

# “PEOPLE POWER” AND THE PROBLEM OF SOVEREIGNTY IN INTERNATIONAL LAW

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## INTRODUCTION

It is settled that the doctrine affording immunity to foreign state officials for human rights violations derives from the doctrine of state sovereign immunity, although the contours of the two doctrines are no longer identical. Until the underlying doctrine of sovereign immunity is dislodged or definitively reformulated, it will continue to seem that holding officials accountable for their human rights violations abrogates some privilege that they are entitled to by right, rattling the cosmic international legal order. Reformulating sovereign immunity is of course much easier said than done. The question of whether human rights violations waive

state sovereign immunity has been extensively debated.<sup>1</sup> So, one must be very humble in thinking that there is anything new to say.

State sovereign immunity in turn derives from the concept of sovereignty in international law. The point of departure for this Article is the assumption that sovereign immunity in international law cannot be reformulated until sovereignty itself is reformulated. This is no easy task because sovereignty has no single, accepted definition. But one particular feature of sovereignty in international law stands out—namely, that the state is reified and treated as a thing-in-itself, with its own will and interests, above and apart from the will and interests of its citizens. The state in international law is defined by the principles of equality and nonintervention,<sup>2</sup> which means, *inter alia*, that international law formally takes no account of the modes of internal political governance in member states as a condition of inclusion in the international order. Military dictatorships are accorded the same sovereign status as the most participatory of democracies, so long as those dictatorships agree (at least nominally) to respect the principles of the U.N. Charter. “Popular sovereignty” is not a condition for recognizing sovereignty in international law.<sup>3</sup>

This Article challenges this reification of the state by suggesting an avenue for bringing popular sovereignty to bear on the concept of

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1. As Christian Tams has observed, “few other questions have prompted as much intense debate in the literature” as the question of the extent to which the “rules of immunity apply in respect of grave violations of international law.” Christian Tams, *Let the Games Continue: Immunity for War Crimes Before the Italian Constitutional Court*, EJIL: TALK! (Oct. 24, 2014), <http://www.ejiltalk.org/let-the-games-continue-immunity-for-war-crimes-before-the-italian-supreme-court/>. He adds that since “the number of plausible arguments and approaches is finite (*jus cogens*, implied waiver, etc.),” there has been a great deal of “duplication and repetition” in the debate. *Id.*

2. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 57 (Feb. 3) (“[T]he rule of State immunity . . . derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory.”); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14, ¶ 202 (June 27) (“[The principle of non-intervention] has moreover been presented as a corollary of the principle of the sovereign equality of States.”).

3. As a preliminary clarification, for the purposes of this Article, “popular sovereignty” is broadly defined according to Article 21(3) of the Universal Declaration of Human Rights: “The will of the people shall be the basis of the authority of government.” It is thus used to encompass a continuum of practices ranging from direct democracy to representative democracy to consent-based kinship or monarchical orders. Although distinctions among the various points on the continuum are large and important, in this Article they are not analytically significant. My use of the term does not encompass theories of the social contract which see the people as alienating their right to govern after contracting to form a polity.

sovereignty externally recognized in international law. Such sovereignty rests on the acts of cooperation and submission through which the population of a nation-state indicates its acquiescence to a particular arrangement of political power. This acquiescence carries legal significance in that it is the condition for the recognition of states and governments in international law. In recent years, nonviolent civil resistance, or “people power” movements,<sup>4</sup> have become widespread, impacting the international order and challenging us to rethink how we conceptualize sovereignty in international law.<sup>5</sup> Large-scale, nonviolent civil resistance movements may be understood as assertions of a “dormant social contract,” whereby those subject to the power arrangement recognized externally by states and other entities in the international community withdraw their acquiescence to that arrangement. It is argued here that this withdrawal of acquiescence carries legal significance that should be recognized in international law.

Part I introduces nonviolent civil resistance movements and provides an overview of their general dynamics and achievements. Part II briefly summarizes the tension between internal and external sovereignty as recognized by international law. It then discusses the main legal rules that have developed to protect sovereignty as recognized in international law. Part III examines two well-known attempts to resolve the tension between internal and external sovereignty: the right to democracy and the responsibility to protect. The analysis shows that, despite being innovative, both principles have fallen short of incorporating popular sovereignty. Instead, they remain state-centered, embracing a paternalistic approach that was destined to fail. Part IV presents an alternative argument for taking account of popular sovereignty in international law. It theorizes “people power” at two stages in the life-cycle of a state: at the moment of initial consent to a power arrangement through the constitution of an “imagined community,” and at the moment when consent is withdrawn through large-scale revolutionary nonviolent civil resistance movements. Part V indicates some practical implications that this reconceptualization of external

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4. A note on terminology: the most precise term for large-scale civilian challenges to political power is “nonviolent civil resistance movements”; however, because this is cumbersome to repeat, I will also use “people power,” “nonviolent conflict,” and “nonviolent protest,” with all of these terms being largely interchangeable.

5. There is little in legal scholarship written about nonviolent protest. To an extent, an exception is found in Danny Auron, *The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change*, 45 GEO. WASH. INT’L REV. 443 (2013) (focusing on derecognition policy as a means for foreign states to effect nonviolent regime change). My approach here differs, in that I focus on people power as the agent of regime change; nevertheless, the theoretical framework that Auron erects is useful, and I have drawn on it, though I depart from it in significant ways.

sovereignty to take account of “people power” might have for particular areas of international law.

### I. NONVIOLENT CIVIL RESISTANCE MOVEMENTS: AN OVERVIEW

What is nonviolent civil resistance? The following definition is given by Erica Chenoweth and Maria Stephan and in their prize-winning book *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*:

Nonviolent resistance is a civilian-based method used to wage conflict through social, psychological, economic, and political means without the threat or use of violence. It includes acts of omission, acts of commission, or a combination of both. Scholars have identified hundreds of nonviolent methods—including symbolic protests, economic boycotts, labor strikes, political and social noncooperation, and nonviolent intervention—that groups have used to mobilize publics to oppose or support different policies, to delegitimize adversaries, and to remove or restrict adversaries’ sources of power.<sup>6</sup>

Nonviolent civil resistance “takes place outside traditional political channels” and is a form of direct action “distinct from other nonviolent political processes such as lobbying, electioneering, and legislating.”<sup>7</sup> Often involving civil disobedience and noncooperation, it is explicitly “lawless” and, therefore, usually operates outside of traditional human rights legal channels. In addition to its historical role in various civil and human rights campaigns (e.g., abolition, women’s suffrage), nonviolent civil resistance has played a major role in the independence, state formation, and pro-democracy movements in numerous countries. Examples include the Anti-Apartheid Movement in South Africa, the pro-democratic resistance in Myanmar, the Ogoni people’s struggle for autonomy and environmental justice in Nigeria, the Velvet Revolution in Czechoslovakia, the “color” revolutions in Eastern Europe, the Solidarity-led revolution in Poland, the Jasmine Revolution in Tunisia, and various protests in other countries during the Arab Spring. Today, civil resistance tactics are also being used in a wide variety of contexts, such as land rights conflicts, demands for accountability, indigenous peoples rights struggles, anti-corruption campaigns, and environmental rights campaigns.

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6. Erica Chenoweth & Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, 33 INT’L SECURITY 7, 9-10 (2008).

7. *Id.* at 10.

Legal scholars have thus far shown little interest in nonviolent civil resistance (perhaps because such movements are seen as political, “extra-legal” phenomena); however, scholarship on such movements has been thriving in other disciplines, particularly political science and sociology. This boom has led to the growth of an interdisciplinary sub-field often referred to as civil resistance studies.<sup>8</sup> Civil resistance studies encompass political and sociological analysis as well as more practically-oriented, how-to guidance.<sup>9</sup> There is a close working relationship between theorists and practitioners.<sup>10</sup>

The interest of scholars and practitioners in developing the theoretical understanding of nonviolent civil resistance has been driven by the increasingly frequent use of such resistance practices in political conflicts around the world. A recent study by the Carnegie Endowment for International Peace concluded:

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8. Both as a topic of academic study and a real-world method of political resistance, the understanding of strategic non-violence has been shaped by the seminal work of the American academic Gene Sharp. After a stint in jail for conscientiously objecting to serve in the Korean War, Sharp became an academic; in 1973, he produced a comprehensive trilogy. See GENE SHARP, *THE POLITICS OF NONVIOLENT ACTION, VOL. 1: POWER AND STRUGGLE* (1973) [hereinafter SHARP, *THE POLITICS OF NONVIOLENT ACTION VOL. I*]; GENE SHARP, *THE POLITICS OF NONVIOLENT ACTION, VOL. 2: THE METHODS OF NON-VIOLENT ACTION* (1973); GENE SHARP, *THE POLITICS OF NONVIOLENT ACTION, VOL. 3: THE DYNAMICS OF NONVIOLENT ACTION* (1973). For other scholarship, see PETER ACKERMAN & CHRISTOPHER KRUEGLER, *STRATEGIC NON-VIOLENT CONFLICT: THE DYNAMICS OF PEOPLE POWER IN THE TWENTIETH CENTURY* (1994); PETER ACKERMAN & JACK DUVALL, *A FORCE MORE POWERFUL: A CENTURY OF NON-VIOLENT CONFLICT* (2000); SHARON ERICKSON NEPSTAD, *NON-VIOLENT CIVIL RESISTANCE: THEORIES, STRATEGIES, AND DYNAMICS* (2015); SHARON ERICKSON NEPSTAD, *NON-VIOLENT REVOLUTIONS: CIVIL RESISTANCE IN THE LATE TWENTIETH CENTURY* (2011); *NON-VIOLENT SOCIAL MOVEMENTS: A GEOGRAPHICAL PERSPECTIVE* (Stephen Zunes et al. eds., 1999); KURT SCHOCK, *UNARMED INSURRECTIONS: PEOPLE POWER MOVEMENTS IN NON-DEMOCRACIES* (2005).

9. See, e.g., MATTHEW MILLER & SRDJA POPOVIC, *BLUEPRINT FOR REVOLUTION: HOW TO USE RICE PUDDING, LEGO MEN, AND OTHER NONVIOLENT TECHNIQUES TO GALVANIZE COMMUNITIES, OVERTHROW DICTATORS, OR SIMPLY CHANGE THE WORLD* (2015).

10. In 1983, Sharp formed a small NGO, the Albert Einstein Institute, to disseminate teachings on nonviolent resistance. Directly or indirectly, nonviolent movements all over the world owe something to Sharp, whose work has been widely circulated, often in underground pamphlet form. A second important figure in bridging the gap between theory and practice is Peter Ackerman, a former student and associate of Gene Sharp, author of several books, advisor to the film *A Force More Powerful* and co-author with Jack DuVall of a companion book by the same name. Ackerman founded the NGO and think tank, the International Center for Nonviolent Conflict, which, like the Albert Einstein Institute, disseminates educational materials on nonviolent civil resistance and also offers workshops for practitioners of nonviolent civil resistance. In the interests of full disclosure, the author has received a small fellowship from ICNC to write a monograph titled “People Power and International Law.”

Major citizen protests are multiplying. Just in 2015, significant protests erupted or continued in Armenia, Azerbaijan, Bosnia, Brazil, Burundi, the Democratic Republic of Congo, Guatemala, Iraq, Japan, Lebanon, Macedonia, Malaysia, Moldova, and Venezuela. The list of countries hit by major protests since 2010 is remarkably long and diverse. It includes more than 60 states that span every region of the world.<sup>11</sup>

Though not all citizen protests are peaceful, violence tends to be reactive. Globally, we seem to be witnessing a collective transfer of knowledge as to how citizens can effectively use nonviolent means to press their demands and hold governments accountable. The results of a large data project at the University of Denver “suggest[] that nonviolent resistance campaigns have become the modal category of contentious action worldwide.”<sup>12</sup>

As Mahatma Gandhi observed long ago, “[E]ven the most powerful cannot rule without the co-operation of the ruled.”<sup>13</sup> It is acknowledged that Gandhi, who studied nonviolent movements from history, first perfected the strategic use of “people power,” which he called *satyagraha*, in nonviolent resistance campaigns carried out over several decades to force the British to leave India. His techniques have been adapted over time by those seeking to intentionally withdraw consent from repressive rulers and press compliance with their demands.<sup>14</sup> These demands may be varied—an end to corruption, free elections, prosecution of human rights abusers, truth about disappearances, land reform, or environmental justice, to name only a few.

The theory behind civil resistance movements begins by rejecting the idea that political power is monolithic and concentrated in a central authority figure.<sup>15</sup> Even in the most authoritarian political regimes, power is multidimensional and derives from at least six different sources: the internal and external perceived legitimacy of the regime; human resources

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11. THOMAS CAROTHERS & RICHARD YOUNGS, *THE COMPLEXITIES OF GLOBAL PROTEST* 3 (2015).

12. Erica Chenoweth & Maria J. Stephan, *How the World is Proving Martin Luther King Right About Nonviolence*, WASH. POST (Jan. 18, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/18/how-the-world-is-proving-mlk-right-about-nonviolence/>. The data project is called the “Major Episodes of Contention” project.

