

# Whose Sovereignty? Empire Versus International Law

Jean L. Cohen

Let me begin by juxtaposing two facts: The world's sole superpower has invaded and occupied Iraq. Carl Schmitt's *Nomos der Erde* has just been translated into English, or I should say American.<sup>1</sup> Is this mere coincidence? Are not the questions he raised, if not his answers, once again on the agenda?

This article focuses on the impact of globalization on international law and the discourse of sovereignty. We have been hearing for quite some time that state sovereignty is being undermined. The transnational character of "risks," from ecological problems to terrorism, including the commodification of weapons of mass destruction, highlights the apparent lack of control of the modern nation-state over its own territory, borders, and the dangers that its citizens face.

Moreover, key political and legal decisions are being made beyond the purview of national legislatures. A variety of supranational organizations, transnational "private global authorities," and transgovernmental networks engage in regulation and rule making, bypassing the state in the generation of hard and "soft law."<sup>2</sup> Indeed the apparent decoupling of law from the territorial state suggests to many that the latter has lost legal as well as political sovereignty.

This conundrum has triggered the emergence of a set of claims about the transformation of international law. If law making is escaping the monopoly of states, then the

standard view of international law as the law that states make through treaties, or consent to through long practice (custom), has to be revised. The emergence of human rights law based on consensus apparently implies that global cosmopolitan law trumps the will of states and their international treaties (consent).<sup>3</sup> Today the very category "international" appears outdated. The question

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<sup>1</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos Press, 2003).

<sup>2</sup> See Günther Teubner, "Global Bukowina: Legal Pluralism in the World Society," in Günther Teubner, ed., *Global Law Without a State* (Brookfield, Vt.: Dartmouth Publishing Group, 1997), pp. 3–15 and passim; Günther Teubner, "Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?" in Christian Joerges, Inger-Johanne Sand, and Günther Teubner, eds., *Transnational Governance and Constitutionalism* (Portland, Ore.: Hart Publishing, 2004), pp. 3–29; Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, "The Concept of Legalization," in Robert O. Keohane, *Power and Governance in a Partially Globalized World* (New York: Routledge, 2002), pp. 132–51; James N. Rosenau et al., *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (New York: Cambridge University Press, 1997); and James N. Rosenau, "Governance and Democracy in a Globalizing World," in Daniele Archibugi, David Held, and Martin Kohler, eds., *Re-Imagining Political Community: Studies in Cosmopolitan Democracy* (Palo Alto: Stanford University Press, 1998), pp. 28–58.

<sup>3</sup> See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004), pp. 301–13, for an argument that consensus should replace state consent as the principle of legitimacy in the international system.

thus becomes: What is to be the new “nomos” of the earth and how should we understand globalized law?<sup>4</sup>

Legal theorists have certainly risen to the challenge over the last decade. Talk of legal and constitutional pluralism, societal constitutionalism, transnational governmental networks, cosmopolitan human rights law enforced by “humanitarian intervention,” and so on are all attempts to conceptualize the new global legal order that is allegedly emerging before our eyes.<sup>5</sup> The general claim is that the world is witnessing a move to cosmopolitan law, which we will not perceive or be able to influence if we do not abandon the discourse of sovereignty.<sup>6</sup> The debates from this perspective are around how to conceptualize the juridification of the new world order.<sup>7</sup> Despite their differences, what seems obvious to those seeking to foster legal cosmopolitanism is that sovereignty talk and the old forms of public international law based on the sovereignty paradigm have to go.

But there is another way of interpreting the changes occurring in the international system. If one shifts to a political perspective, the sovereignty-based model of international law appears to be ceding not to cosmopolitan justice but to a different bid to restructure the world order: the project of empire. The idea that we have already entered into the epoch of empire has taken hold in many circles, as the popularity of the Hardt and Negri volume, and the avalanche of writings and conferences on empire, witness.<sup>8</sup> Like the theorists of cosmopolitan law, proponents of this view also insist that the discourses of state sovereignty and public international law have become irrelevant. But they claim that what is replacing the system of states is not a pluralistic, cooperative world political system under a new, impartial global *rule of law*, but rather a project of

imperial world domination. From this perspective, governance, soft law, self-regulation, societal constitutionalism, trans-governmental networks, human rights talk, and the very concept of “humanitarian intervention” are simply the discourses and deformed mechanisms by which empire aims to rule (and to legitimate its rule) rather than ways to limit and orient power by law.<sup>9</sup>

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<sup>4</sup> See Schmitt, *The Nomos of the Earth*, pp. 336–51, for the concept of *nomos*. In short, a *nomos* is the concrete territorial and political organization of the world order, invested with symbolic meaning, that undergirds the formal rules of international law. For a critique of his essentialist understanding of this concept, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (New York: Cambridge University Press, 2004), pp. 415–24.

<sup>5</sup> Teubner, “‘Global Bukowina’: Legal Pluralism in World Society”; and Neil Walker, “The Idea of Constitutional Pluralism,” *Modern Law Review* 65, no. 3 (2002), p. 317.

<sup>6</sup> Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, “Introduction: Legalization and World Politics,” in Goldstein et al., eds., *Legalization and World Politics* (Cambridge: MIT Press, 2001), pp. 1–15.

<sup>7</sup> One battle is between traditional sovereigntists and cosmopolitans. Another debate exists within cosmopolitanism between centered versus decentered models. For more centered models of legal and political cosmopolitanism, see David Held, *Democracy and the Global Order* (Stanford: Stanford University Press, 1995); and Daniele Archibugi, “Cosmopolitan Democracy,” in Daniele Archibugi, ed., *Debating Cosmopolitanism* (New York: Verso, 2003), pp. 1–16.

<sup>8</sup> Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000). See also *Ethics & International Affairs* 17, no. 2 (2003), “The Revival of Empire,” pp. 34–98; and Michael Ignatieff, “The Burden,” *New York Times Magazine*, January 5, 2003, p. 22.

<sup>9</sup> *E&IA*’s “The Revival of Empire” is more nuanced than this characterization. There is, of course, a debate over whether the United States is an empire, whether it can be a successful empire, when the empire began, and whether recent activity, including the invasions of Afghanistan and Iraq, are signs of its demise. See also Emmanuel Todd, C. Jon Delogu, and Michael Lind, *After the Empire: The Breakdown of the American Order* (New York: Columbia University Press, 2003). My interest is the fate of the discourse of state sovereignty in these claims and counterclaims.

I agree that we are in the presence of something new. But I am not convinced that one should abandon the discourse of sovereignty in order to perceive and conceptualize these shifts. Nor am I convinced that the step from an international to a cosmopolitan legal world order *without* the sovereign state has been or should be taken. The two doubts are connected: I argue that if we drop the concept of sovereignty and buy into the idea that the state has been disaggregated, and that international treaty organizations are upstaged by transnational governance, we will misconstrue the nature of contemporary international society and the political choices facing us. If we assume that a constitutional, cosmopolitan legal order already exists, which has replaced or should replace international law and its core principles of sovereign equality, territorial integrity, nonintervention, and domestic jurisdiction with cosmopolitan right, and if we construe the evolving doctrine of “humanitarian intervention” as the enforcement of that right, we risk becoming apologists for imperial projects. Under current conditions, this path leads to the political instrumentalization of “law” (cosmopolitan right) and the moralization of politics rather than to a global rule of law. I will argue that we face the following political choice today: We can either opt for strengthening international law by updating it, making explicit the particular conception of sovereignty on which it is now based and showing that this is compatible with cosmopolitan principles inherent in human rights norms; or we can abandon the principle of sovereign equality and the present rules of international law for the sake of human rights, thus relinquishing an important barrier to the proliferation of imperial projects and regional attempts at *Grossraum* ordering (direct annexation or other forms of

control of neighboring smaller polities) by twenty-first-century great powers, who invoke (and instrumentalize) cosmopolitan right as they proceed.<sup>10</sup> Clearly I opt for the former over the latter.

The first project entails acknowledging the existence and value of a dualistic world order whose core remains the international society of states embedded within (suitably reformed) international institutions and international law, but that also has important cosmopolitan elements and cosmopolitan legal principles (human rights norms) upon which the discourse of transnationalism and governance relies, if inadequately. On this approach (my own), legal cosmopolitanism is potentially linked to a project radically distinct from empire and pure power politics—namely, the democratization of international relations and the updating of international law. *This requires the strengthening of supranational institutions, formal legal reform, and the creation of a global rule of law that protects both the sovereign equality of states based on a revised conception of sovereignty and human rights.* Much will depend on how the new, and its relation to what went before, is framed. Unlike the theorists of cosmopolitan law and justice without state sovereignty, the paradox for which I want to argue is that today the rearticulation and democratization of sovereignty (internal and external), configured within a multilayered world order with effective international institutions and an updated international law, is

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<sup>10</sup> Of course, international law can also be instrumentalized by the powerful. But the principle of sovereign equality and its correlate, nonintervention, provides a powerful normative presumption against unwarranted aggression. Abandoning it would be a mistake. I also provide noninstrumental, normative arguments in favor of the discourse of sovereignty and public international law.

the sine qua non for the emergence of a global “rule of law” and constitutes an important part of a counterproject to empire. Without a global rule of law that protects sovereignty as well as human rights, any talk of “cosmopolitan” right, especially and above all the alleged right to intervene militarily to enforce human rights, is inherently suspect. Cosmopolitan right can supplement—but not replace—sovereignty-based public international law.

