resort if lesser measures of pressure or assistance prove unavailing. ICISS's conceptual innovation is that once we reimagine sovereignty as responsibility rather than as control, outside intervention when a state will not or cannot discharge its responsibility to protect is no violation of its sovereignty.

The UN General Assembly quickly picked up ICISS's idea that states have a responsibility to protect their own people from "genocide, war crimes, ethnic cleansing, and crimes against humanity" – the four core crimes in the Balkan and Rwandan calamities. Next the Security Council affirmed the doctrine.<sup>76</sup> According to this official UN version of R2P, the responsibility to protect against core crimes has the three prongs I indicated above. First, states themselves bear the primary responsibility to protect their people from the core crimes. Second, the international community, acting through the UN, has a responsibility "to use appropriate diplomatic, humanitarian and other peaceful means ... to help to protect populations" against these crimes. Third, R2P authorizes states "to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter" if all else fails. Such collective action includes military intervention as a last resort, and the Security Council invoked R2P when it authorized the use of force to protect civilians in Libya, and to restore order in the Central African Republic and in Mali.<sup>77</sup>

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<sup>75</sup> The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (ICISS)(Dec. 2001)[hereafter: ICISS Report], §2.14, p. 13, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/57/303](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/57/303).

<sup>76</sup> 2005 World Summit Outcome, UNGA Res. 60/1, A/Res/60/1 (24 Oct. 2005), §§138-39; UNSCR 1674 (2006), §4.

<sup>77</sup> UNSCR 1973 (2011)(Libya), 2085 (2012)(Mali), 2127 (2013)(Central African Republic).

This official UN version of R2P is narrower than the original ICISS proposal: the latter did not limit itself solely to the four core crimes (genocide, war crimes, ethnic cleansing, crimes against humanity), but spoke more generally of “deadly conflict and other forms of man-made catastrophe.”<sup>78</sup> Furthermore, ICISS emphasized the proactive responsibility to *prevent* humanitarian catastrophes, not merely to react to them; and it called on the international community to help distressed states alleviate the root causes of violent internal conflict through development aid and rule of law assistance.<sup>79</sup> By contrast, the version of R2P endorsed by the Security Council is reactive, not proactive.

Notwithstanding the pages it rightly devotes to prevention, the ICISS report unmistakably focuses on humanitarian military intervention when states fail in their responsibility to protect. That focus proved unfortunate. It means that in public discussions, R2P seems inevitably yoked to the last-resort remedy for humanitarian catastrophes: military force, prong three.<sup>80</sup> Debates over humanitarian military interventions will always eclipse the less exciting responsibility to prevent catastrophes by alleviating their root causes. This should hardly surprise us; as the journalistic maxim puts it, if it bleeds it leads, and military intervention bleeds in a way that rule-of-law or development assistance never will. Regrettably, coupling R2P with humanitarian military intervention plays into the hands of cynical politicians who dislike the very idea of sovereignty as responsibility: it allows them to oppose R2P on the ground that it is a cover for military aggression.

The ICISS report focused on internal (“intra-state”) conflicts, and this too narrows its scope.<sup>81</sup> Certainly genocide and ethnic cleansing within a state represent the most dramatic failure of the state’s responsibility to protect its people. But restricting R2P to internal conflicts suggests by negative implication that sovereigns have no responsibility to prevent *inter*-state (that is, international) conflicts, except via the UN Security Council, which is easily gridlocked by the P-5 veto power.<sup>82</sup>

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

- (1) it focuses only on protection against core crimes,

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<sup>78</sup> ICISS Report, p. 19, §3.2. Later, however, the Report suggests that the important norm of non-intervention gives way only in the exceptional circumstances of core crimes. *Ibid.*, p. 31, §§4.12-4.13.

<sup>79</sup> *Ibid.*, §§3.3-3.8; 3.18-3.24.

<sup>80</sup> Sikkink, p. 189. Jean L. Cohen warns that R2P “opens a Pandora’s box” of “maximalist” claims, inviting “strategic, self-serving ‘humanitarian’ and ‘democratic’ interventions.” *Globalization and Sovereignty* (Cambridge University Press, 2012), 176-77.

<sup>81</sup> ICISS Report., p. 20, §3.6.

