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The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law

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THE HOLE IN THE WHOLE: SOVEREIGNTY, SHARED SOVEREIGNTY, AND INTERNATIONAL LAW

*Stephen D. Krasner**

INTRODUCTION	1075
I. SOVEREIGNTY	1077
II. INESCAPABLE TENSIONS	1078
III. THE DURABILITY OF DEVIATIONS FROM CONVENTIONAL SOVEREIGNTY	1085
IV. BAD GOVERNANCE	1088
V. THE PRESENT POLICY REPERTOIRE: GOVERNANCE ASSISTANCE AND TRANSITIONAL ADMINISTRATION	1089
VI. TRUSTEESHIPS: AN UNLIKELY POSSIBILITY	1090
VII. SHARED SOVEREIGNTY: A PROMISING ALTERNATIVE	1091
A. <i>Past Examples of Shared Sovereignty</i>	1092
B. <i>Contemporary Examples of Shared Sovereignty</i>	1093
C. <i>Future Possibilities for Shared Sovereignty</i>	1097
CONCLUSION	1100

INTRODUCTION

Ideally, a body of law comprises a set of coherent and consistent rules. These rules contribute to the creation of an environment that is predictable, efficacious, and just. Most international lawyers hope, expect, or believe that such a body of law can exist for the international system. This is a fool's errand.

Clear bodies of international law may develop in specific issue areas, but only if they create self-enforcing equilibria; that is, if the relevant parties, those with the ability to violate the rule, believe that they would be worse off if they did so. Even when self-enforcing equilibria do exist, they last only so long as the interests and capabilities of actors, which may always change, generate a structure of payoffs that induces continued rule adherence. Many issues, including core questions related to sovereignty, will never be able to generate self-enforcing equilibria in the first place.

There are at least three impediments to the development of a stable body of international law: disagreements about basic substantive and procedural norms; unequal distributions of power; and the absence of

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any final authoritative decision maker. Disagreements about norms are inescapable because of differences in beliefs and interests among actors in the contemporary international system. States are the most important of these actors. Major states have very different views about what constitutes appropriate behavior and how international law should be conceived. Many European political leaders have more faith in the efficacy of international law than do their American counterparts, and are more willing to see law as a device for enunciating norms that may only at some later point in time result in concrete action. Contemporary American political leaders, regardless of party, are more prone to see law as a device for promoting concrete interests. American decision makers have been more skeptical of the idea that the law could be a beacon or magnet which would somehow attract adherents to desirable norms over time. The Europeans enthusiastically backed the International Criminal Court even though it was clear that the United States would not join the Court unless there was a Security Council right of veto over cases, and the Europeans embraced the Kyoto Protocol even though it was clear that its targets could not be met by many states, including the United States, at acceptable economic costs.¹ The concerns of weaker countries in the third world are much different from those of the industrialized north. While powerful industrialized states are now deeply concerned about terrorism, which they see as the major threat to their security, developing countries see disease and poverty as their primary protagonists. Furthermore, it is not necessary to embrace Samuel Huntington's clash of civilizations to recognize that normative values vary among regions as a result of culture, religion, and history.

Perhaps more important, power varies dramatically in the international system, and there is no final authority than can resolve disagreements. The differences between the material capabilities of the United States and other countries, even major industrial countries hardly needs rehearsing. The population of states in the present international system varies from over one billion to under fifty thousand. The revenues of the government of Sierra Leone in the late 1990s were less than ten percent the revenues of the city of Palo Alto, California, with a population 59,000.² In a system in which the actors have different values, different interests, wildly uneven capabilities, and where there is no authoritative decision maker to resolve disagreements and enforce

1. For a general discussion of the political and analytic shortfalls of the Kyoto Protocol, see DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* (2001).

2. Palo Alto, California, Population and Demographics Resources, at <http://paloalto.areaconnect.com/statistics.htm> (last visited May 10, 2004).

judgments, it should not be surprising that rules and norms would be contested, including rules and norms associated with sovereignty.