I do not, however, mean to take a Schmittian or a “political realist” stance. For Schmitt and his contemporary followers, any version of international law articulating universalistic principles, and any conceivable form of cosmopolitanism, amount to empty formalism, irresponsible utopianism, and/or a set of moralistic platitudes cynically invoked to cover the power bids of a superpower or of a few great powers against the weaker ones.<sup>11</sup> To thinkers in this tradition, international law is either irrelevant or just another name for the policy of the powerful. This is especially true of international law purporting to criminalize aggression, protect human rights, and sanction violations through military or other means. For the Schmittian, “He who invokes humanity wants to cheat.”<sup>12</sup> Accordingly, international tribunals applying international or cosmopolitan law and the “humanitarian interventions” allegedly legitimated by human rights discourse can never escape the charge of political justice.<sup>13</sup>

While the concepts of global law and global right can indeed turn into window dressing, it is not necessary to buy into Schmitt’s theoretical assumptions regarding territory or spatial ordering in order to see this.<sup>14</sup> Against Schmitt, I will make a case for the importance and autonomy of formal international and cosmopolitan law.

Yet neither do I want simply to affirm the arguments of moral cosmopolitans or, less

kindly, contemporary human rights fundamentalists. If the political realist errs by overgeneralizing the perspective of strategic interaction (national or great power or imperial self-interest), the moral cosmopolitan errs in the opposite direction. The former is unable to account for the fact that today there is a great deal of effective international law that orients states and shapes their conception of state interest. The moral cosmopolitan focused on global justice and human rights, however, tends to fall prey to a parallel myopia. For reasoning exclusively from the perspective of human rights and what justice requires (overgeneralization of the moral perspective) also leads to contempt for existing international law and a disdain for legal reform through legal means. Like the political realist, the moral cosmopolitan sees sovereignty as a matter of power politics, involving the strategic calculation of national interest and pure *raison d’état*. Unlike the realists, however, the conclusion drawn by human rights fundamentalists is that international law and the discourse of state sovereignty that it is based on must be abandoned in favor of the protection of human rights. In short, the

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<sup>11</sup> On the influence of Schmitt on contemporary realism via his influence on Hans Morgenthau, see Koskeniemi, *The Gentle Civilizer of Nations*, pp. 413–509. See also Henry Kissinger, *Diplomacy* (New York: Simon & Schuster, 1994). Kissinger is also, in my view, clearly influenced by Schmitt. I include Hardt and Negri among the contemporary left followers of Schmitt.

<sup>12</sup> Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), p. 54.

<sup>13</sup> For this concept, see Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961).

<sup>14</sup> Nor do we have to accept his claim that legal limits on the right to go to war and sovereignty are incompatible. And we certainly should not embrace his wholesale rejection of legal formalism or adopt his substantive conception of “law” as merely the ratification of a concrete order.

demands of justice must trump both sovereignty and formal international law, equated with “legalism.”<sup>15</sup> To the moral cosmopolitan, the legalistic discourse of sovereignty and power-oriented international organizations must not be permitted to block rescue operations in the face of gross human rights violations.<sup>16</sup> Accordingly, the default position of sovereignty in international law has to be given up: hence the rush to establish a new fundamental norm for the international order.<sup>17</sup> Among the candidates are a basic human right to security, a fundamental right to protection, a principle of civilian inviolability, and even a human right to popular sovereignty.<sup>18</sup> Indeed, violation of international law, we are told, may be the only means of updating it.<sup>19</sup>

While I cannot address the arguments of the moral cosmopolitans in the confines of this article, I hope to redeem the discourse of sovereignty and international law against its attackers. In what follows, I concentrate on two recent attempts to theorize the new world order along the lines of decentered legal cosmopolitanism. I then present a critique of this construction on empirical and normative grounds. Next, I consider the claim that we have entered into the epoch of empire and show how this approach, despite its critical intentions, blocks crucial reforms in the international system. I conclude by presenting an alternative, dualistic conception of the “new” world order and offer some proposals for reform.

## FROM INTERNATIONAL SOCIETY TO A DECENTERED WORLD ORDER: BEYOND SOVEREIGNTY?

There are two versions of the thesis that a decentered cosmopolitan world order has emerged that renders the discourse of sovereignty irrelevant: one focuses on political

institutions and the other on legal developments. Both maintain that a transition has occurred away from the international society of states and international law to a decentered form of global governance and cosmopolitan law. And both cite the individualization of international law, the invocation of *jus cogens*, which signals the obligatory character of key human rights norms based on consensus, not state consent, and the emergence of transnational

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<sup>15</sup> The clearest statement of this position is that of Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), esp. pp. 51–117; and Michael Walzer, *Arguing about War* (New Haven: Yale University Press, 2004).

<sup>16</sup> See Walzer, *Arguing about War*, pp. 67–85; and Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed. (Dobbs Ferry, N.Y.: Transnational Publishers, 1997).

<sup>17</sup> See, e.g., Michael Ignatieff, “Human Rights as Politics,” in Amy Gutmann, ed., *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2003), p. 42, for the suggestion that the default position on sovereignty in the international order be abandoned.

<sup>18</sup> On the human right to security, see ICISS, *The Responsibility to Protect* (Canada: IDRC, 2001). On the human right to protection, see Michael Walzer, “Au-delà de l’intervention humanitaire: les droits de l’homme dans la société globale,” *Esprit* 9 (August/September 2004), pp. 66–67; and my reply, Jean L. Cohen, “Loi internationale ou intervention unilatérale?” *Esprit* 9 (August/September 2004), pp. 80–88. On the principle of civilian inviolability, see Anne-Marie Slaughter and William Burke-White, “An International Constitutional Moment,” *Harvard International Law Journal* 43, no. 1 (2002). On popular sovereignty as a human right that trumps state sovereignty, see W. Michael Reisman, “Sovereignty and Human Rights in Contemporary International Law,” *American Journal of International Law* 84, no. 4 (1990), pp. 866–76.

<sup>19</sup> See Buchanan, *Justice, Legitimacy, and Self-Determination*; and Allen Buchanan, “Reforming the International Law of Humanitarian Intervention,” in Holzgrefe and Keohane, eds., *Humanitarian Intervention*, pp. 130–73. I strongly disagree with their position. For a counterargument with which I do agree, see Michael Byers and Simon Chesterman, “Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law,” in Holzgrefe and Keohane, eds., *Humanitarian Intervention*, pp. 177–203.

loci of decision and rule making as evidence for this shift.

The first approach focuses on the emergence of new forms of transnational governance that have allegedly replaced unitary states as the key actors in the global political system.<sup>20</sup> This involves both an epistemological and an empirical claim. We must, first, stop imagining the international system as a system of states—unitary entities like billiard balls. In order to perceive its new structural features, we must open up the black box of the state and apply the idea of the separation of powers, thus far restricted to domestic governments, to the global political scene. This conceptual shift will allow the core components of the new world order to come into view: horizontal and vertical transgovernmental networks.<sup>21</sup>

The empirical claim is that the state has been disaggregated into its component parts, each of which functions autonomously in the global political system. Intergovernmental relations now occur primarily through a multiplicity of horizontal networks linking government officials in distinct transnational judicial, regulatory, and legislative channels that operate independently of one another without any claim to represent “the state” as a unitary entity. Together with vertical governmental networks between national and supranational counterparts, these linkages comprise the main loci of global governance and law making, replacing diplomacy and interstate cooperation. The network structure of interaction is allegedly based on the disaggregation of the state and its sovereignty: it enables officials in each domain to solve common problems, share information, harmonize rules, generalize normative expectations, coordinate policy, and punish violators of global law without claiming to do so in the name of the state as a whole.<sup>22</sup>

Transgovernmental networks involve collaborative work by the same officials who are judging, regulating, and legislating domestically. Examples of horizontal regulatory governmental networks are the G-7 and the G-20 organizations, the regular meetings of national finance ministers, as well as the IMF Board of Governors. These are only a small part of the myriad networks among such regulators as central bankers, securities commissioners, and so on, some of whom now even have their own international institutions: the Basel Committee, the International Organization of Securities Commissions, and the International Association of Insurance Supervisors.<sup>23</sup> Such regulatory networks engage in information exchange, enforcement cooperation, and harmonization of practices. Indeed, Anne-Marie Slaughter refers to networked regulators as “the new diplomats.”<sup>24</sup>

Examples of vertical networks include the relationship between the European Court of Justice (ECJ), the International Criminal Court (ICC), and the courts of their respective member states. In each case, primary responsibility for adjudication and enforcing decisions devolves upon the judges within the member states (of the European Union or the United Nations), thus differing from the traditional model of international law adjudication, which assumed that a tribunal such as the International Court of Justice (ICJ) would hand down a judgment applicable to “states,” leaving it up to states to enforce or ignore.<sup>25</sup> There are also vertical

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<sup>20</sup> See the work of Anne-Marie Slaughter, esp. her recent book, *A New World Order* (Princeton: Princeton University Press, 2004).