<sup>82</sup> The Security Council has indeed “identified potential or generic threats as threats to international peace and security, such as terrorist acts, the proliferation of weapons of mass destruction and the proliferation and illicit trafficking of small arms and light weapons.” United Nations Security Council, *Frequently Asked Questions*, Question 12 (“How does the Security Council determine the existence of any threat to the peace, breach of the peace, or act of aggression?”), at <http://www.un.org/en/sc/about/faq.shtml#threat>. But, except in the case of terrorism, it has taken no decisive action against generic threats. On terrorism, see UNSCR 1373 (2001).

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

(2) principally in internal conflicts;

and – despite protestations to the contrary –

(3) it deflects too much attention to humanitarian military intervention at the expense of less drastic remedies.

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

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

## 8. R2H and democracy

Like other features of the political imagination, sovereignty concepts do not change overnight, and they obviously don't change at the say-so of jurists and philosophers. They transform gradually and by inches, one micro-context at a time, responding to tangible needs, and each change presents itself as an unexciting tweak of the existing order, not a dramatic metamorphosis. For example, the World Trade Organization's dispute-settlement tribunals have interpreted treaty language prohibiting members from discriminating against foreigners ambitiously, as an other-regarding obligation to take the interests of foreigners into account in policymaking.<sup>83</sup> For trade specialists, this was perhaps a big deal; but for everyone else it was a small technocratic adjustment, or a “my eyes glaze over” minor news item. And yet, if in a few decades R2H became the reigning conception of sovereignty, this line of WTO cases might in hindsight seem like a significant precursor. Likewise, the Aarhus Convention, an environmental treaty among European and Central Asian nations, requires parties to provide access to information to citizens of other states party to the Convention.<sup>84</sup> Viewed one way, this too is a baby step. Viewed another way, the gradual accretion of baby steps can take us long distances.

The notion of sovereigns as trustees or fiduciaries of humanity raises thorny questions of political theory, explored in a vast literature on global governance, sovereignty, and the rule of law that I cannot discuss here.<sup>85</sup> It also raises thorny questions of practice. One, of course, is

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<sup>83</sup> Eyal Benvenisti & Sivan Shlomo Agon, “The Law of Strangers: The Form and Substance of Other-Regarding International Adjudication,” GlobalTrust Working Paper 08/2017, <http://globaltrust.tau.ac.il/publications>.

<sup>84</sup> Alon Jasper, “Participation of Foreigners in Environmental Decision Making and The Aarhus Convention,” GlobalTrust Working Paper 06/2017, <http://globaltrust.tau.ac.il/publications>.

<sup>85</sup> E.g., Cohen, *Globalization and Sovereignty*; Steven Bernstein, “Legitimacy in intergovernmental and non-state global governance,” *Review of International Political Economy* 18(1) (2011): 17-51; Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, 2013); Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge University Press, 2014).

what incentive any state would have to fulfill its fiduciary obligations. The answer implicit in my argument is a form of enlightened self-interest: it's the only way to keep the peace in the face of transnational threats that states cannot manage unilaterally. But as with many schemes of collective action, participants have rational incentives to defect and free ride, as climate change treaties illustrate. It will take great ingenuity in institutional design to overcome those incentives.

A deeper question is whether responsibility to humanity is consistent with responsibility to one's own people. What if a state's responsibility to its own citizens' welfare conflicts with its cosmopolitan responsibility as trustee of humanity? How should sovereign trustees weigh the interests of their own citizens against those of "humanity"? Benvenisti avoids this question by restricting his proposal to cases where sovereigns can benefit outsiders at no cost to their own peoples.<sup>86</sup> What if satisfying cosmopolitan responsibilities cannot be done costlessly to one's own people?

The short answer is that one's own people are themselves part of humanity – they, too, are the beneficiaries of sovereign trustees' faithful husbandry. I have been emphasizing cosmopolitan responsibilities to cooperate in managing threats to peace that transcend national borders. Managing those threats is in the medium-term self-interest of all peoples, even if cooperation requires short-term sacrifices and disruptions. The fiduciary responsibilities of states to their own people, like all fiduciary responsibilities, sometimes require balancing of the beneficiaries' short-term and longer-term interests, and sometimes that requires making short-term sacrifices to preserve the beneficiaries' situation over the long term. Doubly so when we consider that a sovereign's responsibility to its own people includes future generations, whose interests must not be discounted simply because they are temporally distant.<sup>87</sup> The sovereign fiduciary's beneficiary includes the grandchildren of current citizens – grandchildren who face threats to peace that grow more terrifying the longer governments delay managing them.