I. SOVEREIGNTY

Sovereignty is now the only game in town. Other ways of ordering political life, including colonialism, trusteeships, empires, and the traditional Sino-centric system, lack legitimacy; that is, they would either not make sense (how many people in Taiwan would be able to explain the concept of a tributary state, a central element in the traditional Sino-centric view of international relations), or would be rejected by a large proportion of the populations that might be subject to them, which would clearly be the case for colonialism.³ Nevertheless, the meaning of sovereignty and the actions that can be undertaken by or directed at a sovereign state are, and have always been, both contested and ambiguous.

There are three central elements or aspects of sovereignty:

International legal sovereignty. The basic rule of international legal sovereignty is: recognize juridically independent territorial entities. Once a territory is recognized—that is, acknowledged by others to be a state—it has the right to enter into any agreement it chooses. This rule has been widely, but not universally honored.

*Westphalian, or more appropriately, Vattelian sovereignty.*⁴ The basic rule of Westphalian/Vattelian sovereignty is: do not intervene in the internal affairs of other states. Each state has the right to independently determine its own institutions of government. Empirically, the rule of non-intervention has frequently been violated.

Domestic Sovereignty. Domestic sovereignty refers to the institutions under which a particular state is governed and their effectiveness. There is no rule or norm here although in an ideal world, these institutions would provide security, prosperity, and justice for the inhabitants of the state. In many countries, this ideal is far from being realized.⁵

3. Despite recent works that have explicated some of the virtues of colonialism, the populations of former colonies are not clamoring to bring back their colonial masters. For a defense of some aspects of British colonialism, see NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2002).

4. Though the principle of non intervention is traditionally associated with the Peace of Westphalia of 1648, the doctrine was not explicitly articulated until a century later, by the Swiss jurist Emmerich de Vattel in his *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* ch. 4 § 54 (Dublin, Luke White 1792) (French Original 1758).

5. Domestic sovereignty, especially the need to establish some one final source of authority, was the central concern of two of the key modern thinkers about sovereignty, Bodin and Hobbes. See THOMAS HOBBS, *LEVIATHAN* (Michael Oakeshott ed., Macmillan 1947)

The three elements of sovereignty are neither logically nor empirically related to each other. Failed or badly governed states enjoy international recognition but do not have effective domestic sovereignty and may not have Westphalian/Vattelien sovereignty. States that do have effective domestic and Westphalian/Vattelien sovereignty may not be recognized. The Peoples Republic of China from the 1950s until the 1970s is a case in point. Entities may be recognized that do not have Westphalian/Vattelien sovereignty; Ukraine and Byelorussia from 1945 until the collapse of the Soviet Union are examples.

From an international law perspective, these departures from conventional sovereignty might not appear to be that damaging to aspirations for a well ordered system of international rules and norms. The international environment is a messy place. Things may episodically go awry. There may still be a modal tendency that pulls actors back to conventional sovereignty. In the end, China was recognized (of course, recognition was withdrawn from Taiwan which has effective domestic sovereignty and Westphalian/Vattelien sovereignty). Failed states may not remain failed forever. Ukraine and Byelorussia may be viewed as oddball exceptions to the principle that only juridically independent entities should be recognized.

II. INESCAPABLE TENSIONS

The view that deviations from conventional norms are temporary aberrations or random perturbations around a generally honored central tendency, fails to confront the persistence and extent of departures from conventional practices especially with regard to Westphalian/Vattelien sovereignty. These departures reflect foundational characteristics of the international system: power asymmetries, differing interests, and the absence of any final authority. More specifically, the core interests of powerful states have repeatedly been threatened by the nature of domestic political regimes in weaker states. To lessen this threat, political leaders in powerful states have moved to change the domestic authority structure in weaker ones. If the interests of powerful states are furthered by intervening in the internal affairs of weaker ones, there is no authority that can prevent such intervention. Violations of Westphalian/Vattelien

(1651); JEAN BODIN, *THE SIX BOOKS OF A COMMONWEALE* (Kenneth Douglas McRae ed., Harvard Univ. Press 1962) (Original English Translation 1606). For a critique of sovereignty as one final point of authority, see Stephen D. Krasner, *Sovereignty: Political*, in *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES* 14706, 14706–08 (Smelser & Baltes eds., 2001).

sovereignty are not aberrations, but rather an enduring characteristic of the sovereign state system.