13. Maciej J. Bartkowski, *Recovering Nonviolent History*, in *RECOVERING NONVIOLENT HISTORY: CIVIL RESISTANCE IN LIBERATION STRUGGLES*, at 1, 25 n.3 (Maciej J. Bartkowski ed., 2013) [hereinafter *RECOVERING NONVIOLENT HISTORY*] (quoting MAHATMA GANDHI, *5 COLLECTED WORKS OF MAHATMA GANDHI* 8 (1961)).

14. Sharp began his intellectual study of nonviolent civil resistance with a systematic analysis of Mahatma Gandhi’s life and work, distilling the main lessons and reframing them for a Western audience. See generally GENE SHARP, *GANDHI WIELDS THE WEAPON OF MORAL POWER* (1960).

15. SHARP, *THE POLITICS OF NONVIOLENT ACTION* VOL. I, *supra* note 8, at 7–10.

(the people willing to support and cooperate with the regime); technical skills, and intelligence capabilities; control over material resources; ability to control coercive sanctions (police, military); and support drawn from “intangible factors” such as culture, religion, social attitudes, ideology, etc.<sup>16</sup> Various formal institutions and informal associations support these six facets of the regime’s power. In the civil resistance literature, these institutions and associations are referred to as “pillars of support.”<sup>17</sup> The particular pillars of support differ with respect to every regime, but generally include the police, the military, civil servants, the media, the business community, non-governmental organizations, youth, and churches. The challenge for civil resistance practitioners is analyzing the nature of these pillars in each particular context and devising tactics aimed at weakening their loyalty to the regime in order to “pull” them away from the regime and toward those opposing it. As Srdja Popovic explains, “the nonviolent struggle is about pulling people from pillars. It is not about pushing and pressing and bringing down and bombing and destroying. It is about, can you persuade the people to step out?”<sup>18</sup> As the pillars of support fall away, the sources of the regime’s power are choked off; eventually, the regime weakens and crumbles.

Research on nonviolent civil resistance challenges the conventional wisdom that violence is a successful strategy used because it “works.” The most influential study thus far on civil resistance movements, Chenoweth and Stephan’s *Why Civil Resistance Works*, is a quantitative analysis comparing the effectiveness of nonviolent and violent movements and showing that nonviolent resistance is indeed effective.<sup>19</sup> Chenoweth and Stephan created a database comparing 323 violent and nonviolent campaigns occurring between 1900 and 2006 that had aims that the authors

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16. ROBERT HELVEY, ON STRATEGIC NONVIOLENT CONFLICT: THINKING ABOUT THE FUNDAMENTALS 4–8 (2004) (summarizing SHARP, *THE POLITICS OF NONVIOLENT ACTION* VOL. I, *supra* note 8, at 7–10).

17. *Id.* at 9–18, 74. “Pillars of support” is now a term of art widely used in nonviolent conflict literature without attribution. The International Center for Nonviolent Conflict defines it in its glossary of terms as “[t]he institutions and sections of the society which supply the existing regime with needed sources of power to maintain and expand its power capacity.” *Glossary of Terms*, INT’L CTR. FOR NONVIOLENT CONFLICT, <https://www.nonviolent-conflict.org/index.php/what-is-icnc/glossary-of-terms> (last visited Apr. 25, 2016).

18. Srja Popovic et al., *Blueprint for Revolution: How to Use Rice Pudding, Lego Men, and Other Nonviolent Techniques to Galvanize Communities, Overthrow Dictators, or Simply Change the World*, CARNEGIE COUNCIL (Apr. 22, 2015), [https://www.carnegiecouncil.org/en\\_US/studio/multimedia/20150422/index.html](https://www.carnegiecouncil.org/en_US/studio/multimedia/20150422/index.html).

19. The epigraph for *Why Civil Resistance Works* is Malcolm X’s quip that “nonviolence is fine, as long as it works.” ERICA CHENOWETH & MARIA J. STEPHAN, *WHY CIVIL RESISTANCE WORKS* 3 (2011).

describe as “maximalist,” meaning that the campaign aimed to change a governmental regime, expel a foreign military occupation force, or secede and create a new state.<sup>20</sup> They reached the startling conclusion that nonviolent campaigns achieve their objectives at twice the rate of violent campaigns (53% of the time for nonviolent campaigns versus 26% for violent campaigns).<sup>21</sup> They attribute this greater rate of success to the greater ability of nonviolent movements to attract a broad base of support.<sup>22</sup> Because the barriers to participation are lower, nonviolent movements are typically much more inclusive than violent movements, including more women, elderly people, and youths.<sup>23</sup> Although the number of active participants may still be a relatively small proportion of the entire population, the proportion of the population that participates in nonviolent movements is generally much greater than in most violent movements.

Chenoweth and Stephan disprove the cliché that nonviolent tactics only work against “civilized” opponents like the British in India, but would not have worked against an opponent like Hitler.<sup>24</sup> “The vast majority of

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20. The Nonviolent and Violent Campaigns and Outcomes dataset (NAVCO 1.0) was introduced in an article in 2008. See Chenoweth & Stephan, *supra* note 6, at 15. The version of the dataset used for the 2011 book (NAVCO 1.1) was published as an online appendix. Erica Chenoweth, Nonviolent and Violent Campaigns and Outcomes Dataset, v. 1.1, University of Denver, *available for download at* [http://www.du.edu/korbel/sie/research/chenow\\_navco\\_data.html](http://www.du.edu/korbel/sie/research/chenow_navco_data.html).

21. Chenoweth & Stephan, *supra* note 6, at 8.

22. CHENOWETH & STEPHAN, *supra* note 19, at 30 (noting “a critical source of the success of nonviolent movements is mass participation”); see also *id.* at ch. 2, *The Primacy of Participation in Nonviolent Resistance*.

23. In the EuroMaidan protests in Ukraine, one study found that 35% of participants were under the age of 24, 30% were middle-aged professionals with families, and 12% were retired and grandparents. Olga Onuch, *EuroMaidan Protests in Ukraine: Social Media Versus Social Networks*, 62 PROBLEMS OF POST-COMMUNISM 217, 222 (2015).

24. The idea that nonviolent resistance only works against nonauthoritarian opponents has wide circulation. See e.g., Eric Stoner, *Beck Reiterates Myth that Nonviolence Couldn't Work Against Hitler*, WAGINGNONVIOLENCE.COM (Apr. 29, 2011), <http://wagingnonviolence.org/2011/04/beck-reiterates-myth-that-nonviolence-couldnt-work-against-nazis/> (quoting Dinesh D'Souza as recalling to interviewer Glenn Beck, “One of my professors used to say, if Hitler was in power in India, Gandhi would be a lamp shade.”). This myth was even reflexively repeated by President Barak Obama in his speech accepting the Nobel Peace Prize: “For make no mistake: Evil does exist in the world. A non-violent movement could not have halted Hitler’s armies.” Press Release, White House, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), <https://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>. This myth likely originates with George Orwell: “At the same time there is reason to think that Gandhi, who after all was born in 1869, did not understand the nature of totalitarianism and saw everything in terms of his own struggle against the British government. The important point here is not so much that the British treated him forbearingly as that he was always able to command publicity. As can be seen from the phrase quoted above, he believed in ‘arousing the world,’ which is only possible if the world gets a chance to hear what you are doing. It is difficult to see how Gandhi’s methods could be applied in a country where opponents of the regime disappear in the middle of the night and are never heard of again. Without a free press and the right of assembly, it is impossible not merely to appeal to outside opinion, but to

nonviolent campaigns have emerged in authoritarian regimes . . . where even peaceful opposition against the government may have fatal consequences.”<sup>25</sup> They conclude that the claim that nonviolence would not have worked against Hitler is a “classic straw man.”<sup>26</sup>

Many of those who practice and theorize people power think of it not as a negation of warfare (*i.e.* pacifism) but as an alternative means of waging war: as “war without violence”<sup>27</sup> or as “unarmed insurrection.”<sup>28</sup> “Pacifism,” and even the noun “nonviolence,” are terms avoided by those who study and practice nonviolent civil resistance, perhaps because the words carry undesirable associations with passivity and weakness. Proponents emphasize that embrace of nonviolent resistance need not be principled (*i.e.*, based on the belief that violence is morally wrong); it can, instead, be strategic (*i.e.*, embraced because it is perceived to be successful). Thus, nonviolent civil resistance is often characterized as *conflict* rather than conflict resolution. Ackerman and DuVall state, “Those who use nonviolent action in our stories did not come to make peace. They came to fight.”<sup>29</sup> “This is a technique of combat,” a young Gene Sharp proclaimed in the documentary *How to Start a Revolution*, “It’s a substitute for war and other violence.”<sup>30</sup>

The parallels to warfare have even attracted military minds to promote and engage in nonviolent civil resistance studies. One of the theoreticians who makes the analogy between nonviolent conflict and war most explicit is retired U.S. Army Col. Robert Helvey, who has done trainings in nonviolent strategy for activists in Serbia and Burma and has written a book for the Albert Einstein Institute, *On Strategic Nonviolent Conflict: Thinking About the Fundamentals*. To Helvey, war is not an analogy. Nonviolent action, he says, “is a form of warfare. And you’ve got to think

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bring a mass movement into being, or even to make your intentions known to your adversary?” George Orwell, *Reflections on Gandhi*, 16 *PARTISAN REV.* 85, 92 (1949).

25. CHENOWETH & STEPHAN, *supra* note 19, at 66.

26. *Id.* at 20 (“Collective nonviolent struggle was not used with any strategic forethought during World War II, nor was it ever contemplated as an overall strategy for resisting the Nazis.”). For evidence that nonviolent resistance to Hitler occurred and had limited success, see JACQUES SEMELIN, *UNARMED AGAINST HITLER: CIVILIAN RESISTANCE IN EUROPE, 1939–1943* (1993).

27. See generally KRISHNALAL SHRIDHARANI, *WAR WITHOUT VIOLENCE: A STUDY OF GANDHI’S METHOD AND ITS ACCOMPLISHMENTS* (1939).

28. SCHOCK, *supra* note 8.

29. ACKERMAN & DUVALL, *supra* note 8, at 5.

30. *HOW TO START A REVOLUTION* (The Big Indy 2011).

of it in terms of war. So the principles of war that apply to a military struggle have a tremendous overlap into strategic nonviolent struggle.”<sup>31</sup>

Although current theorists of nonviolent civil resistance often strive to distance themselves from the principled use of nonviolence, a large part of the case for nonviolent action is that nonviolent conflict is morally, not merely pragmatically, preferable to violent conflict. Even Col. Helvey advances nonviolent conflict “in part, because of the reasonable likelihood that it will result in fewer lives lost and less destruction of property.”<sup>32</sup> It is, for instance, widely believed that the turn to violence in the Syrian revolution was inevitable because of the increasingly violent assaults by the Assad regime. Indeed, local men first took up arms to shield peaceful protestors and were welcomed as protectors. But what is less well-known is that protester deaths sharply escalated when the conflict turned violent.<sup>33</sup> “Death tolls in Syria after the uprising’s militarization skyrocketed, from an unbearable five or six to thirty victims of regime fire per day in the nonviolent phase, to seventy to three hundred victims of regime fire per day.”<sup>34</sup> In contrast, if diversified and used to their maximum potential, nonviolent resistance tactics can minimize civilian costs.

Use of nonviolent civil resistance also has long-term benefits for democracy and social peace. “Nonviolent resistance ushers in more durable and internally peaceful democracies, which are less likely to regress into civil war.”<sup>35</sup> Indeed, even failed nonviolent campaigns are more positive in their long-term impacts than successful violent campaigns.<sup>36</sup> Conversely, if a nonviolent campaign is accompanied by a violent flank, the odds of civil war reoccurring within ten years are forty-nine percent, compared with twenty-seven percent for campaigns that were not accompanied by violent campaigns.<sup>37</sup>

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31. Helvey became interested in nonviolent conflict when stationed at the U.S. Embassy in Burma, where he saw that the local population desired change yet realized the armed struggle was inevitably doomed. Excerpted interview by Steve York with Col. Robert Helvey, Retired U.S. Army Colonel, in Belgrade, Serbia (Jan. 29, 2001), <http://www.aforcemorepowerful.org/films/bdd/story/otpor/robert-helvey.php>.

32. HELVEY, *supra* note 16, at xi.

33. MOHJA KAHF, FRIENDS FOR A NONVIOLENT WORLD, THEN AND NOW: THE SYRIAN REVOLUTION TO DATE – A YOUNG NONVIOLENT RESISTANCE AND THE ENSUING ARMED STRUGGLE 16–17 (2014), [http://www.fnvw.org/vertical/Sites/%7B8182BD6D-7C3B-4C35-B7F8-F4FD486C7CBD%7D/uploads/Syria\\_Special\\_Report-web2.pdf](http://www.fnvw.org/vertical/Sites/%7B8182BD6D-7C3B-4C35-B7F8-F4FD486C7CBD%7D/uploads/Syria_Special_Report-web2.pdf).