Notoriously, politicians focus on the near-term, not the further future – in part, no doubt, because the further future is hard to predict and therefore to plan for, but also for the less principled reason that unborn generations don't vote. And voters are unlikely to support tangible sacrifices on behalf of intangible descendants.

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Ethan J. Leib and Stephen R. Galoob have argued forcefully that fiduciary political theory is a bad fit with international law, because the former implies not only obligations on how states behave, but also how they deliberate, giving the beneficiary's interests pride of place in their deliberations. International law, by contrast, cares solely about compliance, not compliance for the right reasons. Leib & Galoob, "Fiduciary Political Theory: A Critique," *Yale Law Journal* 125(7) (2016): 1825-44, 1868-77. Criddle and Fox-Decent respond in "Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob," *Yale Law Journal Forum* 126 (2016): 192-215. They argue that Leib and Galoob have constructed an inaccurate model of fiduciary relations.

<sup>86</sup> Benvenisti, pp. 320-25. As he notes, this limitation corresponds to the requirement of weak Pareto efficiency.

<sup>87</sup> On this point, see Derek Parfit, "Energy Policy and the Further Future: The Social Discount Rate," in Douglas MacLean & Peter Brown, ed., *Energy and the Future* (Rowman & Littlefield, 1983), pp. 31-37, available at <https://wmpeople.wm.edu/asset/index/cvance/parfit>. Economists standardly discount the value of investments in the further future because of lost opportunities in the nearer future. Parfit shows that using such a "social discount rate" to devalue future harms inflicted by our current practices is morally indefensible, on any of the main arguments that might support it. "The moral importance of future events does *not* decline at *n* percent per year. A mere difference in timing is in itself morally neutral." P. 31.

In that case, why not reject the idea that the democratic sovereign's responsibilities to its people includes distant generations?<sup>88</sup> To be sure, Edmund Burke wrote of "the great primeval contract of eternal society," calling it a "partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."<sup>89</sup> Burke's rhetoric is powerful, but is it true? Set aside the Burkean partnership with one's ancestors ("those who are dead"); our question is about the alleged partnership with one's descendants – "those are to be born." Do the living really have a "partnership" or "primeval contract" with them? What if the living don't recognize any such partnership?

One way to make the recognition vivid is to reflect that most people with children care about their children's fates, believe themselves obligated to their children, and think their own happiness is bound up with the happiness of their children, as reflected in the folk-saying that you can't be happier than your least happy child.<sup>90</sup> Then, if they think about it, they will grasp that their children will care similarly about their own children (assuming they have children) – creating a chain of carings that extends at least a few generations into the future.

Consider as well a thought experiment proposed by Samuel Scheffler. Imagine that you somehow learned that thirty days after your own death an asteroid would destroy all human life – the "doomsday scenario." What effect would that knowledge have on the meaningfulness of your daily strivings – everything from saving for your children's education, to having children at all, to curing cancer, to voting, to prayer (other than prayer for a miracle that will spare humanity)? Scheffler believes that it would destroy that meaningfulness. If he is right, as seems plausible, the doomsday thought-experiment dramatizes how much the fate of our descendants matters to our current lives and projects.<sup>91</sup> Reportedly, the entrepreneur Elon Musk wishes to start a utopian Mars colony large enough that if a catastrophe wipes out humanity on Earth, the human species will endure.<sup>92</sup> Such reflexive yearning to perpetuate the human species, even after its reckless suicide, is an indicator of how deeply a collective afterlife matters to us.

All this is to say that the Burkean contract with future generations expresses something deeply rooted in the human condition, and thus that a sovereign's responsibility to his or her or its people includes responsibility to those future generations – regardless of voters' and politicians' myopic short-termism.

But what if a state's own voters aren't on board with R2H because they are indifferent or hostile to outsiders? If a country's voters despise globalism, then R2H seems on a collision course with democratic self-governance. To this, too, there is a response: even under current international law there is no blanket right of democratic self-governance, if that means that democratic majorities get to do whatever they want. If a country's voters want to launch an aggressive war or violate human rights, they cannot do it, regardless of their democratic will. I do not deny that the "trustee of humanity" proposal is inconsistent with a robust right of

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<sup>88</sup> See generally Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational Publishers, 1989); R. I. Sikora & Brian Barry, eds., *Obligations to Future Generations* (Temple University Press, 1979).