<sup>21</sup> *Ibid.*, p. 15.

<sup>22</sup> *Ibid.*, p. 63.

<sup>23</sup> *Ibid.*, p. 38.

<sup>24</sup> *Ibid.*, pp. 36–64.

<sup>25</sup> *Ibid.*, p. 21.

regulatory networks, in the EU, for example, which link antitrust authority of the European Commission and national antitrust regulators.<sup>26</sup>

This new world order is a world full of law, but to perceive the nature of the new global law, proponents of the disaggregated state argue that we need a concept of legalization that drops the idea that law is produced or enforced by a sovereign.<sup>27</sup> Accordingly, one must also finally relinquish the myth of formalism, accept the legal realist critique, shift to an external sociological perspective, and acknowledge a wide range of norms and regulations in the global system as law. Instead of a bright line between legalized and nonlegalized institutions in the global order, there is a continuum between legal and nonlegal obligations and a broad spectrum of norms that ranges from soft to hard law. The point is that as sovereignty breaks down, as the state becomes disaggregated transnationally, and as global transgovernmental (and nongovernmental) networks produce more and more norms to regulate their own interaction, “the dynamic of a politically oriented law will no longer tolerate formalism.”<sup>28</sup> Indeed, compared with interstate cooperation and the slow collective action (and inaction) by formal international institutions such as the UN, coordinated action by networks of regulators, judges, and other government officials is fast, flexible, and effective.

This means that the discourse of sovereignty should be abandoned. Once a useful fiction for imagining international relations, the concept of the sovereign territorial state conceals more than it reveals today. For the networked global political system has allegedly moved beyond mere interdependence to a situation of deep interrelationship and interconnectedness. In short, the *background* conditions of the international sys-

tem allegedly no longer involve a baseline of separation, autonomy, and defined territorial or jurisdictional boundaries, but rather entails connection, interaction, and interpenetrating networks and institutions. Accordingly, “sovereignty-as-autonomy” makes no sense today.<sup>29</sup>

The claim is not only that there are new sources of global law today, but also that the “Westphalian” sovereignty paradigm of international relations, with its principles of sovereign immunity, domestic jurisdiction, and nonintervention that kept state-society relations opaque and impervious to international law (the “black box” problem), has already been displaced (de facto) by a new “principle of civilian inviolability,” a corollary of human rights talk.<sup>30</sup> Responding to the shift from war to armed conflict, the rise of transnational terrorism, and the proliferation of disastrous civil wars, the principle of civilian inviolability is allegedly the logical sequel to the progressive individualization of international law. In short, the dignity and integrity of the individual and her right to protection—the core principle of human rights law—is and should replace sovereignty as constitutive of global (rather than international) relations. Cosmopolitan law already protects individual citizens against abuses of power by their governments and imposes individual liability on soldiers and officials who commit grave human rights abuses. It renders the relations

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<sup>26</sup> See *ibid.*, pp. 36–127, for a full listing of such networks.

<sup>27</sup> See Abbott et al., “The Concept of Legalization,” pp. 132–48.

<sup>28</sup> See Martti Koskenniemi, *The Gentle Civilizer of Nations*, p. 488, for a brilliant critique of the rejection of formalism in the combined work of Keohane and Slaughter.

<sup>29</sup> Slaughter, *A New World Order*, p. 267.

<sup>30</sup> Slaughter and Burke-White, “An International Constitutional Moment,” p. 8.

between citizen and the state transparent at last. Accordingly, we should acknowledge the principle of civilian inviolability as the new *Grundnorm* of the contemporary cosmopolitan legal and political order, replacing sovereignty.<sup>31</sup> Several theorists have not hesitated to take the next step, construing humanitarian intervention by coalitions of the willing as the enforcement of this principle against grave human rights violations.<sup>32</sup>

To parry qualms that this transformation of international relations amounts to global technocracy and governance by unaccountable regulators and judges (given the paucity of legislative networks to date), this analysis comes replete with a set of fundamental norms that should acquire “constitutional” status in the disaggregated world order.<sup>33</sup> I cannot go into detail here. Suffice it to say that since global governance exists, it must be oriented by moral principles and rendered accountable by appropriate mechanisms. Once these norms are in place, a fully disaggregated world order could dispense entirely with the anachronistic discourse and rules of sovereignty and replace the old international law and slow international institutions with decentered, efficient cosmopolitan governance and law making.

This brings me to the second version of the thesis that we have entered a postsovereign, decentered world order—namely, the claim that a cosmopolitan legal system regulating global politics actually exists and that it is *already* constitutionalized.<sup>34</sup> To the systems theorists who elaborate this approach, the key development is the emergence of a world society out of the old international order.<sup>35</sup> The idea is that international society has gone global, shifting from a segmental form of differentiation to a set of relations between many functionally differentiated global systems, of which

the political subsystem is only one. Functional differentiation has also occurred within that subsystem, overlaying and undermining the previous order of “international society” composed of sovereign territorial states.

This analysis thus meshes with the image of the global political order presented above. Here too it is argued that this order is composed not of states but of components of states along with nongovernmental civil actors. From this perspective as well there is a proliferation of law making in world society independent of national governments’ consent or control. But here the claim that a constitutional global legal system already

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid. These theorists construe the Kosovo intervention (which was not authorized by the UN) as a “constitutional moment,” which articulated a new *Grundnorm* for the new world order that has replaced the legal principle of sovereignty. It is worth pointing out that this use of Kelsen’s term, *Grundnorm*, goes against everything he stood for. Slaughter and Burke-White misconstrue the formal transcendental concept of a *Grundnorm*, which in Kelsen’s theory serves as the necessary presupposition for the validity and autonomy of the legal order, as a substantive material norm—“civilian inviolability”—which they derive and generalize from recent U.S. (NATO) policy in Kosovo. Here we have an example of “symbolic constitutionalism,” the abuse of legal theory. The “principle of civilian inviolability” that now allegedly permits humanitarian intervention without UNSC authorization and is presented as a constitutional moment is really only the dressing up of policy as law. This is precisely what Kelsen fought against. No such constitutional moment has occurred in *opinio juris*.

<sup>33</sup> Slaughter, *A New World Order*, pp. 30, 216–60.

<sup>34</sup> Andreas Fischer-Lescano, “Constitutional Rights—Constitutional Fights: Human Rights and the Global Legal System” (unpublished); Fischer-Lescano, “Afghanistan and Global Constitutionalism: New Heaven of the Empire or Autopoiesis of Global Law?” (unpublished); and Bardo Fassbender, “The United Nations Charter as Constitution of the International Community,” *Columbia Journal of Transnational Law* 36 (1998), pp. 529–615.

<sup>35</sup> See Teubner, “‘Global Bukowina’: Legal Pluralism in the World Society.”



exists (which regulates global politics) involves a shift from the external sociological to the internal legal perspective concerned above all with the production of legal validity. Accordingly, the focus is on hard, not soft, law—on the legal system, not on the mere proliferation of regulations. Nevertheless, on this approach too the discourse of sovereignty must be abandoned.

Indeed, from this perspective it is the legal system itself, and not external political, administrative, or corporate economic actors, that determines what the law is. A legal system cannot be understood in terms of the implementation of political programs or sovereign will; it must be seen as autonomous and in charge of the codification of the code: legal/illegal. Courts, in short, are at the core of any legal system, and they must decide whether the law has been violated in any particular instance and resolve any controversy over the legal status (validity) of norms. Accordingly, legality is not a matter of more or less, nor can legalization be understood in terms of a continuum. From the internal perspective concerned with validity, oriented by the code “legal/illegal,” a legal order must be construed as a closed, gapless normative system.