34. *Id.* at 17.

35. CHENOWETH & STEPHAN, *supra* note 19, at 217 (“Countries in which a violent campaign has occurred had the 42 percent chance of experiencing a recurrence of Civil War within ten years, compared with 28 percent for countries in which a nonviolent campaign has occurred.”).

36. *Id.* at 215–16.

37. *Id.* at 218.

Despite some recent high-profile setbacks, notably in the Arab Spring, nonviolent civil resistance movements are experiencing explosive growth.<sup>38</sup> Though the success rates for nonviolent campaigns have declined in absolute terms in recent years, their relative success versus violent campaigns remains steady. Thus, despite the absolute decline in success, the increasing frequency of such movements implies that their overall impact is still increasing dramatically.

This growing frequency can in part be attributed to the new means of social media, which is enabling global dissemination of the tactics and techniques that nonviolent resistance movements increasingly use. Some commentators believe we are seeing “a fundamental shift in the relationship between citizens and the state—a more deliberative form of democratic politics is being forged in the crucible of protests.” Protests are the basis of a new form of “‘monitory democracy’ in which citizens’ major participatory function is continuous evaluative oversight of state action.”<sup>39</sup>

The rise in nonviolent civil resistance movements may seem surprising in light of the recent resurgence in authoritarian regimes around the world,<sup>40</sup> but upon further reflection, these two phenomena are not inconsistent. Observers of authoritarian regimes have noted that these regimes have increasingly resorted to more “legalistic” modes of repression, most importantly, restrictive domestic laws that make it difficult for traditional NGOs to get licenses, receive foreign funding, etc. Where traditional NGOs are having difficulty functioning, it is not surprising that civil resistance movements, which are “lawless,” may emerge as a backstop of popular sovereignty.

The results of the maximalist campaigns studied by Chenoweth and Stephan have important implications for notions of sovereignty in international law. Maximalist or revolutionary campaigns have explicit self-determination objectives that are directed at the political unit of the state taken as a whole, and not at sub-units or private actors. The outcomes of such campaigns thus can have implications for the international legal and political order for two reasons. First, they can change the map of the world, either by changing the territorial shape of the state itself or more commonly by changing the contours of federated states, empires, or

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38. Erica Chenoweth & Maria J. Stephan, *How the World Is Proving Martin Luther King Right About Nonviolence*, THE WASHINGTON POST (Jan. 18, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/18/how-the-world-is-proving-mlk-right-about-nonviolence/>

39. CAROTHERS & YOUNGS, *supra* note 11, at 12.

40. See generally Mathew Burrows & Maria Stephan, *Is Authoritarianism Staging a Comeback?*, ATL. COUNCIL (Apr. 14, 2015), <http://www.atlanticcouncil.org/blogs/new-atlanticist/is-authoritarianism-staging-a-comeback>.

federations. Second, they can change the government that represents that state in conducting its international affairs, potentially changing the development of international law. To better understand these implications, I turn now to a brief exposition of the nature of sovereignty in domestic and international law.

## II. THE KING'S TWO BODIES (OF LAW)<sup>41</sup>

Since the first great wave of democratization swept Europe and Latin America in the nineteenth century, it has become increasingly clear that the understanding of state sovereignty in domestic law has been diverging dramatically from that in international law. This Part describes these respective notions of sovereignty, as well as the nature of this divergence and the legal rules that have developed in international law to protect its particular notion of sovereignty.

### A. Internal and External Sovereignty

Although it is the single most foundational principle in international law and international relations, sovereignty lacks a single accepted definition. As Michael Ignatieff remarks, “No term in our political vocabulary is more mysterious.”<sup>42</sup> Max Weber defined sovereignty as a monopoly on the use of legitimate force in a given territory.<sup>43</sup> Carl Schmitt defined the sovereign as “he who decides on the exception.”<sup>44</sup> More recently, Steven Krasner has said that there are at least four distinct types of sovereignty:

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41. One of the origins of the sovereignty of the states lies in the medieval notion of the “king’s two bodies”—the one a “Body natural” prey to human infirmities; the other a “Body politic” that cannot “be seen or handled, consisting of Policy and Government, and constituted for the Direction of the People, and the management of the public weal.” ERNST HARTWIG KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* 7 (1957) (citing Mich. Term 4 Elizabeth at Serjeant’s Inn, 1 *THE COMMENTARIES, OR REPORTS OF EDMUND PLOWDEN*, §212a).

42. Michael Ignatieff, *The Return of Sovereignty*, *NEW REPUBLIC* (Feb. 16, 2012) (reviewing BRAD R. ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER* (2011) [hereinafter ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT*]), <https://newrepublic.com/article/100040/sovereign-equality-moral-disagreement-government-roth>.

43. MAX WEBER, *POLITICS AS A VOCATION* (1919).

44. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (trans. George Schwab, University of Chicago Press 1985)(1922). See also Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 *WM. & MARY BILL RTS. J.* 291, 295 (2010) (“Sovereignty is a belief system; it is a psychological or sociological construct that represents a society’s fundamental understanding of the proper source and allocation of political power.”).

1. International legal sovereignty, which “refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence.”
2. Westphalian sovereignty, which “refers to political organization based on the exclusion of external actors from authority structures within a given territory.”
3. Domestic sovereignty, which “refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity.”
4. Interdependence sovereignty, which “refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.”<sup>45</sup>

However, definitions always function relative to a particular analytical problem. The analytical problem of sovereignty in international law imposes certain limitations. The types of sovereignty Krasner identifies in numbers 1, 2, and 4 of his typology are all aspects of the sovereignty recognized under international law. So, here, these four types can be collapsed into two: internal (domestic) sovereignty and external (international) sovereignty.<sup>46</sup>

To over-simplify, but not greatly, domestic sovereignty is often Lockean: Sovereignty inheres in the people and a social contract exists between the state and its people. Thus, in approximately two-thirds of the world’s constitutions, the sovereign power of the state, not just the government, is pronounced as residing in the people. Take, for example, the Algerian Constitution, which states: “The people shall be the source of all authority. National sovereignty shall vest exclusively in the people.”<sup>47</sup>

Popular sovereignty may be regarded as an historical stage in the development of what Krasner refers to as Westphalian sovereignty. It is an old chestnut of international relations theory that the Peace of Westphalia

45. STEPHAN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 3–4 (1999).

46. Sovereign immunity in domestic law is not my subject here.

47. CONSTITUTION OF THE PEOPLE’S DEMOCRATIC REPUBLIC OF ALGERIA art. 6, Feb. 23, 1989. The vesting of sovereignty in the people is true of socialist as well as democratic states, with exceptions most often in the case of federated nations (Belgium, Canada), sultanates, and monarchies. See, e.g., CONSTITUTION OF AFGHANISTAN art. 4, Jan. 26, 2004 (“National sovereignty in Afghanistan shall belong to the nation, manifested directly and through its elected representatives. The nation of Afghanistan is composed of all individuals who possess the citizenship of Afghanistan.”); CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM art. 2(2), Nov. 28, 2013 (“The people are the masters of the Socialist Republic of Vietnam State; all state powers belong to the people whose base is the alliance between the working class, the peasantry, and the intelligentsia.”).

gave rise to the modern nation-state. Nothing like a modern state existed in medieval Europe, where a separate system for political rule had not yet emerged. The power to rule “was usually practiced as an annex to a certain status, generally that of property owner” and “distributed among numerous holders, of which none possessed comprehensive, let alone absolute, powers to rule.”<sup>48</sup> Power to rule was personal, not territorial, “so that the inhabitants of an area could be subject to a variety of lords, depending on the respective powers they exercised.”<sup>49</sup> Moreover, secular power was separate from spiritual power, and both were subordinate to God.<sup>50</sup>

In such a system, absolute sovereignty coextensive with territorial boundaries did not exist. Gradually over time, political power consolidated and became coextensive with territorial boundaries, although this shift did not happen instantaneously with the Peace of Westphalia. As territorial boundaries solidified and power consolidated, the first form of political rule in the nation-state was absolute monarchy. Democracy came later, theorized by John Locke in the Two Treatises of Government before being forged in the crucible of the American colonies—events that had repercussions in the form of revolutions across Europe in the nineteenth century.

International legal sovereignty, on the other hand, owes more to Hobbes.<sup>51</sup> In Hobbes’s *Leviathan*, published just three years after the Peace of Westphalia was negotiated and thirty-eight years before Locke’s Two Treatises, the government is not a party to the social contract,<sup>52</sup> which is negotiated horizontally between individuals in the state of nature.<sup>53</sup> Because the state has its own existence above and apart from the people,<sup>54</sup> the social contract that brings it into existence is irrelevant.<sup>55</sup> In other

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48. DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT 17 (2015).

49. *Id.*

50. *Id.* at 16.

51. *See id.* at 79 (“International law, specializing in external relations among states, was not concerned with a state’s internal order . . . It could also ignore the questions about the substance and holders of sovereignty that accompanied the development of internal sovereignty.”).

52. The Peace of Westphalia was negotiated in 1648. The first edition of Thomas Hobbes’s *LEVIATHAN* was published in 1651.

53. THOMAS HOBBS, *LEVIATHAN* 87–88 (John C. A. Gaskin ed., 1998).

54. *Cf.* Emmerich de Vattel, at para. 1 (“Nations or states are bodies politics, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength”) and para. 2 (“Such a society has her affairs and her interest; she deliberates and takes resolutions in common; *thus becoming a moral person, who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights*”)(italics added).

55. *Id.* at 111–14.

words, once the people give up power to the state, they cannot get it back.<sup>56</sup> The Leviathan was primarily a justification for absolute monarchy within the state, the initial stage in the development of Westphalian sovereignty in Europe. Later, Emmerich de Vattel adapted Hobbes’s Leviathan for international law. Vattel “externalized . . . the idea of exclusive and supreme power over territory and people,” in effect “transposing” Hobbes’s absolute monarch to the “international plane.”<sup>57</sup> This externalized sovereignty made the state, embodied in its ruler, the sole representative of the state’s population in external affairs and authorized the exclusion of “external” powers from “internal” affairs. It is this conception of sovereignty that underpins the system of positive international law that grew out of Vattel’s work in the nineteenth century and that still dominates today. International law recognizes only the state as sovereign: “As sovereign the state’s position contrasts with that of non-states (individuals, human groups, corporations, non-governmental organisations (NGOs), international governmental organisations (IGOs), etc.) . . . . By a widespread understanding, ‘sovereignty’ is a quality inhering in each established state and in no other persons.”<sup>58</sup>

Out of the idea of sovereignty reflected in the Westphalian state grew legal rules to ensure stability in the system: the fundamental norm prohibiting one state from intervening in the affairs of another (“nonintervention”) and a correlative doctrine of “effective control” entailing that recognition of a government’s authority to represent a state in the international system depends only on whether that government is in “effective control” of the population in its territory, and not on whether it represents the will of the people.

## B. Nonintervention and Effective Control

There are two main rationales for the principle of nonintervention. The first is stability. The Peace of Westphalia—negotiated in the wake of the Thirty Years War that devastated Europe between 1618 and 1648—was an effort to reduce the instability caused by states interfering in one another’s territory. The treaties making up the Peace of Westphalia weakened the

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56. *Id.* at 115. Subjects of the Leviathan have the limited right to disobey when the sovereign proves unable to protect his subjects, since protection is the main reason for the sovereign’s existence. *Id.* at 147.

57. De Vattel credited Hobbes with being the first to advance a “distinct though imperfect idea of the Law of Nations.” De Vattel, Preface 5a. *Cf.* Stephanie Beaulac, *Emer de Vattel and the Externalization of Sovereignty*, 5 *J. of Hist. of Int’l L.* 237, 242-266 (2003).

58. James Crawford, *Sovereignty as a Legal Value*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 117, 118 (James Crawford & Martii Koskienniemi eds., 2012).

secular power of the Pope and brought an end to the interference of one prince in the affairs of another on the basis of religion. Nonintervention over time became a general norm.<sup>59</sup>

The second rationale for the norm of nonintervention is more laudable, at least in principle, and developed after the fact.<sup>60</sup> It arose when European-style international law was universalized and purged of the implicit racism evinced by its initial restriction to “civilized” states. While nonintervention appeared in the U.N. Charter before the end of colonialism, it has nevertheless been embraced by formerly-colonized, newly-independent states as a guarantee of equality in the international state system and as insurance against another era of colonialism.