<sup>89</sup> Edmund Burke, *Reflections on the Revolution in France*, ¶165 (many editions).

<sup>90</sup> Aristotle went further, and asserted that nobody can be counted happy whose descendants meet with ruin, even after one's death. *Nicomachean Ethics*, Bk. 1, ch. 11, 1100a19-30.

<sup>91</sup> Samuel Scheffler, *Death and the Afterlife*, (Oxford University Press, 2013), 18-27.

<sup>92</sup> Sarah Knapton, "Elon Musk: We'll create a city on Mars with a million inhabitants," *The Telegraph*, June 21, 2017, available at <http://www.telegraph.co.uk/science/2017/06/21/elon-musk-create-city-mars-million-inhabitants/>.

democratic governance across the board. What I deny is that there *is* such a robust right. The examples of democratic majorities voting to launch aggressive war, or to massively violate human rights, show that there is no unrestricted and content-neutral human right of democratic decision-making: it depends on the decision.

When Thomas Franck wrote his pioneering article on the emerging right of democratic governance in international law, he understood it as a right to democratic multi-party elections, accompanying the rights to self-determination and free expression.<sup>93</sup> It was emphatically not a right of democratic majorities to violate international law. Of course, a state's failure to accept fiduciary responsibilities to humanity that its voters despise is not a self-standing violation of today's international law – responsibilities are not (yet) legal obligations. I am arguing that they should be – or, less alarmingly and more precisely, that they should gradually harden from precatory soft-law responsibilities to hard-law obligations, as institutions evolve to make them enforceable. The reason, again, is that reimagining state sovereignty as trusteeship for humanity is our best hope for peace.

## 9. Humanity

R2H raises the philosophical question of what “humanity” might be; it's hard not to recall Carl Schmitt's warning that whoever invokes humanity wants to cheat.<sup>94</sup> Is “humanity” anything beyond the aggregate of all human beings?<sup>95</sup> The aggregate of all human beings is nothing more than a mathematical set of no independent normative interest. The set of all human beings has no shared language or culture or kinship or bond of common affection. As communitarians remind us, communities are thick but “humanity” as a mere aggregation is pathetically thin. The set of all humans is not a community and is not the famous “family of man.”

In response, I suggest that we can think of “humanity” as something more than the set of all humans. I will borrow a metaphor from the colonial model, odious though that may have been. I propose we think of humanity as an immature people, a people that has not yet recognized itself as such. This is akin to Kant's view that the construction of humanity is a historical process that has a long way to go toward its ideal end point of lawful foreign relations and just civic orders.<sup>96</sup> For Kant, however, our immaturity (*Unmündigkeit*) means our self-imposed inability to think for ourselves, so that we turn to others for guidance.<sup>97</sup> What I am calling our immaturity lies in our self-imposed inability to recognize commonality with each other. “Humanity” names the normative project of making that recognition real through the practical activity of institutionalizing shared responses to shared threats.<sup>98</sup>

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<sup>93</sup> Thomas M. Franck, “The Emerging Right to Democratic Self-Governance,” *American Journal of International Law* 86(1) (1992): 63-77.

<sup>94</sup> Carl Schmitt, *The Concept of the Political*, trans. George Schwab (University of Chicago Press, 1996), p. 54.

<sup>95</sup> For present purposes, we can ignore the Burkean question of whether that set should consist of all human beings alive at any given time, or the trans-temporal set of human beings plus their human ancestors and descendants.

<sup>96</sup> Kant, “Idea of a Universal History with Cosmopolitan Purpose,” in *Kant's Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet (Cambridge University Press: 1970), especially propositions 5-7, pp. 45-49. Kant regards humanity as “little beyond the half-way mark in its development.” Proposition 7, Ak. 8:26.

<sup>97</sup> Kant, “An Answer to the Question: What Is Enlightenment?,” Ak: 8:35, in Kant, *Practical Philosophy (The Cambridge Edition of the Works of Immanuel Kant)*, Mary J. Gregor ed. and trans., (Cambridge University Press: 1996).