However, under the conditions of globalization, the legal system and its courts escape the bounds of states and no longer require reference to the political or legal concept of sovereignty.<sup>36</sup> Globalization undermines the traditional legal doctrine that traces the distinction between law and nonlaw back to the constitution (higher law) of the nation-state and to legislation ultimately by a constituent power (sovereignty). The global political constitution is not produced by legislation but through decentered legal self-reflection and through a global community of courts, which ascertain legal validity and legal vio-

lations. The emphasis here is on the emergence of a global political constitution and a global legal system through *polycentric*, plural, autological processes that produce valid legal norms that regulate actors connected through complex *networks* bounded not by territory but by function, communicative codes, and particular practices.<sup>37</sup>

Why does it matter that we perceive and help to further institutionalize decentered, cosmopolitan constitutional law? For the systems theorist, a constitution is a matter of “structural coupling” between subsystemic structures and legal norms. Its function is to guarantee the multiplicity of social differentiation and to liberate the internal dynamism of each subsystem while also institutionalizing mechanisms of self-restraint against their society-wide expansion. This problem emerged first for the political system within the nation-state: mechanisms that could block the political instrumentalization of civil society, of the economy, of law, and so forth, had to be found and legally institutionalized. The structural coupling of law and political power was the solution. Accordingly, constitutionalized rights in the form of negative civil liberties are mechanisms that preserve the autonomy of spheres of action in a countermovement to the expansionist logic of the state. Structural coupling reduces the harm that politics and law can cause each other. The theory of global constitutionalism generalizes this idea to the global political subsystem: human rights (negative and positive) are the functional equivalents of civil liberties.

Relying on H. L. A. Hart’s criteria, this approach points to several indicia of global

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<sup>36</sup> Ibid.

<sup>37</sup> See Teubner, “Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?”

constitutionalism. The transnational judicial networks described above are construed as a “heterarchical” organization of courts, which provide *global remedies* and are at the center of global political constitutionalism. These involve various levels of communication, ranging from the citation of decisions of foreign courts by national courts, to organized meetings of supreme court justices, such as those held triennially (since 1995) by the Organization of Supreme Courts of the Americas, to the most advanced forms of judicial cooperation involving partnership between national courts and a supranational tribunal, such as the ECJ and more recently the ICC.<sup>38</sup> The proliferation of supranational courts must be seen as providing *global remedies* for violations of *cosmopolitan law* despite the fact that they originate in treaty organizations. Even national courts can double as elements of this cosmopolitan legal system, insofar as they participate in the interpretation and judgment of violations of global law. Thus, despite the fact that states are the primary agents responsible for delivering on individual rights, what they enforce are cosmopolitan legal norms, and their failure to do so may expose them to “cosmopolitan justice.”

The treatment of human rights law as *jus cogens* in the Vienna Convention on the Law of Treaties means that *formal constitutional law* exists and functions as higher law vis-à-vis the will of states.<sup>39</sup> No treaty will be considered valid that violates human rights norms, for these are now based on “consensus.” Included in this category are such preemptory norms as the prohibitions against torture, genocide, extralegal killing and disappearances, crimes against humanity, and so on. The proliferation of *erga omnes* rules (which obligate all states whether or not they signed a treaty) is another sign of constitutional cosmopolitanism indicating transcen-

dence of the old international legal order. The fact that the individual is now a key subject at international law, as evidenced by human rights law, also confirms the cosmopolitan character of the global legal system.

Finally, courts decide what amounts to violations of *jus cogens* norms, and they settle disputes about legal validity in the global legal system. There are now norms in that system designating the sources by which norms become law. This ultimate indication of a global political constitution means that there is legal law making (a rule of recognition, higher law regulating lower law). Whenever a question arises about the source of law, it immediately becomes a question about whether a law invoked really is law—a question that only the legal system (courts) can resolve. Thus, there exists a closed, autopoietic (self-creating) global legal system.

These developments are indeed impressive and certainly transcend traditional international law principles. However, to claim that they *already* amount to a cosmopolitan political constitution that should be or is in the process of replacing the international society of sovereign states and international law is premature and dangerous. The risk is that of “symbolic constitutionalism”—that is, the invocation of the core values and legal discourse of the international community to dress up strategic power plays, self-interested regulations, and interventions in universalistic garb. The Bush administration’s justification of its invasion of Iraq as an enforcement of human rights law and Security Council resolutions, despite the failure to win Security Council authorization for this action, is a case in point. The

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<sup>38</sup> See Anne-Marie Slaughter, “A Global Community of Courts,” *Harvard International Law Journal* 44 (Winter 2003), pp. 191–219.

<sup>39</sup> Available at [www.un.org/law/ilc/texts/treaties.htm](http://www.un.org/law/ilc/texts/treaties.htm).

invocation of cosmopolitan principles to classify a state as “rogue” (criminal), and to justify military intervention as the “enforcement” of global right, allow the violator of international law to appear as the upholder of global constitutional legal norms. Some systems theorists are aware of this risk, but they attribute it to the incompleteness of the transition from international to cosmopolitan law, insisting nonetheless on the constitutional and systemic character of the global legal system.<sup>40</sup> The problem from their perspective is the restricted reach of global remedies: the ICJ lacks compulsory jurisdiction, the ICC lacks a definition for the crime of aggression, the Security Council is legally unrestrained and escapes subjection to separation of powers principles, and so on. When these restrictions are overcome, law will be able to control politics.

These are serious problems and I will return to them. But I argue that there is a basic flaw in this overall approach, which renders it defenseless against political instrumentalization despite its intentions. In short, articulating what a decentered cosmopolitan legal system must involve conceptually by reasoning from the standpoint of legal validity is not enough to demonstrate the sociological claim that it in fact exists. The problem lies in a specific kind of legalism: generalizing from a purely internal juridical perspective focused on validity, coupled with an overly narrow concept of constitutionalism and an indefensible evolutionary bias. Constitutional elements and some structural coupling do not amount to constitutionalism, and the presence of some global remedies, preemptory human rights norms, and so forth does not mean that a full-fledged autonomous cosmopolitan legal system already exists.<sup>41</sup>

Moreover, to claim that the concept of sovereignty is irrelevant because it is not needed for internal legal validity or for the

narrow concept of constitution that is deployed in this approach is myopic. Unfortunately, this undermines a key principle of international law—the sovereign equality of states—and blocks needed reflection on how to reconcile it with the new importance ascribed to human rights law and other cosmopolitan principles with which it may conflict. In the current context, in which there is a powerful imperial project afoot seeking to develop a useful version of “global right” that can be invoked to justify quick, unilateral military reactions to alleged human rights abuses, undermining the principle of sovereign equality of states in the name of legal cosmopolitanism plays into the wrong hands.

## CRITICAL REFLECTIONS ON THE NEW LEGAL COSMOPOLITANISM

### *Empirical Complexity*

There are several problems on the empirical level. First, the existence of a global, networked, constitutionalized political order, even an incomplete one, is vastly overstated. States have yielded some powers to supra- and transnational organizations, transgovernmental networking is an important new phenomenon, there is a good deal of non-state governance and rule making, and certainly there are trends in a cosmopolitan direction, especially regarding human rights. The most important is indeed the striking move toward accepting individuals as legal subjects endowed with fundamental rights under international law. A person in

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<sup>40</sup> Fischer-Lescano, “Constitutional Rights—Constitutional Fights,” p. 12.

<sup>41</sup> See Ernst-Ulrich Petersmann, “Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?” *New York University Journal of International Law & Politics* 31 (1999), p. 753.

violation of this law can be brought before an international tribunal without going through the medium of the respective national legal system, and claims to sovereignty or domestic jurisdiction do not shield state actors when they violate the human rights of their own citizens.

But it is not clear that these constitutional elements are the sign of a cosmopolitan legal order that has *replaced* instead of *supplemented* international law based on the consent of states, which remain sovereign, albeit in an altered way. To legal cosmopolitans, these developments indicate that we are in a transitional phase away from internationalism toward a cosmopolitan world society and legal system. But it is not the case that all of the constitutive principles of the new international order can be so characterized—several of them point in the opposite direction. Indeed, it is unclear just which version of international society and which model of sovereignty is being replaced. The legal cosmopolitans speak as if the move is from Westphalian sovereignty to a cosmopolitan legal order, but this is a conceptual sleight of hand: the former, if it ever existed, disappeared long ago. Certainly one would be hard pressed to construe the principle of the sovereign equality of states or the strictures of nonintervention and nonaggression, articulated in the UN Charter, as either Westphalian or as indicating the disaggregation and irrelevance of sovereignty.

Moreover, it is important to acknowledge that such principles as sovereign equality, nonaggression, nonintervention, and self-determination are, in key respects, *new*: they are not remnants of the traditional Westphalian international order or of the conception of sovereignty that prevailed within it. The latter involved a legal arrangement, *jus publicum europaeum*, that attributed Westphalian sovereignty and equal recogni-

tion only to European states, and gave these states the right to acquire colonies and the right to go to war for any reason.<sup>42</sup> The principles of nonintervention and domestic jurisdiction applied only to European member states, not to the rest of the world—there no such norm of nonintervention applied, for no equal sovereignty was ascribed to non-European polities.