The rule of nonintervention in principle meant that states should stay out of one another’s affairs and interact only with the recognized sovereign. But there is only a loose set of rules governing the recognition of states and governments, which is largely left to internal processes.<sup>61</sup> A common thread in these rules is the requirement that “effective control” must be demonstrated before international recognition will be granted. The effective control doctrine does not require that the population of a territory actually consent to the governmental authority in power. The government merely has to demonstrate “the ability to exact habitual, though not willing, obedience,”<sup>62</sup> or in other words, acquiescence. U.S. recognition policy has long been shaped in accordance with this view, as set down long ago by Thomas Jefferson, who declared that it was the policy of the United States to recognize governments that govern “with the will of the nation, substantially declared.”<sup>63</sup> It is that curious modifier “substantially declared” that expresses the effective control doctrine. As Maurice Cranston puts it, “This third criterion had very rapidly, even in American practice, to be watered down to the ‘will of the people’ not necessarily substantially

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59. J. Bryan Hehir, *Intervention: From Theories to Cases*, 9 *ETHICS & INT’L AFF.* 1, 4 (1995) (noting that after the Thirty Years war, the norm of nonintervention developed to “preserve the peace in a world of states divided by nationality, religion, and ideology”).

60. See, e.g., Usha Natarajan, *TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring*, 14 *OR. REV. INT’L L.* 177, 185 (2012) (noting early Third World scholarship “frequently relied on principles of non-intervention and sovereignty in its attempts to empower Third World states”).

61. The 1933 Montevideo Convention on the Rights and Duties of States, 49 *Stat.* 3097, 165 *L.N.T.S.* 19 (Dec. 26, 1933) sets out the most widely accepted definition of statehood. According to Article 1, government is one of the four qualifications of statehood, along with a defined territory, a permanent population, and the capacity to enter into relations with other states.

62. P.K. Menon, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW* 71 (1994) (quoting Tichiang Chen, *THE INTERNATIONAL LAW OF RECOGNITION* 122-23 (1951).

63. *Id.* at 70 (citing Julius Goebel, Jr., *THE RECOGNITION POLICY OF THE UNITED STATES* 102 (1915)).

declared, and then ‘will’ reduced to ‘consent,’ and ‘consent’ reduced to acquiescence, measured by the bare fact of the absence of open popular revolt.”<sup>64</sup>

“Effective control” can thus be an ugly doctrine, morally and legally. Brad R. Roth is the most articulate defender of the doctrine of effective control, having articulated the most elaborate and logically consistent argument against popular sovereignty currently available.<sup>65</sup> He states:

International legal standing has traditionally been established by victory in a trial by ordeal: a region initially integral to an existing state successfully establishes itself as an independent sovereign unit only where its secession movement creates—usually by decisive victory in an armed struggle—facts on the ground that appear irreversible; an insurgent faction successfully establishes itself as a government where it overthrows an existing constitutional structure and secures—even if at bayonet-point—widespread popular acquiescence. The international order’s attribution of sovereign independence to established territorial political communities thereby has traditionally entailed (to put it most bluntly) the right of each to fight its civil war in peace and to be ruled by its own thugs.<sup>66</sup>

Roth considers the doctrine to have crystalized after the Second World War and to be integral to the system of international order guaranteed by the U.N. Charter: “The idea that sovereignty ultimately inheres in the political

64. Maurice Cranston, *From Legitimism to Legitimacy*, in LEGITIMACY/LEGITIMITE 36, 40 (Athanasios Moulakis ed., 1986). Although his words had a Democratic ring, which Cranston emphasizes, Jefferson has usually been understood as expressing the de facto theory of recognition, as he wrote on the later occasion: “We surely cannot deny to any nation that right whereon our own Government is founded – that every one may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organs it thinks proper, whether King, convention, assembly, committee, President, or anything else that it may choose. The will of the nation is the only thing essential to be regarded.” *Id.* at 39 (quoting Letter from Thomas Jefferson to Gouverneur Morris (Mar. 12, 1793), <http://founders.archives.gov/documents/Jefferson/01-25-02-0330>). The slide from “the will of the people” to “the will of the nation” evinces the reification of the nation-state.

65. See generally BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999) [hereinafter ROTH, GOVERNMENTAL ILLEGITIMACY]; ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT, *supra* note 42; Brad R. Roth, *Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice*, 8 SANTA CLARA J. INT’L L. 231 (2010); Brad R. Roth, *Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT’L L. 393 (2010) [hereinafter Roth, *Secessions, Coups, and the International Rule of Law*]; Brad R. Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GERMAN L. J. 384 (2015) [hereinafter Roth, *The Virtues of Bright Lines*].

66. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT, *supra* note 42, at 170.

communities themselves, with governmental apparatuses acting as agents, is at the core of the sovereign equality envisaged in the U.N. Charter.”<sup>67</sup>

The great danger that Roth (and others including states whose democratic bone fides might be questioned by the international community) see in alternatives to the effective control doctrine is the pretext for destabilizing external meddling.<sup>68</sup> He cites approvingly the International Court of Justice’s (ICJ) dictum in the *Nicaragua* case repudiating the United States’ justification for the Contra’s activity in Nicaragua. In response to the United States’ argument that the Sandinista’s government in Nicaragua amounted to a violation of customary international law, the ICJ’s rejoinder was that this “would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.”<sup>69</sup> According to Roth, the effective control doctrine is the best approximation of popular sovereignty at which international law can arrive; in his view, popular sovereignty is already recognized in the international system.

Under this view of the effective control doctrine, popular sovereignty can be claimed by any number of unsavory one-party or military regimes that ruthlessly repress opposition.<sup>70</sup> Of course, a one-party state or a military junta does not correspond to the usual idea of popular sovereignty wherein the will of the people is the basis of government. There is a “through the looking-glass” quality to his argument, since this notion of “popular sovereignty” is essentially fictive, an attribute that any governmental authority can claim. Roth admits as much,<sup>71</sup> but he sees the very fictiveness of this presumption as the paramount achievement of the Charter-era international legal regime.<sup>72</sup>

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67. Roth, *Secessions, Coups, and the International Rule of Law*, *supra* note 65, at 423.

68. See also Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT’L L. 507, 512 (2011) (“Inasmuch as the democratic entitlement has been linked with a right of ‘pro-democratic intervention’, the worry has been expressed that it dangerously weakens the legal prohibition on the use of force.”).

69. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14, ¶ 263 (June 27) (emphasis added).

70. Brad R. Roth, *The Rise and Fall of Revolutionary-Democratic Dictatorship* in Roth, *Governmental Illegitimacy*, 75–120.

71. Brad R. Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GERMAN L.J. 384, 385 (2015) (“Thus, territorial inviolability prevails even where states can, only by a feat of ideological imagination, be characterized as “possessed of a government representing the whole people belonging to the territory without distinction”).

72. *Id.* at 415 (seeing the “Charter-based order” as “predicated. . . on a moral vision that brackets ideological difference while insisting on an expandable (and demonstrably expanding) range of cross-cutting imperative precepts”).

Is there a good alternative to the effective control doctrine? Roth argues not, for reasons that echo rationale two, described above. Since popular will is “a complex and normatively-loaded concept, any imposition from abroad of procedures calculated to appropriately measure popular will might be seen as at best presumptuous, and at worst a usurpation.”<sup>73</sup> Paradoxically, the right to be ruled by one’s own thugs may more closely approximate popular will than the right to be ruled “by foreigners announcing benevolent intentions.”<sup>74</sup>

Roth’s argument has most bite when applied to the recognition of states because the international legal system distinguishes sharply between states and governments, and with respect to states, it discernibly prefers inertia to change. Governments come and go, but the state remains. To an extent, it is undeniable that this does facilitate stability. International obligations generally attach to states and survive the turpitudes of domestic politics. This continuity is particularly important in matters of treaty succession and sovereign debt. Otherwise, a state could slough off its international obligations whenever its government changed hands and chaos would ensue. Similarly, state secession and independence movements are perceived to create turmoil in the international order and are disfavored.<sup>75</sup> The secessions legitimated in the breakdown of the Yugoslav federation through the work of the Bandinter Commission appeared to be an exception, perhaps indicating the emergence of a new customary rule. Roth has criticized the Bandinter Commission for “validat[ing] irregular outcomes through well-intentioned exercises in intellectual dishonesty.”<sup>76</sup> The specific dishonesty he refers to is the Commission’s rationale for justifying the non-consensual breakup of Yugoslavia by predicating the legal personality of Yugoslavia, as a federation, on the “representativeness” of its federal government vis-à-vis regional components.<sup>77</sup> More broadly, he sees the Commission as having been asked to do something essentially ultra vires to international law, *i.e.*,

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73. Roth, *Secessions, Coups, and the International Rule of Law*, *supra* note 65, at 426.

74. *Id.* at 427; Anne Peters, *Humanity As the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 541 (2009) (“The international principle should therefore still be understood to protect the capacity to choose a political system commensurate with one’s national culture, even if this results in an illiberal and authoritarian regime.”).

75. ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 221 (1995)(noting that “[e]ver since the emergence of the political principle of self-determination on the international scene, States have been adamant in rejecting even the possibility that nations, groups and minorities be granted a right to secede from the territory in which they live”).

76. Roth, *The Virtues of Bright Lines*, *supra* note 65, at 415.

77. *Id.* at 397–98.

to pronounce a legal opinion before the internal struggle over “effective control” had been allowed to run its course.<sup>78</sup>

Despite the sharp distinction between state and government in international law, Roth maintains that his argument applies almost equally well to the recognition of governments. He defends this on pragmatic grounds as the best guarantee of popular sovereignty in an international community embracing ideological pluralism: “In that context, the effective control doctrine could be seen not as a repudiation of the popular sovereignty norm, but rather as an application of it in those circumstances of ideological pluralism.”<sup>79</sup>

Sovereign immunity in international law is the logical consequence of the effective control doctrine; yet the immune sovereign state, the notion that the “king that can do no wrong,” troubles the moral conscience. And the idea that international peace can be purchased with the blood of the sovereign’s citizens has been demonstrated, time and again, to be incorrect. In recent years, dissatisfaction with the high costs of the Westphalian-type sovereignty have resulted in efforts to reconceptualize sovereignty in international law and bridge the gap between internal and external sovereignty through the right to democratic governance (or “right to democracy”) and the responsibility to protect (R2P).

### III. PROPOSALS FOR RECONCEPTUALIZING EXTERNAL SOVEREIGNTY: PATERNALISTIC, NOT POPULAR

Both the right to democracy and the R2P are traceable to the burgeoning of human rights consciousness and of the accompanying legal framework that began to coalesce during the 1970s. But weak enforcement mechanisms meant that state compliance was mostly voluntary. Only in the 1990s were more robust enforcement mechanisms contemplated. During what was then understood as the Cold War’s conclusion, human rights defenders and international lawyers perceived three things almost (but not quite) simultaneously: first, that the spread of democracy to the states of the former Soviet Union had ended the ideological standoff that had made the collective security arrangements laid out in the U.N. Charter largely dysfunctional;<sup>80</sup> second, that the end of the Cold War had little impact on internal conflicts, which seemed, correctly or not, to be becoming both

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78. *Id.* at 397.

79. Roth, *Secessions, Coups, and the International Rule of Law*, *supra* note 65, at 425.

80. KOFI A. ANNAN, *WE THE PEOPLES: THE ROLE OF THE UN IN THE 21ST CENTURY* 43 (2000) (“Freeing the United Nations from the shackles of the Cold War also enabled it to play a more significant role. The 1990s saw an upsurge in both in our peacekeeping and in our peacemaking activities.”).

more frequent and more deadly;<sup>81</sup> and third, that even if the U.N.’s collective security arrangements eventually started to be able to function as originally designed, they were not achieving immediate success. In the wake of the first realization, there was a burst of enthusiasm for a “right to democratic governance.” In the wake of the second two realizations, an imperative to protect civilians even from abuses by their own governments was recognized. These legal innovations sought to align internal and external sovereignty. But this Part shows that both fell short of recognizing true popular sovereignty because neither recognized the central role of the empowered agency of individuals in the creation and maintenance of states and governments. The analysis here proceeds by critiquing the best intellectual justifications of these legal innovations—Thomas Franck’s seminal article *The Emerging Right to Democratic Governance* and the influential report by the International Commission on Intervention and State Sovereignty, published at the end of 2001 (“ICISS Report”).

#### A. Right to Democracy

Thomas Franck’s article advanced the claim that, with the collapse of the Soviet Union and the rise of a pro-democracy movement in China, the world was witnessing the global triumph of the democratic ideal first expressed in the American Declaration of Independence.<sup>82</sup> “Democracy,” Franck argued, “is on the way to becoming a global entitlement,” even a condition of a state’s recognition in the community of states, “that increasingly will be promoted and protected by collective international processes.”<sup>83</sup> The impetus for Franck’s article was, in large part, the international response to the failed coup against then-Russian President Boris Yeltsin and the overthrow of Jean Bertrand-Aristide, the elected President of Haiti.

Though it is becoming axiomatic that human rights law cuts back on state sovereignty, Franck was the first to argue for the existence of a “right to democracy” that, *inter alia*, would protect popular sovereignty, conceived of mainly as the right to free and fair elections. He saw this emerging rule as based partly in customary law and partly in the “collective interpretation of treaties,”<sup>84</sup> adducing as evidence: the actions of the

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81. *Id.*

82. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 47–48 (1992).

83. *Id.* at 46.