For instance, John Owen reports one hundred ninety-eight cases of forcible intervention to change domestic regimes in the period 1555 to 2000, most of which occurred during three periods of ideological conflict among major powers: the Reformation and Counter-Reformation, the French Revolution and its aftermath (1789–1849), and the ideological struggles of the twentieth century (1917–1991), with spikes during episodes of hegemonic struggle: the Thirty Years War, the French revolutionary and Napoleonic wars, and the beginning of the Cold War. The primary motivation of interveners was to enhance security by imposing like minded regimes in weaker states that were suffering from internal conflict. In cases of forced imposition, there is little pretense of domestic acquiescence, of honoring international legal sovereignty, although major power may sometimes identify local allies.⁶

The history associated with the Cold War is widely known. The Cold War was essentially a struggle between the United States and the Soviet Union over the nature of domestic political regimes in third countries. Neither superpower respected Westphalian/Vattelien sovereignty. Both wanted to prevent countries from adopting domestic institutional arrangements supported by the other.

With the exception of Czechoslovakia, the Soviet Union essentially imposed communist regimes on those countries that were occupied by the Soviet military at the end of the Second World War and continued directly to penetrate some of the authority structures of these states after communist regimes were established. For instance, Soviet secret police operated throughout Eastern Europe and were empowered to arrest individuals regardless of their nationality. The head of the Polish Security Ministry had Soviet officers as his personal guards. He was advised by an official of the Soviet Ministry of State Security. In the Polish Ministry of Internal Security, eight out of twenty sections were headed by Soviet officers. Similar levels of penetration occurred in other countries.⁷ The militaries of the satellite states, with the exception of Romania which under Ceausescu adopted a different strategy, could not operate independently.⁸ Rather, under the Warsaw Pact, they were integrated into a

6. John M. Owen, IV, *The Foreign Imposition of Domestic Institutions*, 56 INT'L ORG. 375, 375–77 (2002).

7. ZBIGNIEW K. BRZEZINSKI, *THE SOVIET BLOC: UNITY AND CONFLICT* 120–21 (1960).

8. While Ceausescu challenged the Soviet Union with regard to foreign policy, he never deviated in his commitment to communism, a strategy that spared him from the fate that befell Czechoslovakia in 1968, when it attempted to mollify Soviet political concerns while at the same time dismantling the apparatus of Communist party domination. The economies of

command structure that was controlled by Soviet officers. The Soviets also gave support to Third World countries that adopted Marxism/Leninism as their governing ideology. Cuba is one obvious example. Such support was not a violation of the rules of sovereignty—the transfers were entirely consistent with international legal and Westphalian/Vattelien sovereignty—but such support demonstrates that the Soviets were hardly indifferent to the attractiveness and viability of communism around the world, and not just in Eastern Europe.

American leasers adopted a similar strategy. The United States pushed for the creation of democratic and capitalist regimes in occupied Germany and Japan. Confronted with the possibility of a communist victory in Italy in 1948, American officials indicated that they would withdraw foreign assistance if the communists won, and even threatened military action.⁹ The United States sent troops to Korea and Vietnam to prevent communist takeovers of both countries; successfully in the former, but not in the latter. The United States intervened in the Dominican Republic in 1965 to prevent what was mistakenly perceived to be a communist coup in the making,¹⁰ and in Grenada in 1983. The United States engaged in covert interventions in Iran in 1951 and in Chile in 1973. The common thread that ran through all American interventions during the Cold War (with the exception of Panama in 1989), both covert and overt, was the fear, sometimes well-founded and sometimes not, that a country was about to “go communist.” The United States, like the Soviet Union, had little use for the principle of Westphalian/Vattelien sovereignty when its leaders understood basic security interests to be at risk.