The new version of sovereign equality articulated by the UN Charter is ascribed to *all member states*, and since the 1960 General Assembly Resolution (1514 and 1541), *colonialism* has been explicitly rejected. This shift allowed for the emergence in principle of an egalitarian international system with a single norm of nonintervention applying to all states.<sup>43</sup> Inherent in this conception of sovereign equality, the newly generalized principle of nonintervention, together with strictures regarding the peaceful settlement of disputes and the principle of nonaggression in the UN Charter, are meant to protect state sovereignty while also limiting it.<sup>44</sup> To be sure, the Charter also articulates the principle of collective security, eliminating the *jus ad bellum*, and it gives the Security Council wide authority to decide when to use force to parry threats to peace and security. Today this discretion is taken to apply to domestic as well as international conflicts if they pose such threats. This is the cosmopolitan dimension of the Charter. Nevertheless, sovereignty, reconstituted and revised as sovereign equality, entailing the principles of domestic jurisdiction and nonaggression, remains the

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<sup>42</sup> See Schmitt, *The Nomos of the Earth*, pp. 140–210.

<sup>43</sup> See Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity Press, 2002), p. 145.

<sup>44</sup> Chapter I, Article 2 of the UN Charter states, “The Organization is based on the principle of sovereign equality of all its Members”; available at [www.un.org/aboutun/charter](http://www.un.org/aboutun/charter).

default position in the Charter, the collective enforcement provisions and the recent *jus cogens* status of human rights norms notwithstanding.

These principles should thus be seen as part of a project to “democratize,” not to “abolish sovereignty.” Of course, the conception of what are the prerogatives of sovereignty has changed. Today the “sovereign equality” of states is deemed compatible with limits on what were once considered their sovereign privileges. These limits, imposed by international institutions, articulate a new form of international society, based on increased cooperation among states and an altered conception of sovereignty, not a wholesale shift to a different principle of international order. Indeed, the growth of international cooperation, the increased emphasis on human rights since the 1990s, the expansion of intergovernmental organizations and their increased capacity to meddle should drive the international community to define more clearly where states are entitled to remain immune from outside interference. In the current hybrid global political order, with its international and cosmopolitan elements, the answers are no longer self-evident. But we are certainly not in a world where functional differentiation and transnational networks have replaced states and rendered sovereignty irrelevant. There has, to be sure, been a *partial* disaggregation of sovereignty in the sense that some functions once considered the prerogatives of the sovereign state are now placed in the hands (authority) of supranational bodies: courts, the Security Council, and some transnational regulatory bodies. But the overly strong and misleading disaggregation thesis described above is not helpful: representative government (internal and external) has not been replaced by governance, and the unity and sovereignty of the

state remain intact, as does the importance of public international law and institutions despite the emergence of transnational governmental networks.

I argue that the core of the world political system remains the “international society of states,” although it has undergone important transformations.<sup>45</sup> The global political system is *dualistic*, composed of sovereign states and international law along with nonstate actors, new legal subjects, and consensual, cosmopolitan elements. Segmental differentiation persists alongside the new functional differentiation. There can be collisions between the principles expressed in each aspect of the global political order. It is hardly news that the principles of human rights can clash with the principles of nonintervention and “domestic jurisdiction.” What is needed today is the articulation of new legal rules that anticipate and regulate these clashes.

Whether one should construe this multifaceted order as inherently contradictory, unstable, and therefore transitory—that is, as disorder for which the remedy is a wholesale shift from international to cosmopolitan society and law—or as a new phase of international society, internally dynamic with important new heterogeneous elements that need to be coordinated with the existing principles of international law via legal reform, cannot be decided empirically. Normative and political issues are involved.

### *Normative Ambiguities*

Cosmopolitan moral and legal theorists, along with many human rights advocates, are eager to abandon the concept of sovereignty because it signifies to them a claim to

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<sup>45</sup> For the concept of international society, see Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 2002), pp. 1–94.

power unrestrained by law and a bulwark against legal, political, and military action necessary to enforce human rights.

I contend that this view is profoundly mistaken and that the discourse of sovereignty involves normative principles and symbolic meanings worth preserving. Even if one particular sovereignty regime has waned, another can take its place with continuity on this level. Indeed, the absolutist conception of sovereignty that corresponds to the negative assessment cited above has long since been abandoned, Schmitt's attempted revival of a decisionistic, existentialist model notwithstanding.<sup>46</sup> Indeed the Hobbesian claim that internal sovereignty must be located in one single institutional center whose will is *legibus solutus* has been belied ever since the first modern constitutional democracy emerged in the United States in the eighteenth century, based on the separation of powers, checks and balances, and popular sovereignty, not to mention the division of powers entailed by federalism. The theory and practice of modern constitutionalism demonstrates that limited sovereignty is not an oxymoron, and that sovereignty, constitutionalism, and the rule of law are not incompatible. It also shows that functions or prerogatives once ascribed to the unitary sovereign can be divided and/or ascribed to other bodies (such as the EU or the UN) without the abolition of sovereignty or the disaggregation of the state.

I make an even stronger claim. Situated at the boundary between politics and law, sovereignty evokes both the public power that enacts law and the public law that restrains power.<sup>47</sup> The concept of sovereignty is a reminder not only of the political context of law but also of the ultimate dependence of political power and political regimes on a valid, public, normative legal order for their

authority. Sovereignty is thus a dynamic principle of the mutual constitution and mutual containment of law and politics.<sup>48</sup>

From a purely juridical perspective, sovereignty refers to a valid, *public* legal order that allocates authority and jurisdictional competence.

From a political perspective, sovereignty evokes the *autonomy of the political* and, in the form of popular sovereignty, a *distinctive political relationship* between a citizenry and its government within a defined territory.<sup>49</sup> Today, sovereignty means that political power is public and impersonal, as it is lodged in a set of offices, or government. Indeed, the discourse of sovereignty articulates the political as a distinct realm of public activity within which power is supposed to serve public purposes, to be exercised through law, and which involves consensus building, deliberation, and compromise. The citizen is the referent of public power and of the constitutional principles and design regulating the exercise of sovereign power. The discourse of popular sovereignty implies that government is representative government. Precisely because sovereignty is a relational concept, it cannot be located in any political body—neither in the hands of rulers nor in a particular institution such as a parliament or the presidency, nor in a particular group of citizens. Internal sovereignty is thus, in the final analysis, based on the consent of the governed; government is to serve the interests of the citizenry and public purposes generally. It involves a claim

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<sup>46</sup> See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge: MIT Press, 1986).

<sup>47</sup> See Martin Laughlin, "Ten Tenets of Sovereignty," in Neil Walker, ed., *Sovereignty in Transition* (Oxford: Hart Publishing, 2004), pp. 55–87.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

to ultimate *authority* within a political community, but it is also a contingent claim, which requires recognition, domestically and internationally. Today, external sovereignty has to be understood against this background of meanings.

The discourse of external sovereignty arises within a plural political universe, one in which neither a single global authority nor an unchallenged world empire exists. In such a context, sovereignty becomes the constitutive frame of reference for international relations and serves an epistemic function: allowing one to think of the multiplicity of autonomous political communities and their interrelationship.<sup>50</sup> State sovereignty and international law are coconstitutive: international law accords the recognition, standing, and rules of behavior for sovereign states; sovereign states are a key source of international law. Nevertheless, international law orients and delimits state sovereignty. International institutions are also the products of treaties among sovereign states but, similarly, develop their own autonomous logic and become an additional source of law and power without thereby undermining the core principle of contemporary international society: sovereign equality.

From the external perspective, sovereignty entails the normative principle of autonomy, ascribed by the community of sovereign states to one another. To be sure, the claim to *autonomy* was tightly coupled, in the Westphalian model, to *exclusivity*: the territorial sovereign state in the system of states would brook no interference in its “internal affairs.” The system of sovereign states was construed as one of discrete, mutually exclusive, comprehensive territorial jurisdictions. This implied that a nonexclusive authority is typically a dependent one. There could be no overlapping jurisdictions within a sovereign state.

In the contemporary post-Westphalian order, these two dimensions of sovereignty can and have become decoupled. It is possible, in other words, to conceive of autonomy without comprehensive territorial exclusivity and to imagine jurisdictional overlap without subsumption.<sup>51</sup> This means that the integrity and autonomy of a polity qua polity need not be impugned by the coexistence of other jurisdictional claims, some of which may even assert supremacy within the same territorial space. The mere fact that there are rules obligating states or rules that ascribe competence over what were once considered internal matters to supranational bodies does not mean that states are no longer sovereign, for it is the rules of international law that tell us in what sovereignty consists. Thus, the new *jus cogens* status of certain human rights norms are now part of the rules that constitute and limit sovereignty, but they are not proof that it is irrelevant. Similarly, the development of functionally delimited supranational and transnational jurisdictional claims in the global political system can supplement and overlap without abolishing the autonomy of segmentally differentiated territorial sovereign states.