<sup>98</sup> I explore this idea further, in the context of international criminal justice, in Luban, “The Enemy of All Humanity,” forthcoming in the *Netherlands Journal of Philosophy* and also in the *Oxford Companion to International Criminal Law*, ed. Kevin Jon Heller, Frédéric Mégret, and Sarah Nouwen.

This emphatically does not mean that at some future point we must have a world government reigning over all humanity. As philosophers including Kant have well understood, in practice a world government would be terrible – a top-heavy imperial monstrosity. But a people can be a people without a government of its own, and that is how we should think about humanity.

“Humanity” would in any event never be a community sharing a distinctive way of life the way that local, thick communities do. On the contrary, it would be deeply pluralist, and that is a fundamental reason to reject the right-Hegelian proposition that a people only attains full self-recognition in its own state.<sup>99</sup> Humanity’s self-recognition of the sort I propose would consist solely in recognition that transnational threats require collective responses – put in other words, that the standpoint of humanity implies the acceptance of transnational responsibilities. The responsibility of sovereigns as trustees or fiduciaries, what I have called R2H, would be to act on that recognition.

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

### **10. The false promise of reactionary nationalism**

The question discussed in section 8 about voter hostility to globalism takes us to the contemporary upsurge of nationalism, my concluding topic. By now you can guess most of what I have to say: that nationalism in its present reactionary form is exactly the wrong direction for a realistic politics of peace.

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

- (1) An ethnic definition of the “nation” along the lines of the romantic view of the state, regardless of the ethnic mix that actually lives there.
- (2) An exaggerated focus on national pride and dignity, often paired with a prickly sense of (real or imagined) historical grievance.
- (3) A view of international affairs as overwhelmingly competitive and zero-sum, rather than cooperative, leading to ...
- (4) ... a mistrust of internationalism and globalism, often coupled with ...
- (5) ... a suspicion that internationalist projects, including international human rights and international criminal justice, are the handiwork of self-interested and predominantly Western elites, coupled with ...
- (6) ... a rejection of sovereignty-as-responsibility in favor of Westphalian sovereignty-as-control, including ...
- (7) ... a propensity to denounce all forms of external pressure, or even criticism from outsiders (especially about human rights), as an affront to sovereignty.

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<sup>99</sup> E.g., Giovanni Gentile, *Genesis and Structure of Society*, trans. H. S. Harris (University of Illinois Press, 1960).

- (8) Illiberalism, receptiveness to big-man personalist rule, and concomitant disdain for rule-of-law values.
- (9) Cultural conservatism, especially anti-feminism, under the rubric of protecting the nation's religious and historical traditions.
- (10) Xenophobia.

Another name for this syndrome might be “populism,” which Jan Werner-Müller defines as anti-elitist, anti-pluralist movements that claim the right to speak for “the people” and demonize those who disagree as enemies.<sup>100</sup> I prefer “reactionary nationalism” because not all reactionary nationalisms are populist – some, notably Chinese nationalism, are top-down –and, of course, because I wish to contrast with the internationalism that adherents to reactionary nationalism despise and fear.

Some may protest that my label is unfair to nationalism; furthermore, that liberal nationalism is possible and more desirable than cosmopolitanism. “Moderate self-preference is the moral core of a defensible nationalism,” William Galston writes, and nothing is wrong with moderate self-preference.<sup>101</sup> But “nationalism” is a slippery word that changes its meaning over time, and I think its past meanings give it a better reputation than contemporary reactionary nationalisms deserve. I have said that early state-making involved not only consolidating territories, but forging a “people” – a nation to go with the nation-state.<sup>102</sup> For nineteenth-century European state-makers, nationalism meant overcoming local rivalries in the name of unification and economic modernization.<sup>103</sup> That required dismantling the vestiges of fiefdoms and feudalism, a project that harmonized with liberal revolutions. In other parts of the world, nationalism means subordinating tribal loyalties to larger loyalties. In anti-colonial struggles, nationalism meant independence and self-determination. Nationalism understood in any of these ways can be thought of us as a progressive ideology, especially salutary when we recall the peacekeeping virtues of the nation-state.