The use of force, either overt or covert, has not been the only way in which major powers have tried to influence domestic sovereignty in other countries. Another tool has been to use recognition, the granting of international legal sovereignty, to leverage change in the domestic political institutions of a target state. Minority rights have been a problem in the international system for the last two centuries. Leaders of more powerful states have been concerned about minority rights in some weaker states not only because of principles and identification with co-religionists or co-ethnics, but also because instability in weaker states associated with ethnic tensions could threaten the security of larger ones. One way in which larger states have tried to address this issue has been to condition recognition on the acceptance of minority rights.

most of the satellite states had policies that mirrored those of the Soviet Union. Christopher D. Jones, *National Armies and National Sovereignty*, in *THE WARSAW PACT: ALLIANCE IN TRANSITION?* 88–103 (Holloway & Sharp eds., 1984).

9. JAMES EDWARD MILLER, *THE UNITED STATES AND ITALY, 1940–1950: THE POLITICS AND DIPLOMACY OF STABILIZATION* 229, 237 (1986).

10. ABRAHAM F. LOWENTHAL, *THE DOMINICAN INTERVENTION* 72–73 (1972).

In Europe, the Balkans offers the most compelling example. The major European powers made the acceptance of minority rights a condition of recognition for all of the successor states of the Ottoman Empire beginning with Greece in 1832, followed by Romania, Bulgaria, Montenegro, and Serbia, and ending with Albania in 1913 and Turkey itself after the First World War. The Europeans were insistent on minority rights for a number of reasons. Humanitarian concerns about Turkish repression of unrest in Bulgaria in the 1870s helped to return Gladstone (who had written a pamphlet called *The Bulgarian Horrors and the Question of the East*) to the prime ministership in 1880. Jewish groups in western Europe and the United States pressed their governments to address anti-Semitic policies in Romania at the end of the nineteenth century. Most important, however, the major powers feared that ethnic tensions in the Balkans could threaten their own security. During the nineteenth century, the major powers were persistently drawn into conflicts in the Balkans as Ottoman authority weakened and the interests of Russia, Britain, and Austria-Hungary were directly engaged. The Russians were anxious to expand their influence to the south, including access to the Mediterranean; the British worried about the growth of Russian power, especially after the completion of the Suez Canal, a key link with British India, in 1869; and Austria-Hungary was increasingly concerned about the impact of ethnic tensions and nationalism in the Balkans on the behavior of Slavs within the Empire. The outbreak of the First World War proved these anxieties to be all too well founded.¹¹

The practice of conditioning recognition of new Balkan states on the acceptance of minority rights was again followed by the European powers after the breakup of Yugoslavia in the early 1990s. In 1991, the foreign ministers of the European Community made acceptance of the Carrington Plan the prerequisite for recognition. The plan stipulated that basic civil and political rights were to apply to all, regardless of sex, race, color, language, religion, or minority status. The republics were to respect the rights of national and ethnic minorities elaborated in conventions adopted by the United Nations and the Commission on Security and Cooperation in Europe (CSCE; later the OSCE, Organization for Security and Cooperation in Europe). In local areas where members of a minority formed a majority of the population, they were to be given special status, including a national emblem, an educational system "which respects the values and needs of that group,"¹²

11. C. A. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 164-68 (1934); INIS L. CLAUDE, JR., NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 7, 13 (1955); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY ch. 3 (1999).

12. European Community, Treaty Provisions for the Convention (Carrington Report) Chapt. II, Art. 2(5)(c), U.N. Doc. S/23169 annex VII at 39 (1991).

a legislative body, a regional police force, and a judiciary that reflects the composition of the population.¹³ Disputes were to be taken to a newly established Court of Human Rights, which would consist of one member nominated by each of the Yugoslav republics and an equal number plus one of nationals from European states who would be nominated by the Member States of the European Community.¹⁴

Issues of minority rights arose again in the mid-1990s, following NATO efforts to end the fighting in Bosnia. Annex 6 of the Dayton Accords, signed in December 1995, committed the signatories—The Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska—to honor the provisions of fifteen international and European human rights accords. The signatories also agreed to the creation of a human rights ombudsman, who would be appointed by the OSCE, and a Chamber of Human Rights, where eight of the fourteen members would be appointed by the Council of Europe.¹⁵