International and cosmopolitan law can have their own integrity and jurisdictional scope without threatening the autonomy of the polities to which they are applied. Such law can reach right through the state, without destroying the latter’s internal legal or political coherence, its legal status in the society of states, its identity as a polity, or its ultimate authority and supremacy in its

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<sup>50</sup> See Neil Walker, “Late Sovereignty in the European Union,” in Walker, ed., *Sovereignty in Transition*, pp. 3–32; and Neil Walker, “The Idea of Constitutional Pluralism,” *Modern Law Review* 65, no. 3 (2002), pp. 317–59.

<sup>51</sup> See Walker, “Late Sovereignty.”

respective jurisdictional domain. The state can be sovereign so long as the political relationship between the government and the citizenry remains intact and autonomous, and provided that new institutional arrangements or jurisdictions promote more efficacious external action by the state.<sup>52</sup> Accordingly, the normative plus that the discourse of sovereignty entails—namely, the autonomy and equality of polities, including their nonsubordination and nondomination by others, and the presumption against unwarranted intervention—can be had without the downside of the black box problem, without comprehensive territorial exclusivity, without insisting on the untrammelled will of the state, once we give up the Westphalian conception. The principle of sovereign equality should be understood in these terms. I submit that especially in the epoch of “humanitarian intervention,” it must remain the default position of the international order. Accordingly, the principle of nonintervention (the correlative of sovereignty) retains its primacy even though it may have to be reinterpreted in light of whatever formal legal rules are developed to regulate humanitarian actions authorized by the UN. In short, keeping the principle of sovereign equality front and center keeps the burden of proof where it should be: on the shoulders of would-be interveners.<sup>53</sup>

The paradox of a multilayered global political order that enunciates sovereign equality and human rights can be a productive one. It should spur jurists and political theorists to make new distinctions that develop formal international law in ways adequate to the shifts in values and to the complexities of the contemporary world order.<sup>54</sup> Indeed, that is how the recurrent tension between rights and sovereignty has been handled in domestic political sys-

tems—the assertion of new rights or new claims regarding the scope and design of democracy has triggered innovative legal and political distinctions in order to resolve conflicts. The core intuition that makes the paradox productive rather than destructive is the idea that rights and democracy (popular sovereignty) are coequivalent—democracy without constitutionalism is as unacceptable today as is constitutionalism without democracy.<sup>55</sup> The parallel intuition regarding external sovereignty is that we must sever political autonomy from the idea of comprehensive jurisdiction and realize that the apparent antinomy between sovereignty and human rights or between state sovereignty and multiple sources of international law is based on an anachronistic conception of the former as absolute.

Sovereign equality and human rights are *both* new and indispensable principles; in international relations, both are based on what Jürgen Habermas has called egalitarian universalism, and they can become complementary if the attempt is made in good faith to make new distinctions and update the rules of the international legal order accord-

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<sup>52</sup> The example of the EU is most instructive. Strong claims to state sovereignty coexist with strong claims to supremacy of EU law over union matters. This is a productive paradox involving division and the increase of power.

<sup>53</sup> See the debate in Holzgrefe and Keohane, eds., *Humanitarian Intervention*, over whether a new norm of unilateral humanitarian intervention has in fact emerged and whether legal reform should occur to make it hard law.

<sup>54</sup> On the productivity of legal paradoxes, see G. P. Fletcher, “Paradoxes in Legal Thought,” *Columbia Law Review* 85 (1985), pp. 1263–92; and Niklas Luhmann, “The Third Question: The Creative Use of Paradoxes in Law and Legal History,” *Journal of Law and Society* 15, no. 2 (1988), pp. 153–65.

<sup>55</sup> See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996), pp. 84–118.



ingly.<sup>56</sup> As opposed to imperial universalism, which perceives the world from the centralizing perspective of its own worldview (hoping to impose its version of global right), egalitarian universalism demands that even superpowers relativize their particular interpretations of general principles vis-à-vis the interpretive perspectives of equally situated and equally entitled agents. The universalistic core of the principles of sovereign equality and human rights requires the rejection of the hierarchal, ethnocentric, and racist assumptions that informed the Westphalian sovereignty order. It implies that political autonomy, democratic self-determination, and human rights are the legitimate aspirations of citizens in every polity.

Let me be very clear here. I am most certainly *not* arguing that external sovereignty be made contingent upon a particular internal political arrangement, such as constitutional democracy, or that a “human right to popular sovereignty” renders unilateral military intervention to protect this right acceptable. To construe popular sovereignty or democracy as a human right is to make a category mistake: it collapses political into moral categories, reducing the citizen to “person” and confusing collective political action of a citizenry with the citizen’s legal standing. Yes, citizenship involves basic individual rights, such as the right to vote, but it also has a political meaning and an identity component that cannot be reduced to the dimension of individual rights.<sup>57</sup> To argue for making the international legal principle of sovereignty contingent on the “human right” of popular sovereignty as an individual right is sophistry. Popular sovereignty is a regulative principle, not an individual right. The relation between internal sovereignty, citizenship, constitutional democracy, and external sovereignty I outlined

above must be understood differently—namely, as constituting a regulative principle, a normative set of meanings to which we should aspire, not a recipe to justify abolishing the principle of sovereign equality.

## GLOBAL LAW WITHOUT THE STATE—THE IDEOLOGY OF EMPIRE?

Of course for Schmitt and contemporary Schmittians, sovereign equality is always predicated on inequality. Only equals are equal. Equality means identity—homogeneity along a substantive dimension. And indeed, the system of sovereignty he analyzed (*jus publicum europaeum*) restricted sovereign equality to “friends”—members of the European community. There was no equality, no sovereignty, no “bracketing of war” for non-European polities.

Although this system was already undermined by the end of the nineteenth century after its Eurocentric character was abandoned, it took two world wars and the emergence of non-European superpowers to give it its final deathblow. Writing in 1950, Schmitt argued that the passing of the Westphalian sovereignty order expressed in *jus publicum europaeum* leaves us with three alternatives: (1) The new “nomos” of the earth could retain the old structure in ways consistent with contemporary technical means. America would step into England’s shoes and guarantee the balance of the rest of the world; (2) A plurality of regional groupings, or *Grossräume*, could emerge and balance one another, while dominating

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<sup>56</sup> Jürgen Habermas, “Interpreting the Fall of the Monument,” trans. Max Pensky, *German Law Journal* 4, no. 7 (July 1, 2003).

<sup>57</sup> See Jean L. Cohen, “Changing Paradigms of Citizenship and the Exclusiveness of the Demos,” *International Sociology* 14, no. 3 (1999), pp. 245–68.

the smaller polities; (3) The victor in the global antithesis between West and East (the Cold War) would be the world's sole sovereign and appropriate the whole earth—land, sea, and air—dividing and managing it in accord with its plans and ideas.<sup>58</sup>

From the perspective of the twenty-first century it certainly looks like the third option is well under way. The current U.S. administration seems bent on undermining the international order it helped to establish with the signing of the UN Charter and later important international agreements. It is also determined to prevent the development of clear, coherent legal principles (and hard procedural law) that could help to regulate the enforcement of human rights in ways consistent with the sovereign equality of states and existing international law and institutions. The United States' failure to pay its full UN dues, its rejection of the ICC, its refusal to sign the Kyoto Protocol on global warming, are only a few examples indicating that it disdains international institutions. The recent invasion and occupation of Iraq became the occasion for making the move against international law explicit. Far from accepting the role of responsible hegemon participating in international structures, backing up international law and helping to codify the new, the United States has resuscitated the discourse of "old versus new" in order to split Europe, undermine international institutions, and reorder basic relationships unilaterally.

Open hostility to international law and to the UN is coupled with the use of moralistic discourses of humanitarian intervention to "enforce" human rights, including the newly alleged human right to democracy, and justifications for "preventive wars." Hand in hand with these discourses goes the insistence on maintaining unrivaled military

power. This indicates more than the empirical fact that the United States happens at the moment to be the world's sole superpower. For it appears to be trying to position itself as the only power able to secure world peace and justice, police and punish violators, guarantee human rights, and protect democracy and "civilization" in the name of global right. It sees itself as engaging in "just wars" at the periphery, and combating terrorism everywhere. But it often wants to do this without subjecting itself to international law or participating in international institutions or in the international community. The name of such an "order and orientation" is empire.