84. Franck, *supra* note 82, at 47.

General Assembly<sup>85</sup> and the OAS<sup>86</sup> in response to the coup in Haiti, the commitment of over fifty percent of U.N. member states to democratic governance in their domestic law, and requests for international election-monitoring by an increasing numbers of states where domestic institutions ensuring democratic legitimacy were weak. Conceptually, he argued that the right was forming out of three constituent building blocks: the norm of self-determination; the right to free political expression (including the rights to seek, receive, and impart information and ideas, as well as the rights of peaceful assembly and association); and the right to political participation.<sup>87</sup> Franck's article described the "right to democracy" primarily in terms of the development of an obligation to submit to election monitoring.<sup>88</sup>

Franck did not draw out certain implications of his reconceptualization of sovereignty. Of course, he recognized that the "notion that the [international] community can impose such standards, on which the democratic entitlement is based" is in tension with the principle of state sovereignty, embodied in Article 2(7) of the U.N. Charter, which provides that the United Nations shall not interfere in matters "essentially within the domestic jurisdiction of states."<sup>89</sup> He also recognized that the obligation to submit to monitoring would reduce the sovereign powers of the state. Foreshadowing R2P, Franck understood that enforcing the right to democracy might in some cases entail the use of force. To allay the fears of small nations that election monitoring might lead to "more Panama-style unilateral military interventions,"<sup>90</sup> Franck cautioned that any enforcement activities would be collectively carried out under U.N. authorization.<sup>91</sup>

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85. The U.N. General Assembly passed a resolution demanding that Aristide be restored to power. U.N. Doc. A/46/L.8/Rev. 1 (1991).

86. The Organization of American States even more emphatically called for Aristide's reinstatement. Support to the Democratic Government of Haiti, OEA/Ser.F/V.1/MRE/RES.1/91, corr.1, paras. 5, 6 (1991).

87. See International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171 (protecting, *inter alia*, the rights "to take part in the conduct of public affairs, directly or through freely chosen representatives" and "[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors"); Human Rights Comm., General Comment No. 25: Article 25 (Participating in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) (stating that "Article 25 lies at the core of democratic government based on the consent of the people," but stopped short of declaring a right to democracy).

88. See generally Franck, *supra* note 82.

89. *Id.* at 78 (citations omitted).

90. *Id.* at 84.

91. *Id.*; see also Sara McLaughlin Mitchell & Paul F. Diehl, *Caution in What You Wish For: The Consequences of a Right to Democracy*, 48 STAN. J. INT'L L. 289, 291 (2012) ("[P]rotecting democratic

Although he saw democratic entitlement as a means for realizing the “self-determination of peoples,” Franck stopped short of conceiving of state sovereignty as residing in the people. Democracy requires the “consent” of the governed, he conceded, because “law needs to secure the habitual, voluntary compliance of its subjects.”<sup>92</sup> But the right to democratic governance in his description remained “state-centric” to the extent that the “craving of governments for validation”—not the craving of peoples for democracy—was “the engine pulling the democratic entitlement.”<sup>93</sup> Likewise, states and other international organizations were seen as the guarantors of democracy; one day, he concluded, “legitimacy . . . will be measured definitively by international rules and processes.”<sup>94</sup> The people themselves were not envisioned as playing much of a role, even though many accountability measures can be traced to people power movements applying pressure from below. Even when discussing what he calls “autochthonous validation,” that is, democracies that have achieved internal means for validating legitimacy, Franck only perceived a quasi-social contract: leaders in countries that have achieved such validation have “made a farsighted bargain comparable to John Locke’s social compact” and “surrendered control over the nation’s validation process” to various domestic constituencies.<sup>95</sup>

To the extent that sovereignty was reconceptualized, this was done—as in international human rights legal frameworks generally—along paternalistic lines. If the state had fewer sovereign powers after a right to democratic entitlement crystalized, it would be because it had transferred some of those powers to various organs of the international community. Of course the right to democratic governance protected the right of citizens to choose their governments through free and fair elections, but Franck’s conception of this new right did not empower citizens of the state vis-à-vis international law. Although the timing of Franck’s article indicates that it was precipitated by the “people power” movements that swept Eastern Europe and China in the pivotal year of 1989, all of which followed on the heels of the Philippines’ EDSA revolution, his analysis takes almost no notice of the fact that election monitoring only became a possibility in the former Soviet-bloc states after, and as a consequence of, the pressure from

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rights in existing states and expanding the right to encompass other states necessarily means that the international community, and leading states in particular, might need to carry out a variety of actions, including the use of force.”).

92. Franck, *supra* note 82, at 48.

93. *Id.* at 50.

94. *Id.*

95. *Id.*

nonviolent social movements that undermined the Soviet regimes in Eastern Europe. Instead of the fall of the Berlin Wall, Franck focused on the international response to the attempted coup against Boris Yeltsin after the transition within Russia itself, and even more on election-monitoring in Haiti, which he took to be an augur of the future.

#### B. The Responsibility to Protect

By the middle of the 1990s, elation about the spread of democracy had given rise to anxiety about the international community's ability to respond to violence occurring within sovereign states' borders. Violence had broken out in the former Yugoslavia where the Soviet Union's client Slobodan Milosevic and his Serb nationalist supporters had refused to agree to the consensual breakup of the federated state. The U.N.'s involvement in Yugoslavia did not prevent the slaughter of the very people it was trying to protect. Its hesitation to commit to action in Rwanda shortly thereafter paved the way for the worst genocide since the Holocaust. When more ethnic conflict targeted Muslims in Kosovo and the Security Council did not act, NATO organized a unilateral military intervention that was, at best, moral but illegal and, at worst, precipitated even more retaliatory killing. In historical terms, R2P was born out of a sense of remorse on the part of the international community for its failures in Yugoslavia and Rwanda and out of conflicted reactions to the wisdom of the NATO intervention in Kosovo.<sup>96</sup>

The intellectual framework for R2P was set out in an influential 2011 report by the International Commission on Intervention and State Sovereignty ("ICISS Report"), the heart of which set out a standard for humanitarian intervention. Loosely basing its guidelines on the "Just War" theory, the doctrine of R2P stipulates that states have the responsibility to protect their citizens from mass atrocity crimes (genocide, war crimes, ethnic cleansing and crimes against humanity) and declares that if states fail to uphold their internal responsibilities, the international community has the obligation to step in.

At dizzying speed (for international law, at least) the idea gained currency. Key features of the ICISS Report were adopted by U.N. member

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96. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at VII-IX (2011) [hereinafter ICISS REPORT]; see also Joelle Tanguy, *Redefining Sovereignty and Intervention*, 17 ETHICS & INT'L AFF. 141, 141 (2003) (reviewing ICISS REPORT, *supra*) ("The fiftieth anniversary of the Genocide Convention was haunted by the shameful neglect of Rwanda. The Mogadishu fiasco, the cruel ambiguities of Srebrenica, the silence over Chechnya, and the confusions of the Kosovo intervention fed a contentious debate on the circumstances, authority, and means to intervene.").

states at the 2005 United Nations World Summit, though not the Report in its entirety.<sup>97</sup> As adopted, the norm does two main things: first, it lays out the responsibility of states to protect their populations from the four human rights atrocities; and, second, in less declarative language, it provides that “[t]he international community should, as appropriate, encourage and help States to exercise this responsibility.”<sup>98</sup> The World Summit Outcome document makes it clear that peaceful means should be exercised as a first resort,<sup>99</sup> but it clearly contemplates the use of “collective action” in the event that peaceful means are “inadequate and national authorities are manifestly failing to protect their populations” from human rights atrocities.<sup>100</sup> R2P was operationalized in the 2009 Report of the Secretary-General on Implementing the Responsibility to Protect.<sup>101</sup>

R2P explicitly tried to reconcile the internal and external notions of sovereignty discussed in Part I above. In two famous addresses to the U.N. General Assembly in the late 1990s, Kofi Annan called on the international community to answer the question of how the international community should respond when confronted with another Rwanda. As summarized in the ICISS Report, the Secretary-General had challenged the international community to reconcile “two notions of sovereignty, one vesting in the state, the second in the people and in individuals.”<sup>102</sup> The authors of the ICISS saw his approach as reflecting “the ever-increasing commitment around the world to democratic government (of, by and for the people) and greater popular freedoms”<sup>103</sup> and tried to downplay the radical change that such a reconciliation would entail. “The second notion of sovereignty to

97. G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138–40 (Sept. 16, 2005) (“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . . The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”). Notable omissions were the recommendation that states act unilaterally if the Security Council fails to act as well as the various proposals on reforming the use of the veto.

98. *Id.* ¶ 138.

99. *Id.* ¶ 139 (“The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”).

100. *Id.*

101. *The Responsibility to Protect*, OFFICE OF THE SPECIAL ADVISER ON THE PREVENTION OF GENOCIDE, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited Apr. 25, 2016) (“Sovereignty no longer exclusively protects States from foreign interference; it is a charge or responsibility that holds States accountable for the welfare of their people.”).

102. ICISS REPORT, *supra* note 96, ¶ 2.13.

103. *Id.*

which he refers,” they said, “should not be seen as any kind of challenge to the traditional notion of state sovereignty. Rather it is a way of saying that the more traditional notion of state sovereignty should be able comfortably to embrace the goal of greater self-empowerment and freedom for people, both individually and collectively.”<sup>104</sup>

The authors of the ICISS Report took the reformulation of sovereignty as central to their mandate to outline criteria for humanitarian intervention. While the resulting eponymous concept of R2P has become identified with the right to intervene militarily to halt human rights atrocities; conceptually, it designates a reformulation of sovereignty to include the state’s responsibility to protect its citizens. This new formulation of sovereignty as responsibility underpins the doctrine of humanitarian intervention with which R2P is now associated. If states fail to uphold their “responsibility to protect,” responsibility devolves to the international community.

R2P is an attempt to bring the international conception of sovereignty more in line with the domestic one by creating a form of sovereignty wherein the state is responsible to the needs and rights of its population.<sup>105</sup> But like the right to democratic governance, this new form of sovereignty is paternalistic because it stresses the state’s duties towards its subjects, and not the subjects’ power vis-à-vis the state.<sup>106</sup> As the ICISS Report expressed it:

It is acknowledged that sovereignty implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of good international citizenship.<sup>107</sup>

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104. *Id.*

105. *Cf.* Peters, *supra* note 74, at 526 (noting that the ICISS Report marks a “decisive turn away from Hobbesian absolutism, the sovereign of which is responsible only to God, and not to humans”).

106. Theoretical defenses of R2P also frequently ignore the role of human agency. *See, e.g., id.* at 514 (“State sovereignty is not only – as in the meanwhile canonical view – limited by human rights, but is from the outset determined and qualified by humanity, and has a legal value only to the extent that it respects human rights, interests, and needs.”); Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT’L L. REV. 321, 323-24 (1991) (“The purpose of this inquiry is to show that the sovereignty of states, in the context of both municipal and international arrangements, has come to be subjected to radical limitations dictated by the demands of human rights protection.”).

107. ICISS REPORT, *supra* note 96, ¶ 1.35.

Likewise, Anne Peters, in celebrating the ouster by R2P of sovereignty’s “position as a *Letztbegründung* (first principle) of international law,” stressed the value of “humanity . . . understood as the legal principle that human rights, interests, needs, and security must be respected and promoted.”<sup>108</sup>

Both of the legal innovations just discussed did not escape the central feature of “Hobbesian” sovereignty in international law, namely, the reification of the state. The state remains the major actor recognized in law, and individuals are passive, acted upon, protected, or respected by the state. Both the right to democratic governance and the responsibility to protect would be strengthened by taking account of the role of empowered individuals in the creation and maintenance of states and state sovereignty.

### C. The Outcomes of Paternalistic Interventions

The implementation of the legal innovations discussed in the previous sections has been rocky. Since these have been discussed at greater length elsewhere, I only briefly describe the events that have most greatly undermined the emerging doctrines: in the case of the right to democratic governance, 9/11 and the war in Iraq; and in the case of R2P, the intervention in Libya and the closely associated non-intervention in Syria.

Democratic gains, which seemed unstoppable at the time Franck wrote, have been turned back in many countries by a number of developments.<sup>109</sup> Franck waxed optimistically about the intervention in Haiti, but as events played out, it is hard to say that the intervention furthered the cause of democracy. In an essay written after his death to commemorate Franck’s work, Susan Marks asked, “What has become of the emerging right of democratic governance?”<sup>110</sup> Although she offers four different answers,<sup>111</sup> the answer that she seems to favor is the view that promoting democracy is not the solution but the problem because, in its

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108. Peters, *supra* note 74, at 514.