Forcible intervention, including the Cold War and efforts to protect minority rights in the Balkans, are only two of the many examples of violations of the norm of Westphalian/Vattelien sovereignty. Every major peace treaty from Westphalia to Helsinki has included provisions that contradict the Westphalian model.¹⁶ The Treaties of Osnabruck and Muenster, which make up the Peace of Westphalia, have extensive provisions for religious toleration in the Holy Roman Empire, including the stipulation that all issues related to religion had to be agreed on by a majority of Catholics and Protestants, voting separately in the Diet and imperial courts of the Empire.¹⁷ The Vienna settlement at the end of the Napoleonic wars included provisions for the protection of the rights of Catholics living in the Netherlands. In addition, Russia, Prussia, and Austria pledged that they would respect the rights of individuals of Polish nationality who were now living within their territories following the final partition of 1795, which eliminated Poland as an autonomous political entity.¹⁸ After the First World War, Woodrow Wilson's vision of collective security led to minority rights being an integral part of the

13. Beverly Crawford, *Explaining Defection from International Cooperation: Germany's Unilateral Recognition of Croatia*, 48 *WORLD POL.* 482, 497 (1996).

14. See *supra* note 12, at Arts. 7(a)(1), (3).

15. United States, Department of State, *The Bosnia Agreement annex 6*, available at <http://www.state.gov/www/regions/eur/bosnia/dayann6.html> (last accessed May 11, 2004).

16. J. A. LAPONCE, *THE PROTECTION OF MINORITIES* 23–42 (1960).

17. Stéphane Beaulac, *The Westphalian Legal Orthodoxy—Myth or Reality?*, 2 *J. HIST. INT'L L.* 170–72 (2000); Treaty of Osnabruck, Oct. 24, 1648, 1 *CONSOL. T.S.* 198, 234, 237–38.

18. CLAUDE, *supra* note 11; MACARTNEY, *supra* note 11, at 159–60; JACQUES FOUQUES-DUPARC, *LA PROTECTION DES MINORITÉS DE RACE, DE LANGUE, ET DE RELIGION* 122–24 (1922).

postwar settlement. Collective security rested on democratic states; democracy required self determination; but complete self determination was impossible in a Europe where ethnic groups were intermixed in many countries. To make democracy work, it was necessary that minority rights be guaranteed. In the aftermath of the war, some thirty-three countries accepted provisions for minority rights that included, for instance, in Poland a prohibition on voting on Saturday because it would have violated the Jewish Sabbath, and the provision of bilingual education in areas where there were large percentages of minority children. A minorities bureau was established in the League of Nations. A set of procedures was established that made it possible to take violations of minorities commitments to the International Court of Justice.¹⁹ Finally, human rights were one of the three major baskets of the Helsinki accords of 1975.²⁰

While this cursory march through the last four hundred years highlighting military intervention for regime change, the Cold War, minority rights in the Balkans, and the provisions of major treaties, does not exhaust the objectives and mechanisms associated with efforts by external actors to influence the domestic authority structures of target states, these examples do suggest that violations of Westphalian/Vattelien sovereignty are frequent. In some cases, these violations have not been explicitly acknowledged; the Soviets would always hold that the development of communist regimes in central Europe was the result of domestic preferences. In other cases, violations have been explicit; the minorities provisions of the Versailles settlement and the Dayton accords are spelled out at great length. In some instances, external actors have aimed to change the fundamental nature of the regime in the target state, as was the case for both the Soviet Union and the United States during the Cold War. In other cases, they have aimed at specific aspects of governance. Some violations of Westphalian/Vattelien sovereignty have been voluntary and thus consistent with the rules of international legal sovereignty. This was the case for the religious toleration provisions of the Peace of Westphalia. None of the signatories of the treaties of Osnabruck and Muenster, including the Holy Roman Emperor, believed in principle in religious toleration, but they all recognized that religion was such a

19. See The Polish Minorities Treaty, June 28, 1919, 225 CONSOL. T.S. 412, also in Macartney, *supra* note 11, App. I, at 502–06; R.J. VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS 44–45 (1986); OSCAR I. JANOWSKY, NATIONALITIES AND NATIONAL MINORITIES 115–22 (1945).