The imperial project is certainly on the agenda today. As indicated above, Hardt and Negri assume that the project has already succeeded, although they propound a rather vague concept of empire, which, most importantly and least convincingly, lacks a center. They explicitly deny that its center is the United States, arguing instead for an imperial network with multiple centers.<sup>59</sup> They are wrong on both counts: the project has not yet triumphed, and it does have a center and a carrier.

Given their position, it is odd and deeply contradictory to insist as they do that sovereignty has not faded away but rather has become imperial. For their decentered "imperial sovereignty" is based on the loss of the autonomy of the political, on the elimination of the distinction between public and private, on the erosion of "hard" international law in favor of "soft" deformed rulings, and on the disintegration of a distinctive political relationship between a polity or government and its

<sup>58</sup> Schmitt, *The Nomos of the Earth*, pp. 354–55.

<sup>59</sup> Hardt and Negri, *Empire*, pp. xii, xiv.

citizenry.<sup>60</sup> Accordingly, decentered imperial “sovereignty” replaces government with governance, public law with the rules of self-regulating systems and networks, relational sovereignty between equal cooperating units in a community of states with globalized and unitary imperial right. The conceptual confusion here is staggering, for the kind of rule they describe is the antithesis of the theoretical concept of sovereignty, which perforce has as its referent public power and public law.

Be that as it may, Hardt and Negri construe the discourse of decentered cosmopolitan constitutionalism (along with the concepts of soft law, self-regulation, human rights, humanitarian intervention, and revived just war doctrine) as an obvious candidate for the job of legitimating empire by dressing up its mode of exercising domination as law. They are right to warn that this discourse can be instrumentalized by the imperial project. Talk of global constitutionalism and the death of sovereignty *avant la lettre* helps to marginalize international law and to legitimize interventions. It invites the claim that even a unilateral military intrusion into a weaker state is not a violation of international law but rather an enforcement of global right and cosmopolitan justice. Indeed, some international lawyers and human rights theorists have explicitly embraced the task of justifying the imperial project in the name of global right.<sup>61</sup> Even if this role is refused, in a context in which a world republic is not on the agenda, and in which a strong, centered imperial project bent on undermining international institutions and law does exist, it is dangerous to make unwarranted claims about global constitutional law and the irrelevance of sovereignty. Indeed, Hardt and Negri’s conception of a decentered empire, coupled with their rejection of the

concepts of state and popular sovereignty, public power and public international law, and government in favor of governance, entails some complicity with the imperial project. Such claims deflect attention away from the only viable political alternative to empire: a strengthened international society and law informed by the culture of rights but based on the principle of sovereign equality.

## MAINTAINING SOVEREIGN EQUALITY

There is an alternative to the project of empire and to the restricted set of choices Schmitt described. I believe that it is possible to strengthen international institutions and develop international law in a way that protects state sovereignty and human rights, supports popular sovereignty, and helps to regulate the self-regulation of the new non-state transnational powers while fostering a global rule of law. This requires certain theoretical and practical steps.

The disassociation of the tight link between autonomy and exclusivity is the *first theoretical step* toward such a project. The *second* is the abandonment of the absolutist and decisionistic concept of sovereignty in favor of the relational model described above. If these two ideas are linked together, then it is perfectly conceivable that international law could penetrate the black box of the state without undermining its sovereign autonomy or integrity. When states agree to certain restrictions, when they “delegate” jurisdiction to supranational entities, when they establish frameworks for

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<sup>60</sup> See the discussion of Laughlin, “Ten Tenets of Sovereignty,” pp. 55–87.

<sup>61</sup> See, e.g., Slaughter and Burke-White, “An International Constitutional Moment”; and Ignatieff, “The Burden.”

cooperation that create binding rules, they do not thereby lose or divide their sovereignty—indeed, they may even enhance it.

Despite its polemical character, Schmitt's analysis of the Westphalian understanding of sovereignty in *Nomos of the Earth* is helpful in this regard. In describing the system of sovereign states that was the basis for the *jus publicum europaeum*, Schmitt states the obvious: European international law was grounded in a balanced relationship of a plurality of sovereign territorial states. The balance of power was crucial to maintaining plurality. It was also the precondition for effective international law: if one power was stronger than all the others put together, it might think it had no need for international law. However, he goes on to insist,

Such an order was not a lawless chaos of egoistic wills to power . . . these egoistic power structures existed side-by-side in the same space of one European order, wherein they mutually recognized each other as sovereigns. Each was the equal of the other, because each constituted a component of the system of equilibrium.<sup>62</sup>

Accordingly, the articulation of sovereignty within a community of states *that decides to consider one another as equals* is the political precondition for feasible and effective international law. In other words, international law has to be based on a set of political relationships between states to which sovereignty is ascribed within a common framework, based on shared political norms, involving mutual recognition, balance, and institutionalized cooperation.

Moreover, formal equality has to be linked to some degree of material equality among the states. In an institutionalized structure of power and counterpowers, no single sovereign state should be able to prevail over all the others and impose its will as

law. This does not exclude a guarantor of international right and international law—that is, a state powerful enough to ensure that others play by the rules to which it also subscribes. The ascription of sovereignty to states by an international “community” by virtue of which they become members and equals is thus a way of limiting as well as empowering those states. Without this, an opponent becomes nothing more than an object of violent measures, while law becomes mere window dressing.

I see no reason why this conception cannot be generalized to all states construed as equal members of the international community along the lines of the UN Charter. Equality need not be construed as a substantive principle of homogeneity based on a friend/enemy conception of the political. It is enough that the general principles of the international order—sovereign equality and human rights—are accepted in principle (as they are by any state that has joined the UN), and allowed to develop into a shared culture of mutual respect of rights and accountability. The “democratization” of external sovereignty backed up by international law is thus the *third* step in the project. Certainly this is the idea behind the principle of “sovereign equality.” It informs the key “transformative” developments in international relations since World War II: sovereign states gave up their “sovereign” right to go to war and aggressive war became illegal; colonialism was dismantled and deemed a violation of the principle of self-determination; sovereign states began actively to pursue cooperation in a multiplicity of international institutions; and they accepted being limited by human rights principles, renouncing impermeability to international law in this domain. These are the new rules of sover-

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<sup>62</sup> Schmitt, *The Nomos of the Earth*, p. 167.

eignty in the society of states, not indications of its abolition. Pace Schmitt, participation in supranational institutions and further development of international law, spurred in part by the efforts of nongovernmental organizations of international civil society, can thicken commonalities and consensus.

The *fourth step* involves fostering the internal democratization of all states, large and small. With the disintegration of formal colonialism and the Cold War–era blocs, the autonomy of countries once subordinated to the great powers has the potential to take on real meaning, especially if they become involved in regional associations based on the principles of sovereign equality and constitutionalism, like the EU. But what makes the sovereignty of states valuable in the long run is that autonomy is a precondition for popular sovereignty and democracy within a polity. Today, the idea of self-determination is not only a principle of national identity and liberation but also a principle of popular sovereignty involving democratic self-government under law. The dimension of political autonomy at issue here has nothing to do with defining an external enemy and everything to do with the internal construction and articulation (constitutional design and articulation of rights) of the “friend” component of Schmitt’s infamous distinction.

The spread of the discourse of popular sovereignty (and the rule of law) and the emergence of representative constitutional governments in more and more states throughout the world fosters the tide of democratization (equal autonomous voice) in international relations. We got an inkling of what this could mean when governments of countries large and small, having to worry about their citizens’ views, refused to cave in to the most intense pressure by the world’s sole superpower and insisted on weapons

inspections rather than voting for the war in Iraq. Instead of being able to bask in the global legitimacy of a widely accepted “peace action” that a positive vote in the Security Council would have afforded, the United States confronted one of the most multipolar moments in history and to this date has not been able to muster the support for its Iraq venture that a well-established empire would expect.

Support for internal democratization, however, must not be taken as a green light for violent interventions by powerful outsiders purporting to *impose* democracy, liberating the locals against their will and thus forcing them to be free. As I already indicated, there is no such thing as a human right to popular sovereignty, and any attempt to justify interventions by invoking such a right is pure ideology. In short, the principle of sovereign equality and nonintervention is and must remain the default position of the international order. The problem of what to do in the case of dictatorial authoritarian regimes that overthrow democratic institutions or block their emergence is of course a troubling one. So is the issue of how to deal with regimes that violate the most basic rights of their own citizens. The decision taken in 1997 by the Organization of American States (OAS) to amend its charter to permit suspension of a member whose democratic government is overthrown by force is a fascinating example of a set of rules agreed upon by sovereign states aimed at linking recognition of state sovereignty to the protection of internal popular sovereignty.<sup>63</sup> One thing is sure, however: the claim of a superpower to be defending democracy while engaging in unilateral military intervention is bound to appear as, and

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<sup>63</sup> See the OAS Charter; available at [www.oas.org/juridico/english/charter.html](http://www.oas.org/juridico/english/charter.html).

usually is a fig leaf for, parochial ends. In light of today's imperial project and the recent experience in Iraq, the world community rightly condemns such actions.