109. See, e.g., *IS AUTHORITARIANISM STAGING A COMEBACK?* (Mathew Burrows & Maria J. Stephan eds., 2015).

110. Marks, *supra* note 68.

111. *Id.* at 514, 522. The first answer is that the emerging right is progressing apace. Referring to the work of Gregory Fox, Marks notes that there is increasing acknowledgment of the right to democratic governance but that that crystallization as a norm has been hampered by “lack of consensus about the definition of democracy involved” – is it satisfied by elections and political participation, or does it require more substantive guarantees? – and by regional variation in commitment to the democratic form of government. The second answer is that the progress towards consolidation of the right of democratic governance has been set back by the security concerns raised by 9/11 and the concomitant resurgence of authoritarianism world-wide. The third answer is to see that the right to democratic governance has been absorbed into the development agenda; for example, in the U.N., the work of supporting democracy is now largely carried out by the UNDP. *Id.* at 511–17.

international institutional form, support for democracy is almost always linked to structural adjustment policies that, in her view, end up doing more harm than good. Perhaps, she suggests, we need to go beyond trying to frame our “emancipatory” ambitions through the lens of “democracy.”<sup>112</sup> She views Haiti as a cautionary tale, not as an example to be emulated. After Aristide was restored to power by a U.S. and U.N. military intervention, he was pressured to agree to a set of austerity measures that proved crippling for the rural poor. U.S. interference in Haiti’s subsequent elections, the forced removal of a constitutionally-elected president, and pressure in the form of restrictions on aid all point to the dangers that can attend foreign “support” for democracy.

Despite the importance of Haiti, the “war on terrorism” is likely the main reason why the right to democratic governance has been set back. Civil liberties have been limited, even in democratic countries like the United States and the United Kingdom. Authoritarian regimes have seized on the security concerns raised by 9/11, increasingly marginalizing civil society actors by targeting them as “terrorists” or agents of foreign powers. Democracy promotion has also become suspect because it was one of the rationales for the United States’ ill-fated venture in Iraq, another by-product of 9/11.<sup>113</sup> Though it seems hardly fair to link Franck’s article with the war in Iraq, the fact remains that George W. Bush sought in part to legitimate the Iraq War by casting it as humanitarian intervention to save the Iraqi people from a dictator and restore democracy.<sup>114</sup> He gave a speech in November of 2003 at an event commemorating the National Endowment for Democracy,<sup>115</sup> placing the Iraq War “in a broader context of the ‘2,500-year old story of democracy,’ in the same tradition as the ‘military and moral’ American commitments to restoring democracy to post-War Germany, to protecting Greece from Communism during the Cold War and combating communist domination in Latin America, Europe and Asia, including . . . Vietnam.”<sup>116</sup>

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112. *Id.* at 510.

113. Thomas Carothers, *The Backlash against Democracy Promotion*, 85 FOREIGN AFFAIRS 55 (2006).

114. Remarks by President George W. Bush at the 20<sup>th</sup> Anniversary of the National Endowment for Democracy (Nov. 6, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031106-2.html>

115. The NED is a private but federally-funded foundation involved in promoting democracy abroad through the giving of small grants.

116. Fred Barbash, *Bush: Iraq Part of ‘Global Democratic Revolution’: Liberation of Middle East Portrayed as Continuation of Reagan’s Policies*, WASHINGTON POST (Nov. 6, 2003), <http://www.washingtonpost.com/wp-dyn/articles/A7991-2003Nov6.html>.

In light of Bush’s effort to portray the Iraq War as democracy promotion, which was really a secondary rationale for a “preemptive” war to seize weapons of mass destruction, it should be noted that, in general, external coercive interventions to impose democracies have a dismal record.<sup>117</sup> One study of forty-three imposed democracies found that such efforts failed sixty-three percent of the time, and successes lasted an average of only 13.1 years.<sup>118</sup> Another study of French and British as well as U.S. interventions found that U.S. military actions brought about democracy in only three countries, and only in one (Panama) did democracy take hold for an extended period.<sup>119</sup> U.K. and French interventions fared no better, resulting in zero and one democratic transformations, respectively.<sup>120</sup>

Like democracy promotion, R2P has become suspect, and its initial application did not go well. Darfur erupted too soon to truly benefit from R2P, but the timing was right to apply R2P to Libya in 2011. When Colonel Gaddafi referred to protesters against the regime as “cockroaches,” it triggered alarm bells and recalled the radio messages blasted from the tops of moving cars calling Hutus to take up arms against Tutsis.<sup>121</sup> The Security Council reacted swiftly, first by imposing an arms embargo and then by authorizing “all necessary measures,” U.N.-speak for use of force, “to protect civilians and civilian populated areas under threat of attack.”<sup>122</sup> The preamble of Resolution 1973 authorizing force specifically invoked “the responsibility of the Libyan authorities to protect the Libyan population.”<sup>123</sup> The moment for R2P seemed to have arrived. But no sooner had R2P been applied in an actual intervention authorized by the U.N.

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117. McLaughlin, Mitchell & Diehl, *supra* note 91, at 296 (empirically reviewing efforts to protect or promote democracy through the use of force or other “coercive strategies” and finding that the historical record is decidedly mixed).

118. Andrew J. Enterline & J. Michael Greig, *Against All Odds?: The History of Imposed Democracy and the Future of Iraq and Afghanistan*, 4 FOREIGN POL’Y ANALYSIS 321, 341 (2008).

119. Jeffrey Pickering & Mark Peceny, *Forging Democracy at Gunpoint*, 50 INT’L STUD. Q. 539, 555 (2006).

120. These four successful cases are out of a total of seventy-nine military interventions. *Id.* at 546.

121. Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELB. J. INT’L L. 59, 60 (2012) (noting Gaddafi’s use of ‘cockroaches’ “was eerily reminiscent of the same word used in the same context by Hutu radio in Rwanda prior to the massacre of Tutsi opponents in 1994”).

122. S.C. Res. 1970 (Feb. 26, 2011); S.C. Res. 1973 (Mar. 17, 2011).

123. S.C. Res. 1973, *supra* note 122, at 1. Resolution 1970 also makes reference to R2P. S.C. Res. 1970, *supra* note 122, at 2.

Security Council than it went off the rails. A few years later, Libya is an unsafe mess of warring militias and rival governments.<sup>124</sup>

What happened? Although the post-mortem on Libya is not yet complete, it is clear that the NATO mission in Libya exceeded its mandate. The Security Council Resolution authorizing use of force in Libya called for a “no-fly zone,” among other measures, but it did not call for “regime change.”<sup>125</sup> In abstaining from the Resolution, but not blocking it, the Russians expressed reservations that the scope of the operation was unclear and that it “allows everything.”<sup>126</sup> President Obama, President Sarkozy of France, and Prime Minister David Cameron of Great Britain published a joint letter, unilaterally, and in the midst of the operation, announcing that “Colonel Gaddafi must go, and go for good.”<sup>127</sup> Not only did this escalation realize Russian fears, but it followed closely on the heels of the disastrous Iraq War and the unhelpful dithering in earlier stages of the Arab Spring, particularly in Egypt, that had compounded suspicion of American motives in the region. Because of how R2P was implemented in the Libyan context, it is now associated with militarily-imposed regime change.<sup>128</sup> This has had devastating repercussions in Syria, where Russia (and China) reacted by vetoing all resolutions aimed at a collective security response.<sup>129</sup>

Despite good intentions, both the legal innovations of the right to democracy and R2P ended up providing rationales for armed external interventions, rather than empowering citizens against the states. Section IV puts forward a theoretical basis for reconceptualizing sovereignty in an alternative way that recognizes the agency of actual people in creating and maintaining the state’s power.

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124. See generally AMNESTY INT’L, LIBYA: RULE OF THE GUN: ABDUCTIONS, TORTURE AND OTHER ABUSES IN WESTERN LIBYA (2014), <https://www.amnesty.org/en/documents/mde19/009/2014/en/>.

125. S.C. Res. 1970, *supra* note 122; see also *Background Information on the Responsibility to Protect*, OUTREACH PROGRAMME ON THE RWANDA GENOCIDE & THE UNITED NATIONS, <http://www.un.org/en/preventgenocide/rwanda/about/bgresponsibility.shtml> (last visited Apr. 25, 2016) (providing information about all Security Council Resolutions referencing R2P).

126. Gleb Bryanski, *Putin Likens U.N. Libya Resolution to Crusades*, REUTERS (Mar. 21, 2011), <http://www.reuters.com/article/us-libya-russia-idUSTRE72K3JR20110321> (“The resolution is defective and flawed. It allows everything. . . . It resembles medieval calls for crusades.”).

127. *Libya Letter by Obama, Cameron, and Sarkozy: Full Text*, BBC NEWS (Apr. 15, 2011), <http://www.bbc.com/news/world-africa-13090646>.

128. Chris Keeler, *The End of the Responsibility to Protect*, FOREIGN POL’Y J. (Oct. 12, 2011), <http://www.foreignpolicyjournal.com/2011/10/12/the-end-of-the-responsibility-to-protect/> (“After the recent resolution condemning Syria failed to pass through the UN Security Council, it seemed clear that for many politicians in BRICS countries, humanitarian intervention has become no more than an inappropriate violation of national sovereignty.”).

129. Graeme Bannerman, *Libya: A Costly Victory*, POLITICO (Oct. 21, 2011), <http://www.politico.com/story/2011/10/libya-a-costly-victory-066599>.

#### IV. THEORIZING PEOPLE POWER

Popular sovereignty bears upon the status of a state or government in international law in two different ways, referred to here as “front-end” people power and “back-end” people power. Front-end people power concerns the role of individual agency in the formation of states and governments. Even in domestic law, the idea of the “social contract” is often regarded as a legal fiction,<sup>130</sup> representing a moment in time that never really existed. But the view of the social contract as essentially fictive represses the role of human agency in state formation. Front-end people power is less important to my argument here, but it is important to bear in mind theoretically when thinking about sovereignty and international law. Back-end people power looks at the role of the agency of individuals who are acting in association to the end of systematically withdrawing consent from the state or governmental authorities during revolutionary civil resistance campaigns. When this consent is withdrawn, the presumption that the state has the “acquiescence” of the population has been, in effect, rebutted.

##### A. Front-End People Power

States did not magically spring full-grown from the ground of Europe, like Athena from the head of Zeus. While the Peace of Westphalia may have marked a watershed moment in a transitional process, the long-term viability of nation-states required nationalism, the complex texture of affective ties by which individuals residing within a particular territory came to think of themselves as related by blood, culture, and history, and as sharing a common destiny. As Benedict Anderson wrote more than three decades ago, nations are imagined communities:

[The nation] is imagined because the members of even the smallest nations will never know most of their fellow members, meet them, or even hear of them, yet in the minds of each lives the image of their communion . . . . It is imagined as a community, because, regardless of

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130. See e.g., Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 *YALE J. INT'L L.* 331, 387 (2009) (arguing that, in defending a Kantian view of international law, “Fernando Tesón . . . appears to make the Lockean claim that state legitimacy rests on an actual ‘horizontal’ contract between the people, as well as on an actual ‘vertical’ contract between the people and the state’s officials . . . both contracts are really fictions, so strictly speaking it is false” (citing Fernando R. Tesón, *A PHILOSOPHY OF INTERNATIONAL LAW* 57–58 (1998)). A. John Simmons takes this argument one step further by saying that a Lockean social contract view amounts to “philosophical anarchism” because this actual consent never obtains and so all states in the world, including liberal democracies, are illegitimate. See A. JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 103–12, 155–56 (2001).

the actual inequality and exploitation that may prevail in each, the nation is always conceived of as a deep, horizontal comradeship. Ultimately it is this fraternity that has made it possible, over the past two centuries, for so many millions of people to kill for such limited imaginings.<sup>131</sup>

Though Anderson's work has been criticized for not giving sufficient attention to the collective labor involved in forging these communities,<sup>132</sup> a recent volume edited by Maciej Bartkowski calls attention to the way that nonviolent struggle has frequently contributed significantly to achieving national liberation or consolidation.<sup>133</sup> Take for example, the formation of the Polish state after World War I. The Polish-speaking Polish-Lithuanian Commonwealth had been partitioned in 1795 into three parts among Russia, Prussia, and the Hapsburg Empire.<sup>134</sup> The people attempted countless violent uprisings in the nineteenth century, only to be crushed in 1863 by the Russian army. Despite official histories celebrating armed uprisings, Poles turned to nonviolent civil resistance for almost the next half-century, doing what came to be known as "organic work," to strengthen the Polish economy and culture, particularly through creating alternative educational institutions, and laying the foundations for a potentially more successful state.<sup>135</sup>

Nonviolence in Poland was embraced not only out of weakness, but also out of a belief that "work at foundations" was necessary to promote "social and economic development, cultural learning, and preservation of language, tradition and historical memory."<sup>136</sup> Where the occupying powers were intent on eradicating Polish culture, resistance took the form of preserving the "cultural, ethnic, linguistic, and historical boundaries of being a Pole."<sup>137</sup> The creation and maintenance of underground parallel institutions, particularly educational, financial, and economic, enabled Poland to coalesce rapidly as a state after 1918. After Poland was subordinated yet again, this time to the Soviet Union after World War II,

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131. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6–7 (1991).