20. VINCENT, *supra* note 19, at 66–79; see also Andrew Moravcsik, *Lessons from the European Human Rights Regime*, in INTER-AMERICAN DIALOGUE, ADVANCING DEMOCRACY AND HUMAN RIGHTS IN THE AMERICAS 35, 48–49 (1994).

volatile issue that it could destroy the polity altogether.²¹ In other cases, violations have been coercive, such as the Soviet military occupation of Czechoslovakia in 1968, which violated both international and Westphalian/Vattelien sovereignty.

Thus, there is an inescapable tension in the sovereign state system. Rulers have often decided that they are better off violating Westphalian/Vattelien sovereignty than honoring it. In some cases, they have voluntarily ceded some of the autonomy of their own state. In other cases, leaders of powerful states have used coercion to compromise the autonomy of weaker states. The willingness of political leaders to violate Westphalian/Vattelien sovereignty is not surprising, given the absence of any final authoritative decision maker in the international system, and differences in power, interests, and values across states. Thus, there is a hole in the whole of the sovereign state system. One of the system's basic norms, the expectation that each state will be autonomous—*not* subject to any higher authority within its own borders—has and will continue to be transgressed.

In my earlier work, following the analysis developed by Nils Brunsson, I have referred to this kind of situation, in which rules are long lasting but not consistently honored, as organized hypocrisy.²² In a recent essay, Brunsson writes: "Hypocrisy is a response to a world in which values, ideas, or people are in conflict—a way in which individuals and organizations handle such conflicts. Organizations are routinely exposed to conflict. People have different and often contradictory ideas about how an organization should work and what it should achieve, and to satisfy one demand fully may be to satisfy poorly or to fail to satisfy another."²³ Hypocrisy in the international state system is inescapable, but an environment in which hypocrisy is inescapable is not one in which a coherent body of law, or even a coherent set of norms, can be developed.

21. It was exactly these concerns about religious conflicts which prompted Bodin and Hobbes to develop their notions of sovereignty as a final point of authority within the state. They hoped by providing such a rationale for authority and obedience, that they would be able to enhance political stability. Bodin himself was almost killed in religious riots in France in 1572; his anxiety about political stability was not simply based on abstract reasoning. For Bodin's experience, see QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 284–85 (1978).

22. KRASNER, *supra* note 11.

23. Nils Brunsson, *Organized Hypocrisy*, in *THE NORTHERN LIGHTS: ORGANIZATION THEORY IN SCANDINAVIA* 201, 203 (Cziarniawska & Sevón eds., 2003).

III. THE DURABILITY OF DEVIATIONS FROM CONVENTIONAL SOVEREIGNTY

The fact that political leaders have frequently breached Westphalian/Vattelien sovereignty does not mean that they have been able to create stable outcomes that matched their objectives. There have been failures and successes. At least in the long run, the United States was more successful in Europe than the Soviet Union. Efforts to create stability by guaranteeing minority rights in the Balkans failed, but those designed to enhance religious toleration were largely successful. One stunning example of success in the contemporary world has been the European Union, whose member states, as a result of the free exercise of their international legal sovereignty, have compromised their Westphalian/Vattelien sovereignty.

Given our present level of information, it is not possible to reach a definitive conclusion about the conditions that separate successful from unsuccessful efforts involving violations of Westphalian/Vattelien sovereignty. We do not have a complete data set of such violations that might allow us to systematically examine alternative explanations. However, at least one productive way to think about this problem is to recognize that because of the absence of a final authoritative decision maker, any stable arrangement, whether it conforms with Westphalian/Vattelien sovereignty or not, must be supported by a self-enforcing equilibrium. That is, the key actors, those with the ability to upset an arrangement, must conclude that there is no superior alternative available to them. These key actors could come from within or without the country. They could be motivated by normative or material concerns.