This does not preclude regional associations like the EU or the OAS from agreeing not to tolerate the forcible overthrow of a constitutional democracy by a would-be dictator or to insist on the observance of certain democratic and legal principles of would-be members. In such cases, military intervention can be avoided precisely because sovereign states have accepted these rules ensuring a link between popular sovereignty, political representation, and external sovereignty. Such agreements do not undermine the principle of sovereign equality, they strengthen it.

A *fifth step* must be taken if the project of empire is to be defeated—namely, the emergence of effective counterpowers within the world community, able to balance the superpower of the United States as well as the “infra-power” of “private” transnational networks involved in governance. This is the “truth content” of political realism—neither law nor morality can conjure away political power or strategic calculations. Unless viable counterpowers emerge *willing to strengthen international law and institutions and draw the United States back into their framework*, cosmopolitan right will be nothing other than what Schmitt always said it is: utopian and ideological. It would be disastrous if the emerging superpowers of the twenty-first century emulated the disdain for international law and the imperial gesturing of the United States. It would be far better if effective state alliances emerged that were articulated in regional associations, along the lines of the EU, and that were committed to shouldering the responsibilities of their combined power, strengthening international law, fostering a global rule of law, and, with UN

authorization, helping to enforce international law. Membership in such regional associations could protect the sovereign equality of small polities and make their voices matter more on the world scene. It would also help enormously if the regional association stood for democratic principles and human rights and encouraged its members to foster and maintain them. This is the level on which plurality, in the sense of effective political power (counterpower), will re-emerge and matter, as Schmitt rightly foresaw. But it can exist in conjunction with the legal principle of sovereign equality for all states within (and outside) regional associations (thus blocking *Grossraum* projects) and with international and cosmopolitan law on the global level (thus blocking imperial projects).

The *sixth and final step* is to stop the trend toward the deformatization of international law that began in the 1990s with the invasion of Kosovo and that has been fostered by every subsequent “humanitarian intervention.” These interventions are usually justified in moral terms of an obligation of the powerful to act in dire emergencies, to rescue people (the powerless) from disastrous human rights violations (genocide, ethnic cleansing, and so on), regardless of legal niceties. For there is at present no “law of humanitarian intervention,” and, strictly speaking, the Security Council is authorized to approve military interventions only when international peace and security are threatened. There is no customary rule that construes military intervention as the way to “enforce” human rights law. There is only the imprecise and ad hoc expansion of the definition of threats to peace and security from interstate to internal civil disturbances, and the generalized moral discourse of human rights, which enable the Security Council and others to justify violations of state sovereignty in the name of humanitarianism. The

point is, pace human rights fundamentalists, that one cannot simply postulate a human right to protection, to rescue, to security, or to civilian inviolability and then assert that any state or collective body able to do so has the moral duty to enforce such rights through military intervention. Indeed the argument, via analogy with civil disobedience, that it is necessary to update international law by such illegal military means is deeply unconvincing and counterintuitive.<sup>64</sup>

The proliferation of “exceptional” rescue operations, which violate international law in the name of cosmopolitan right, undermines rather than fosters respect for the rule of law. Several authors have traced the ways in which such a deformed moral-humanitarian discourse has undermined existing international law, and how it is being used (especially by the United States) to block the creation of new, coherent legal rules that could and should regulate humanitarian intervention in ways that respect the principle of sovereign equality.<sup>65</sup> These include the formal international legal articulation of the relevant rights; clearly articulated and agreed upon substantive standards identifying what kind and level of violation would be sufficient to warrant intervention (thresholds); formalization of the rules, including procedural rules, indicating how claims can be made; determination of who (which public body) is authorized to make the judgment that a violation has occurred, and what to do about it, including who is authorized to act to stop the violation. Without such rules, one cannot speak of updating international law or enforcing cosmopolitan right. Indeed, moral cosmopolitans disagree about minimal and maximal interpretations of the human right to security or protection and about what constitutes a violation.<sup>66</sup> Only international law can mediate between the moral and the political so as to establish clear limits and rules while

affording legality and legitimacy to appropriate action.

We do not have a global rule of law today or a constitutionalized international order, but we do have hard international law that can be developed in the right direction. The Security Council and Chapter VII of the UN Charter is the place to start. Security Council authorization is indispensable, in my view, for any military intervention, but it is not enough: one needs the articulation of coherent and consistent rules to regulate the new powers that the Council has arrogated to itself by extending those granted to it under Chapter VII to apply to domestic conflicts and grave rights violations that do not cross borders. The principle of sovereign equality can remain intact under these circumstances only if the rules are formalized after public deliberation and if they are consistently applied. Otherwise, a two-tiered system will emerge that leaves the weak (developing countries) defenseless against the powerful (developed, industrialized countries). Such a

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<sup>64</sup> I am referring to Allen Buchanan and Robert O. Keohane, “The Preventive Use of Force: A Cosmopolitan Institutional Proposal,” *Ethics & International Affairs* 18, no. 1 (2004), pp. 1–22.

<sup>65</sup> See Martti Koskenniemi, “The Lady Doth Protest Too Much: Kosovo and the Turn to Ethics in International Law,” *Modern Law Review* 65, no. 2 (2002); and Ruti G. Teitel, “Humanity’s Law: Rule of Law for the New Global Politics,” *Cornell International Law Journal* 35 (2002), p. 355.

<sup>66</sup> In Buchanan and Keohane, “The Preventive Use of Force,” the authors offer a very long list that includes not only genocide, ethnic cleansing, and torture but also the “more damaging forms of discrimination” and the “right to the means of subsistence.” They support interventions by “coalitions of democratic states” without the detour of the UNSC. Others, like Michael Reisman, support intervention in favor of a right to popular sovereignty that “trumps state sovereignty.” Still other lists, like that of Michael Walzer, are more minimal. Moral philosophy cannot adjudicate among these different lists of “fundamental” human rights. See my “Loi internationale ou intervention unilatérale?”

system would have a familiar ring—and stands little chance of being accepted today.

There are many suggestions for reform of the UN, and this is not the place to discuss them in any detail.<sup>67</sup> Yet there clearly is a need to find a way to bring the Security Council itself (a political body, after all) under the principle of the separation of powers and to render it accountable. Global remedies and compulsory jurisdiction for international courts should apply to this body as well as to states. Among the most frequent reform proposals are the expansion of the permanent membership of the Security Council to include twenty-first-century great powers (maybe even the EU), a voluntary renunciation of the veto in favor of a two-thirds vote when “humanitarian” intervention is at issue, and some expanded, deliberative, advisory role for the General Assembly in these matters. The idea is to make international institutions more effective, so that it becomes more likely that necessary interventions take place and less likely that purely self-interested ones do. All interventions will be based on mixed motives. Only if one is forced to give reasons not only to one’s domestic public or the informal world publics of international civil society but also in institutionalized, decisional, political public spheres (like the Security Council and those in regional bodies) in order to garner support and convince others to share responsibility for authorizing an action will it be possible to make a plausible claim that there are genuine, universally acceptable reasons for an intervention. Without further development of hard international law along these lines, predicated on the default position of sovereign equality yet oriented toward “norming the exception,” without legality complementing alleged moral legitimacy, interventions justified by the discourse of human rights will threaten the

autonomy not only of failed or rogue states but of every political community.

Constitutionalization of the global political system is a work in progress, not a fait accompli. The dualistic model I have in mind would involve the articulation of public power and public law on multiple levels of the world political system. It would seek to harmonize the core principles of international relations today—sovereign equality and human rights—not abandon one in favor of the other. At issue is a shift of the culture of sovereignty from one of impunity to one of accountability and responsibility of states in light of their obligation to protect.<sup>68</sup> This entails reformulating, not abandoning, the default position of sovereignty and its correlate, the principle of nonintervention, in the international system.

We really face only two choices today: strengthened international law or imperial projects by existing and future superpowers. We know that though strong states are the most effective guarantors of human rights, states also violate these rights. The old rules don’t suffice, but the time has certainly not come for abandoning the discourse of sovereignty as human rights fundamentalists and empire enthusiasts propose. Instead, the current rules of international legal sovereignty have to be rethought. For it is the revised discourse of sovereignty, backed up by international institutions, that can situate global regulation and cosmopolitan law on the side of the first project and help to prevent their instrumentalization by the second. This is the only answer to Schmitt’s charge that “he who invokes humanity wants to cheat.”

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<sup>67</sup> See the three-volume work of Joachim Muller, ed., *Reforming the United Nations: New Initiatives and Past Efforts* (The Hague: Martinus Nijhoff, 1997).

<sup>68</sup> See, e.g., ICISS, *The Responsibility to Protect*.