My fear is straightforward: with a few notable exceptions, today's most assertive nationalist parties and movements are reactionary, and there is nothing moderate about them. As the criteria I listed above indicate, they are illiberal (criterion 8), and not at all friendly to the agenda of human rights (criterion 5). In those places where reactionary nationalism allies with traditionalist religions, it is also deeply anti-feminist or downright misogynist (criterion 9). As for responsibilities beyond borders, reactionary nationalists recognize none (criteria 3-6). I am tempted to borrow an idea from Imre Lakatos's philosophy of science, and describe nationalism as a *degenerating political program*, parallel to Lakatos's degenerating research programs – research programs that were once promising but are now dead ends.<sup>104</sup> Let me try to explain why.

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<sup>100</sup> Jan Werner-Müller, *What Is Populism?* (University of Pennsylvania Press, 2016). See also William Galston, *Anti-Pluralism: The Populist Threat to Liberal Democracy* (Yale University Press, 2018).

<sup>101</sup> Galston, p. 5.

<sup>102</sup> At the beginning of the sixteenth century, the inhabitants of France did not call themselves “the French” – their local identities as, say, Norman or Valois came first. By that century's end, they called themselves *bon français*. Frederick J. Baumgartner, *France in the Sixteenth Century* (1995), 4-7.

<sup>103</sup> On the modernization point, see Steven Pincus, *1688: The First Modern Revolution* (Yale University Press 2011).

<sup>104</sup> Imre Lakatos, “Criticism and the Methodology of Scientific Research Programmes”, *Proceedings of the Aristotelian Society*, 69: 149–186; reprinted in Lakatos and Alan Musgrave, eds., *Criticism and the Growth of Knowledge* (Cambridge University Press 1970).

The strongest philosophical arguments on behalf of nationalism appeal to communitarian values – civic affection for one’s own people in one’s own territory, an idea as old as Aristotle’s proposition that friendship lies at the foundation of the polis. But contemporary realities don’t align with this communitarian vision of nationalism. What we see in today’s reactionary nationalisms is not affection for one’s own, but hatred of others – militant anti-pluralism. With very few exceptions, reactionary nationalist parties arise in states with significant minority groups, distinguished from the majority by race or religion, that the nationalists wish to exclude from the nation as they define it.<sup>105</sup> The despised minority may be recent immigrants, but they needn’t be. In my own country, for example, the most extreme reactionary nationalists define the United States as a white, Christian country, notwithstanding that a quarter of our population is brown or black, and the black population’s ancestors were here from the beginning. This ideology has nothing to do with civic solidarity, national history, or patriotism. Instead one thinks of Karl Deutsch’s definition of a nation: “a group of people united by a mistaken view about the past and a hatred of their neighbors.”<sup>106</sup> Today that includes not only foreign neighbors, but the different-colored family next door.

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

The characteristic moral virtue associated with nationalism is patriotism, and some readers have asked whether I am objecting to patriotism. The answer is an energetic no. Patriotism need not be xenophobic or reactionary. Indeed, I regard the appropriation of the label “patriot” by reactionary nationalists as a sinister propaganda ploy, used to demonize liberals and internationalists as unpatriotic – a lie that liberal nationalists and ethical cosmopolitans should reject and combat.

We thus find ourselves in a perplexing and deeply frustrating situation. At a time when the gravest threats to peace – and to human rights – require an internationalist response, politics increasingly tilts toward reactionary nationalism.<sup>107</sup> Nationalism of this sort seems attractive precisely because of the threats and confusion we see around us. Yet if I am right, reactionary nationalism is a symptom of those ailments, not their cure. The cure is adopting the standpoint of humanity, and inventing political and legal institutions to make it real.

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<sup>105</sup> Significantly, under the anti-immigrant Trump administration, the United States has changed the mission statement of its customs and immigration agency to delete a previous reference to “America’s promise as a nation of immigrants” and substitute the mission of “protecting Americans, securing the homeland, and honoring our values” – values that apparently no longer include pride in ourselves as a nation of immigrants. Richard Gonzales, “America No Longer a ‘Nation of Immigrants,’ USCIS Says,” NPR, Feb. 22, 2018, at <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>.

<sup>106</sup> Karl Wolfgang Deutsch, *Nationalism and Its Alternatives* (Random House, 1969).

<sup>107</sup> See the discouraging evidence marshaled by Yascha Mounk, *The People vs. Democracy* (Harvard University Press, 2018), 105-122. The polls Mounk cites show diminishing commitment to democracy, increasing openness to authoritarian alternatives including military government, and more so among the young.