The European Union is an example of an institutional arrangement that has transgressed conventional sovereignty rules so successfully that it is hardly seen as being a transgression at all. The member states of the EU have used their international legal sovereignty, their right to sign treaties, to create supranational institutions and pooled sovereignty arrangements that have compromised their Westphalian/Vattelien sovereignty. For instance, the rulings of the European Court of Justice have direct effect and supremacy in the legal systems of the member states. Thus, the member states of the EU are not juridically independent, even though this loss of independence is the result of freely chosen commitments. For some issue areas, such as trade policy, there is qualified majority voting; states may have to accept a policy with which they disagree. Thus, the member states of the EU are not autonomous; at least in some issue areas, they

cannot freely choose their policies.²⁴ Countries that were members of the EU when the Monetary Union was established could opt out, a path chosen for instance by the United Kingdom, but new members have not been given this option.

The European Union has been so successful because it has created over time a set of self-enforcing equilibria. Individual states may not have been entirely happy with specific decisions that were taken, but their leaders still decided that adhering to the Union was better than departing from it. Surely, some of the new members of the EU would have preferred a different deal than the all or nothing package that they were offered, but no other offer was on the table. Taking this deal was better than rejecting it.²⁵

A similar although less well known story might be told about the acceptance of religious toleration in Europe, embodied in a series of agreements of which the Peace of Westphalia is the best known. Again, rulers used their international legal sovereignty to compromise their own Westphalian sovereignty. They accepted internationally legitimated constraints on their own freedom of action within their own territories because religious conflict was so threatening to the stability of their political systems. Even though initially there were few who believed in religious toleration, much less religious freedom, as a matter of principle, religious conflicts in Europe had been so destabilizing that accepting internationally legitimated constraints was a better option for rulers than demanding complete control over religious practices within their territory. *Cuius regio eius religio* was a slogan; it was not after 1648 a policy prescription.²⁶

Finally, the American success in Germany and Japan after the Second World War can also be understood to be the result of a self-enforcing equilibrium. During the Cold War, the United States maintained a large military presence in both countries. Any domestic actor contemplating

24. For discussions of EU decision making including the role of the European Court of Justice, see Ann Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993); George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INT'L ORG. 357 (2001); Alec Stone Sweet & Thomas L. Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63 (1998).

25. For a discussion of how powerful states might use go-it-alone power to alter the status quo in ways that leave weaker states only with options that are inferior to the status quo ante, see LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2000). Nevertheless, even in these situations, if states see no better option, acquiescence can be a self-enforcing equilibrium.

26. See MACARTNEY, *supra* note 11, at 158–59, regarding the frequency with which religious rights were preserved when territory changed hands. For a discussion of Catholic rights in Canada when France gave control to Britain, see LAPONCE, *supra* note 16, at 23–24.

defying American preferences would have to take account of the possibility that American leaders would use their on-the-ground coercive capability. In addition, political leaders in Japan and especially Germany were anxious about the threat posed by the Soviet Union. They both knew that in case of conflict, they would not be able to defend themselves. Most importantly, key political leaders in both countries agreed with the core elements of the American vision for their postwar reconstruction. These leaders wanted democracy and capitalism. The combination of American military power, the Soviet threat, American economic incentives, and support from key economic, political, and social sectors in Japan and Germany created a self-enforcing equilibrium in which external intervention by the United States helped to establish effective and decent domestic sovereignty in Germany and Japan.

Violations of Westphalian/Vattelian sovereignty that do not create self-enforcing equilibria will fail. For instance, attempts by external powers to use the extension of international legal sovereignty to secure minority rights have rarely achieved their objective. At the outset, political leaders of would-be states are confronted with the options of non-existence (no international legal sovereignty) or accepting the conditions offered by external actors. They want recognition, but they are not particularly interested in, or perhaps even hostile to, minority rights. To secure recognition, these leaders accept minority rights provisions for their polity. Once recognition is granted, however, it cannot easily be withdrawn. Unless the minority rights provisions generate a minimum winning coalition domestically, they will be rejected or ignored.²⁷