132. DON MITCHELL, *CULTURAL GEOGRAPHY: A CRITICAL INTRODUCTION* 269 (2000) (criticizing Anderson for not paying greater attention to "the *practices* and exercises of power through which these bonds are produced and reproduced," arguing instead that "[t]he question is not what common imagination *exists*, but what common imagination is *forged*").

133. *See generally* RECOVERING NONVIOLENT HISTORY, *supra* note 13.

134. *See generally* Maciej J. Bartkowski, *Poland: Forging the Polish Nation Nonviolently, 1860s–1900s*, in RECOVERING NONVIOLENT HISTORY, *supra* note 13, at 259.

135. *Id.* at 263.

136. *Id.*

137. *Id.* at 264.

the legacy of nonviolent resistance was revived in the 1980s, enabling Poland to throw off Soviet domination in 1989.

The work of people power in imagining national communities is not unique to Poland. Similar efforts took place all over Europe and elsewhere around the globe (indeed, Anderson’s *Imagined Communities* focused on Southeast Asia). Gandhi’s nonviolent nationalist campaign helped to bring about India’s independence from Britain and the formation of its assorted peoples into a unified state. Nonviolent civil resistance was also a feature of Albanian resistance to Serbian rule in Kosovo prior to the NATO intervention and it also played a pivotal role in bringing about the independence of East Timor.

Of course, some of the nation-building that took place occurred through violent means, and some efforts cannot be easily understood through a democratic lens. But it is worth including this front-end people power as a reminder that the nation-state that lies at the center of the international system is not an immutable form that political organization on a global scale must inevitably take. The nation-state is not a “natural” political category; it is man-made. Indeed, the most trenchant postcolonial critique of Anderson’s work addresses the fact that colonialism imposed the nation-state and nationalism as the shape that anticolonial resistance was forced, unnaturally, to take.<sup>138</sup> As Jordan Paust observes:

[B]y focusing on the “state,” one is less likely to appreciate the roles that are actually played by individuals and groups in the formation and continuation of a process involving the denomination “state” and the creation of law both within and outside the state. In a real sense, the state has existed and will exist, as will other forms of human association, because of patterns of human expectation and behavior.<sup>139</sup>

## B. Back-End People Power

It could be argued that while “people power” may contribute to the initial founding of a state, it does not necessarily remain analytically relevant after the state comes into existence. However, even where creation moments have receded in time, there is an ongoing social contract in the ordinary operation of both states and governments that we may characterize

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138. PARTHA CHATTERJEE, *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* 9 (1993) (describing a “nationalism [that] has no option but to choose its forms from the gallery of ‘models’ offered by European and American nation-states”).

139. Jordan J. Paust, *Non-State Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. OF INT’L L. 977, 1000 (2011).

as “latent” or “dormant.”<sup>140</sup> This dormant social contract is manifested in action or inaction on the part of citizens that creates the cooperation necessary for the everyday administrative operation of the apparatuses of power.

The dormant social contract is another name for the “acquiescence” that international law has minimally required for the recognition of states and governments. As noted in above in Part II(B), acquiescence in governmental authority has long played a role in the loose set of laws governing recognition of both states and governments. Since this acquiescence is meaningful for claims of recognition made by states and governments, its withdrawal should be meaningful as well.

As noted in Part I, civil resistance works by dissecting and, eventually, dismantling the pillars that support a regime’s political power. This dissection and dismantling of pillars of support activates the social contract that has been, up until that point, dormant. Even if the “original” moment when the social contract was originally negotiated in a state of nature is irrecoverable or hypothetical, that moment can be enacted and made real when consent to the social contract is withdrawn through widespread civil resistance. As Locke noted, “there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.”<sup>141</sup>

It will be recalled that one of Roth’s justifications for the effective control doctrine is the difficulty in actually ascertaining “the will of the people.” He reasons further:

It is hardly clear how to respect popular will in the ordinary case other than by deferring to the apparatus to which the populace has, for whatever reason, evidently decided to render obedience. Even where this decision has been made under duress, the populace may not be well served by leaving open the question of who may assert rights, incur obligations, and confer immunities in its name.<sup>142</sup>

While conceding that “[t]he possibilities for consensus judgment that the principal of popular sovereignty has been violated in a particular case are

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140. Bartkowski refers to “dormant people power,” meaning the latent power that citizens have to mobilize and refuse to cooperate with state authorities, to turn their passive cooperation into active noncooperation. Bartkowski, *supra* note 13, at 4. I have rephrased this as “dormant social contract” to highlight the philosophical connection with social contract political theories and to suggest that the ordinary moment can be revived.

141. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* para. 149 (1690).

142. Roth, *Secessions, Coups, and the International Rule of Law*, *supra* note 65, at 34–35 (citations omitted).

much greater now than in the past,” Roth still sees the presumption that a people is acquiescing in the rule of an authority as “a potential application of the norm of popular sovereignty under adverse fact-finding conditions.”<sup>143</sup> Although, as Danny Auron notes, there is “no accepted mechanism” for determining “when habitual obedience has been lost,”<sup>144</sup> people power presents a reasonable (and relatively objective) proxy. Recall that Chenoweth and Stephan point to the ability of nonviolent civil resistance movements to attract a much broader base of support than violent resistance movements. They identify 3.5% as the tipping point: when 3.5% of the population participates in a nonviolent campaign, that campaign is likely to succeed.<sup>145</sup>

The question remains whether this 3.5% can be presumed to represent the “will of the people.” If the remaining 96.5% do not seriously impede the nonviolent resistance, and even actively support them, then an inference can be drawn that the 3.5% represents the will of the people. This inference is strengthened where there is evidence that the everyday functioning of the state has been disrupted, as occurred in the former Czechoslovakia when leaders of the nonviolent uprising were able to mobilize a large, country-wide general strike at noon on November 27, 1989.<sup>146</sup> The greater inclusiveness of nonviolent movements gives them greater claim to represent “the will of the people” as opposed to violent resistance groups.

I noted above that the effective control doctrine has most bite when it comes to statehood. A less well-developed fear that Roth mentions is that opening up international law to self-determination as a real norm will open up a Pandora’s Box of nationalist, ethnic, and racial jousting for political power, where the desires of the minority will inevitably be sacrificed to the desires of the majority.

While Roth in his earlier writings noted certain inadequacies in the doctrine of effective control,<sup>147</sup> more recently he has reaffirmed the virtues

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143. ROTH, *GOVERNMENTAL ILLEGITIMACY*, *supra* note 65, at 142.

144. Auron, *supra* note 5, at 469.

145. Erica Chenoweth, *My Talk at TEDxBoulder: Civil Resistance and the “3.5% Rule”*, RATIONALINSURGENT.COM (Nov. 4, 2013), <http://rationalinsurgent.com/2013/11/04/my-talk-at-tedx-boulder-civil-resistance-and-the-3-5-rule/>.

146. Although the strike was for only two hours, it was highly successful, which impressed U.S. diplomats deciding which side to back. “I think when the general strike succeeded, we figured this was really serious.” *The Velvet Revolution, November 1989*, ASS’N FOR DIPLOMATIC STUDIES & TRAINING (last visited Apr. 25, 2016), <http://adst.org/2015/10/the-velvet-revolution-november-1989/> (excerpting an interview with Theodore E. Russell, Deputy Chief of Mission at Embassy Prague from 1988 to 1991).

147. First, civil war “renders the test of effective control indeterminate and prompts doctrinal reliance on the dubious rule against ‘premature recognition.’” ROTH, *GOVERNMENTAL ILLEGITIMACY*, *supra* note 65, at 415. Second, “foreign intervention on behalf of the effective government . . . even

of bright lines; however, it is arguable that a bright-line rule overstates the dangers of a more flexible approach to self-determination. Despite the Yugoslav cases, secession remains a rare event, and supporting nonviolent civil resistance movements does not seem likely to change that. Chenoweth and Stephan found no cases where nonviolent civil resistance movements aimed at independence from an existing state achieved success, and only four out of forty-one cases where violent movements achieved success (a 9.8% rate of success).<sup>148</sup> Russia's annexation of Crimea does present a cautionary tale, but it is not an example of either a nonviolent or violent secession movement. It is rather a by-product of straightforward Russian aggression. Furthermore, although Roth's bright-line rule permits negotiated secession, there is no guarantee that stability will result. Granting independence to South Sudan was supposed to resolve tensions with the North, but conflict broke out again shortly after South Sudan declared independence.

When a resistance movement has evolved and become a large-scale, mass movement with an inclusive platform, it can be concluded that the population has effectively (and demonstrably) withdrawn its consent from the government being recognized as legitimate by the international community.<sup>149</sup> Danny Auron has proposed that states use "de-recognition" as a policy tool to deal with repressive regimes embroiled in conflict with large-scale nonviolent protest movements, as a means of "nonviolent intervention."<sup>150</sup> While he usefully suggests that large-scale nonviolent protests and use of government force to suppress them are indicators that effective control has been lost, he follows along the lines of Franck's argument in focusing on how states in the international system can use the withholding of legitimacy as a means to enforce an entitlement to democratic governance, rather than on how citizens using nonviolent means can achieve democratic change on their own.<sup>151</sup>

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where lawful, vitiates the significance of effective control as a guide to respect for popular sovereignty." *Id.* Third, "unambiguous manifestations of popular repudiation of the ruling apparatus . . . render untenable the doctrine's presumption of legal standing for that apparatus as the representative of the popular will." *Id.* at 416.

148. CHENOWETH & STEPHAN, *supra* note 19, at 73.

149. In GOVERNMENTAL ILLEGITIMACY, Roth acknowledges that "unambiguous manifestations of popular repudiation of the ruling apparatus . . . render untenable the doctrine's presumption of legal standing for that apparatus as the representative of the popular will"). Roth, *supra* note 66, at 416.

150. Auron, *supra* note 5, *passim*.

151. Proposals to condition external sovereignty on some form of domestic popular sovereignty have proliferated in academic circles but failed to become customary law, except in some regional contexts, largely because of fears that it could not be implemented impartially. For arguments in favor of conditioning the norm of nonintervention on domestic popular sovereignty, see generally Lori Damrosch, *Politics Across Borders: Nonintervention and Non-forcible Influence over Domestic Affairs*,

## V. TOWARDS DEVELOPING A LEGAL REGIME FOR SITUATIONS INVOLVING NONVIOLENT CONFLICT

What follows from all this? Suppose that we do conceptualize sovereignty differently, what are the implications for international law? It might be that very little follows, since much recognition policy is a matter of foreign relations—which foreign authorities does a given government want to have good relations with and which does it find distasteful? Which moral commitments is it willing to sacrifice and which does it desire to press? Foreign governments will still make pragmatic calculations of what political advantage might accrue to them by supporting one or another side in an internal conflict, whether violent or nonviolent. However, given both that nonviolent civil resistance movements are increasing in number and that they are morally and pragmatically preferable to armed conflict as a means of resolving political disputes, it is imperative that the international community develop a legal and policy framework to support and incentivize them as an alternative to violence for the resolution of political conflict. Such frameworks will not be easily developed, given the political chaos that has been created by the Libyan-Syrian mistakes; but it is this very chaos that compels rethinking such a foundational concept in international law as sovereignty. The following proposals are preliminary ideas for further development and are presented with the understanding that they are not likely to be translated into reality anytime soon.

A number of the concerns Roth raises could be addressed by devising a set of legal rules that differentiate violent from nonviolent resistance movements and treat the latter as presumptively superior indicators of “the will of the people.” Roth assumes throughout his writings that the relevant “internal processes” resulting in “effective control” are violent in nature. This assumption is being drawn into question by the widespread use of “people power” as a more effective means of waging political conflict than violence. Since many of those engaged in nonviolent struggle think of it not as a negation of warfare (pacifism) but as an alternative means of waging war, it is arguable that it is more accurate to think of large-scale nonviolent civil resistance as creating a state of affairs analogous to civil war. The task would then be to think about how the laws governing non-international armed conflicts might be adapted to better regulate this alternative political

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83 AM. J. INT’L L. 1 (1989); for cautions, see Peters, *supra* note 74, at 521. (“[T]he proposal to condition, as a general matter, external state sovereignty and with it non-intervention on the state’s internal political order, notably on its democratic credentials, has potentially detrimental consequences for human security both in the concerned state and elsewhere.”).

condition that is neither peace nor war, but rather, conflict that is being carried out nonviolently. As Chenoweth and Stephan observe:

Civilian populations are often seen as victims of war or as potential recruits, rather than as agents and instigators of a different form of resistance. As a consequence, scholars of conflict and civil war take the violence as a starting point, either examining the presence of violence compared to its absence,<sup>152</sup> or comparing degrees of violent behavior once a conflict already exists.

A legal and policy framework for nonviolent civil resistance would have to begin by taking into account its logic. One of the canons of nonviolent resistance strategy is the need to maintain nonviolent discipline in the face of deadly force. It is human to feel a desire for revenge or an impulse for self-protection. But the use of violence is the very thing that a repressive regime wants; indeed, it may work hard to provoke a violent reaction. Assad used provocateurs, violence targeted to incite ethnic conflict, and left weapons caches lying about for protesters to pick up and use. Resorting to violence means engaging with a regime on its own terms and giving up the “moral weapon” of nonviolence. It also means fighting on the terms where the regime is strongest and the resistance is weakest. A legal framework for “people power” movements should create incentives for maintaining nonviolent discipline. The international community should do whatever it can to support nonviolent resistance movements when they emerge and treat them as superior, both morally and politically, to violent resistance movements, thus taking away the moral hazard of provoking violence.

In trying to save R2P from its own “success” in Libya, the international community needs to set limits on future interventions and indicate clearly their protective nature. Except under the kind of limited circumstances imagined by the responsibility to protect, foreign intervention should be limited to providing nonviolent aid for nonviolent movements, or to protective military action (such as no-fly zones) on behalf of nonviolent movements subjected to force. Intervention for regime change should be clearly prohibited.

It might be useful to resurrect the doctrine of belligerency but with modifications suited for nonviolent conflict. In the past, customary international law recognized gradations among violence waged by non-

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152. CHENOWETH & STEPHAN, *supra* note 19, at 250.

state actors.<sup>153</sup> In that context, “rebellion,” “insurgency,” and “belligerency” were terms of art used to designate armed conflicts against a government according to the levels of violence and territorial control achieved by the non-state actors. Rebellions and insurgencies designate conflicts that are relatively minor and entail no recognition, but when the violence reached a certain level of intensity and control was exerted over substantial territory, insurgents could be accorded international recognition. Traditionally, international law gave a status to armed, non-state insurgents if the following criteria were met:

First, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.<sup>154</sup>

With respect to relations between third states and the parties to the conflict, such recognition had the consequence of transforming an internal conflict (a “non-international armed conflict”) into an international armed conflict where the laws of war applied. The result: imposing duties of non-participation, neutrality, and impartiality on third states.<sup>155</sup> Today this doctrine is infrequently used and some see it as having fallen into desuetude.<sup>156</sup> Furthermore, it is acknowledged that states facing insurgencies are reluctant to recognize insurgents as belligerents, as doing so enhances their legitimacy.<sup>157</sup> However, such recognition (and perhaps nonviolent support) could be conditioned on use of nonviolent tactics. For instance, France and other states very quickly recognized the Libyan

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153. Cf. U.K. MINISTRY OF DEF., *THE MANUAL OF THE LAW OF ARMED CONFLICT* 27 (2004) (addressing “large-scale civil wars in which the participants were internationally recognized as having belligerent status” and “classic examples are the American Civil War and the Spanish Civil War”).

154. HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 176–78 (1947); for more recent iterations of this rule, see Joseph B. Kelly, *Legal Aspects of Military Operations in Counterinsurgency*, 21 MIL. L. REV. 95, 96–97 (1963); Konstantinos Mastorodimos, *Belligerency Recognition: Past, Present, and Future*, 29 CONN. J. OF INT’L L. 301, 303 (2014).

155. There is less agreement on whether recognition by third states triggers the laws of war in the relations between the parent state and insurgents. Mastorodimos, *supra* note 154, at 309, 309 n.52.

156. *Id.* at 311 (observing that “[p]ast practice shows a slow demise on the use of the doctrine”).

157. Auron, *supra* note 5, at 483. Auron mentions the possible “substitute recognition” of nonviolent resisters, but he does not explore that alternative in any detail. *Id.* at 443–44.

opposition as the “sole representative of the Libyan people,” without regard to whether the opposition was committed to nonviolent means or not.<sup>158</sup>

Though not all nonviolent tactics take the form of open confrontation with a repressive regime, in most conflicts civilian participants at least sometimes openly confront authorities, thereby exposing themselves to mortal threat. A “privilege of nonviolence” might be given to those who engage in nonviolent conflict and successfully maintain nonviolent discipline. Since the use of deadly force violates usual social norms, the “privilege of belligerency” is restricted to those who meet certain conditions set out in the Geneva Conventions. But this reluctance could be inverted in the case of unarmed insurgents and could help them gain legal recognition and standing.

A “privilege of nonviolence” might also require treatment for those imprisoned by the regime comparable to that guaranteed lawful prisoners of war. Non-state armed insurgents are typically regarded as unlawful combatants in international law and are not entitled to prisoner of war status. This change would mean considerably better treatment than that usually afforded prisoners in repressive states.

Nonviolent support—preferably delivered by civil society actors, not national actors—that could help nonviolent resisters shift course and sustain a movement over the long-haul might be the most efficacious form of intervention. The violence used against the Syrian protesters was extreme, and it may appear to support the commonly-held view that nonviolent campaigns can only succeed against “nice” authoritarians. But research on nonviolent resistance points to the conclusion that strategy plays a more important role in the success of any campaigns than structural conditions or regime type.<sup>159</sup> One option a movement has when confronted with massive violence to large public demonstrations is to take resistance efforts out of public spaces where they can be targeted and mobilize more invisibly for a time, as Poland did when efforts at armed uprisings were put down. Regarding Syria, Stephan observes, “I think our shared analysis is that any form of resistance against this regime was going to have a difficult time. But we do say, perhaps counterintuitively, that nonviolent

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158. See Sam Foster Halabi, *Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context*, 27 AM. U. INT'L L. REV. 321, 379 (2012) (noting “states recognized the opposition in Benghazi out of a need to ensure that the conduct of hostilities between the incumbent regime and the opposition cause minimal disruptions to the participation of Libya in the global energy supply”).

159. Peter Ackerman & Hardy Merriman, *The Checklist for Ending Tyranny*, in IS AUTHORITARIANISM STAGING A COMEBACK? 67 (ed. Mathew Burrows & Maria J. Stephan)(arguing “[s]kills and strategic choice often matter more than conditions in determining the outcomes of these conflicts”).

resistance—if it had had more time, if there had been the ability of the opposition to plan, to diversify their tactics, for the local resistance, which was actually quite amazing around Syria, to bring their activities together, to coordinate their assistance – it may have had a chance of success.”<sup>160</sup>

If we look at the situations in Libya and Syria from the perspective of nonviolent civil resistance, we find an irony. R2P was implemented in Libya, where peaceful protests quickly gave way to violence, and not in Syria, which had a thriving and sustained “people power” campaign. In the case of Syria, the Libyan precedent helped to create a moral hazard where at least some defectors from the regime in Syria thought that armed resistance would provoke speedy international action. As a member of the Free Syrian Army said:

We did not think for a second that we were are going to end up fighting for real and long. We thought we would put on a show, so the international community will come and save us in the way it was in Libya. They will bomb Assad’s palace and bring the government down.<sup>161</sup>

One of the leading theorists of nonviolent civil resistance, who believes that effective change only comes about when a civilian population organizes itself, warned presciently the day after military strikes began on Gaddafi forces: “If you get someone else to come and help you, they will come with their interests, and potentially turn your country into a battlefield.”<sup>162</sup>

Regime change cannot be imposed militarily from the outside. It is the prerogative of the people; though obviously, when a genocide seems ripe to occur, or is actually unfolding, the rationale for intervention should not materially depend on whether those targeted or not “maintain nonviolent discipline.” But even in the case of Rwanda, which has been retrospectively understood as a paradigmatic case justifying armed intervention, it is possible that a smaller, earlier intervention might have been just as effective as a larger, later intervention. Had Romeo Dallaire, the military leader of the U.N. peace-keeping mission on the ground, been given permission to act on intelligence he had received from inside the

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160. *Why Civil Resistance Movements Succeed* [Interview with Erica Chenoweth & Maria Stephan], NPR (Aug. 21, 2014), <http://www.npr.org/2014/08/21/342095367/why-civil-resistance-movements-work>.

161. *Id.*

162. Eric Stoner, *Sharp on Libya and Burma*, WAGINGNONVIOLENCE.COM (Mar. 20, 2011), <http://wagingnonviolence.org/2011/03/sharp-on-libya-and-burma/>.

Interahamwe and raid the arms caches that were being prepared, the genocide might have been largely short-circuited, with minimal intervention.

It needs to be acknowledged that even nonviolent support provided to nonviolent movements can be extremely controversial and lead to backlash if it creates the impression (even one not grounded in reality) that that external actors are manipulating domestic politics to bend them to their own political agenda. The “Color” Revolutions in countries of the former Soviet bloc—the Rose Revolution in Georgia (2003), the Orange Revolution in Ukraine (2005), and the Tulip Revolution in Kyrgyzstan (2005)—threatened Russian leadership who “sought to portray these events as part of an American conspiracy to ensure that friendly, pro-America leaders are in place in the countries surrounding Russia.”<sup>163</sup> In fact, the United States government had supported some opposition groups and did claim some credit for the changes.<sup>164</sup> Russia’s newly aggressive foreign policy and its notorious crackdown on civil society seems at least partly indebted to the initial success of the Color Revolutions in toppling unpopular leaders in former Soviet bloc states.<sup>165</sup> However, it appears that, contrary to both Russian and U.S. claims, civil resistance campaigns cannot be exported or imported. Chenoweth and Stephan’s data show that, from 1900 to 2006, campaigns that received funding from a foreign state were no more likely to succeed than campaigns that did not.<sup>166</sup>

## CONCLUSION

Nonviolent civil resistance movements are having a shaping effect on the international order worldwide, yet international law has been slow to recognize their importance. Until now, such movements have operated in a vacuum with respect to international law. This needs to change. Through the development and dissemination of technologies of civil resistance, noncooperation, and civil disobedience, ordinary citizens around the world are organizing to withdraw their consent from repressive governments,

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163. LINCOLN MITCHELL, *THE COLOR REVOLUTIONS* 73 (2012).

164. *Id.* at 86–87.

165. *Id.* at 92–114. “Because of the perceived role of U.S. democracy assistance in the Color Revolutions, barriers have been erected in the former Soviet Union and beyond that make it harder for the NGOs and companies that work on democracy assistance to function around the world. Additionally, the democracy assistance project became conflated not just with regime change, but with regime change seeking to install pro-American leaders. This has contributed to the increasing cynicism and doubt surrounding democracy assistance internationally and in the U.S.” *Id.* at 192.

166. CHENOWETH & STEPHAN, *supra* note 19, at 59 (“While foreign support or international sanctions may have been critical in some cases, there is no general pattern indicating that they are necessary for successful campaign outcomes.”).

asserting popular sovereignty in ways that have altered the international geopolitical order. In Central and Eastern Europe, nonviolent resistance movements helped to bring about the dissolution of the Soviet Union and the concomitant re-emergence of numerous independent European states – Poland, Czechoslovakia (now the Czech Republic and Slovakia), Hungary, a united Germany, the Balkans. The Cedar Revolution drove Syrian forces out of Lebanon. Nonviolent civil resistance helped to end colonialism in Ghana, Malawi, and India. East Timor became independent of Indonesia. In many other countries, military juntas and other dictatorships have been overthrown, altering the balance between democratic and non-democratic states in the international order.

The power of civil resistance movements to alter the map of the world is one reason why popular sovereignty should be integrated into the concept of external sovereignty in international law; another is that such movements make visible the dormant social contract that underlies all political power. International law treats the bundle of organized social relations making up the state as a reified “thing” existing above and apart from the aggregate of individual actions and omissions that bring it into existence and sustain it in reality. Acknowledging the dormant social contract will help, if only theoretically, in revealing the role of people in the creation and ongoing maintenance of the state and its government, a role that must be repressed in order to achieve the reification of the state. Paternalistic reformulations of sovereignty have led to the disastrous interventions of the type that the norm of nonintervention was supposed to prevent. We need to move away from paternalism in international law and create legal frameworks that empower a state’s own citizens to peacefully claim their rights, while respecting the state’s territorial boundaries.

The international community has a collective interest in supporting and incentivizing nonviolent conflict. If order is the goal of international relations and international law, rules need to be found to avoid the long-term destabilizing effects of internal violent political transitions. The choices are not limited to a state being governed by its own thugs on the one hand or by a foreign power, however benevolent, on the other. As Roth himself acknowledges, there is an indefensible contradiction in the fact that international law strives to outlaw armed conflict as a means of resolving political conflict between or among states, but continues to “dignify” armed conflict as a means for achieving political change within states.<sup>167</sup> Elaborate

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167. Roth, *The Virtues of Bright Lines*, *supra* note 65, at 411 (“[T]he international system has continued to dignify the internal use of force as a basis for setting the terms of the territorial public order.”).

legal frameworks have been designed to regulate violent conflict, but none exist to regulate nonviolent conflict. This also needs to change.

Finally, to return to the subject of sovereign and official immunity, traditional international law based on the consent of states will never completely solve the problem of immunity, though the International Criminal Court is a promising development. However, limits on sovereign and official immunity are coming from the ground up, through the “people power” movements that are seeking accountability in domestic law for perpetrators of corruption and human rights violations. It is foreseeable, as Franck predicted, that the international legal system will eventually move away from pluralism towards a normative framework that will privilege a right to democratic governance. However, it will do so, not because of the “craving” of states for legitimacy, but through the the long-term exercise of “people power” demanding accountability from hitherto immune authorities.