In the case of Soviet involvement in central Europe, Communist regimes lasted only so long as they were backed by the Soviet army. When the Soviet army disappeared, so did communism in central Europe. There was a self-enforcing equilibrium only so long as the populations of central Europe knew that any attempt to escape the Soviet orbit would be met with overwhelming force.²⁸ The Communist regimes which the Soviets created after the Second World War never secured a

27. In the aftermath of the First World War, the only countries that were really supportive of minority rights were Hungary, which had few minorities of its own and many Hungarians living in other states; and Czechoslovakia, which had a large German minority population, but was also committed to democratic practices. See SEBASTIAN BARTSCH, *MINDERHEITENSCHUTZ IN DER INTERNATIONALEN POLITIK: VÖLKERBUND UND KSZE/OSZE IN NEUER PERSPEKTIVE* 81–83 (1995).

28. Even this self-enforcing equilibrium did not always hold. The Hungarian population did revolt in 1956. The Soviet intervention in Czechoslovakia in 1968, in contrast, was more the result of miscalculations by the Czech reformers who hoped that the Soviet Union would accept dramatic internal reforms if they made it clear that external policies would not change. See Christopher D. Jones, *Soviet Hegemony in Eastern Europe*, 29 *WORLD POL.* 216 (1977).

domestic minimum winning coalition that could have sustained them after the Soviet Union was gone.

In sum, violations of Westphalian/Vattelian sovereignty have occurred frequently. The aspirations of political leaders who engaged in these breaches of conventional sovereignty have not always been realized. Institutional arrangements will only be durable if they create a self-enforcing equilibrium.

IV. BAD GOVERNANCE

One of the great challenges of the contemporary era, perhaps the greatest, is how to promote better governance in badly governed polities. For the period 1955 to 1998, the State Failure Task Force identified 136 state-failure events in countries with populations above 500,000. State failure was operationalized as one of four kinds of internal political crisis: revolutionary wars, ethnic wars, "adverse" regime change, and genocides. The percentage of countries experiencing failure increased from about five percent in the mid 1950s to over twenty percent in the 1990s.²⁹

The largest number of poorly governed states is found on the continent of Africa, where about a fifth of the countries have experience failure at one time or another.³⁰ Poor governance in general has been a widespread problem for Africa, as reflected in overall economic performance and human development. In constant 1995 US dollars, gross domestic product per capita for all of Sub-Saharan Africa fell from \$660 in 1980 to \$587 in 1990, to \$575 in 2002. More than half of the African states had absolute declines in their per capita incomes during the 1990s. Life expectancy for the area as a whole increased from forty-eight years in 1980 to 50 in 1990, but then declined to forty-six in 2002.³¹ The twenty-seven lowest ranking countries on the Human Development Index prepared by the United Nations Development Program are all from Sub-Saharan Africa.³²

States that experience failure or poor governance more generally are beset by many problems, including deteriorating infrastructure, widespread corruption, poor provision of public services, and insecurity.

29. Jack A. Goldstone et al., *State Failure Task Force: Phase III Findings iv-v*, 3-5 (2000), available at <http://www.cidcm.umd.edu/inscr/stfail/SFTF%20Phase%20III%20Report%20Final.pdf> (on file with the Michigan Journal of International Law).

30. *Id.* at 21.

31. Derived from data found at <http://devdata.worldbank.org/dataonline> (last visited April 11, 2004).

32. UNITED NATIONS DEVELOPMENT PROGRAM, *HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD* 151-52 (2002).

The authority of the government may not extend beyond the capital city. The state may enjoy the perquisites of international legal sovereignty—a flag, access to international organizations, diplomatic immunity—but its domestic sovereignty may be an empty shell.

The consequences of failed and inadequate governance have not been limited to the societies directly affected. Poorly governed societies can generate conflicts that spill across international borders. Transnational criminal and terrorist networks can operate in territories that are not controlled by the internationally recognized government. Humanitarian disasters not only prick the conscience of political leaders in advanced democratic societies, but also leave them with no good political choices.

State failure, or the collapse of existing authority structures, may also be the result of external invasion. The United States, with substantial support from other countries and United Nations Security Council authorization, invaded Afghanistan in 2001, displacing the Taliban government, and then in 2003, with much less support from others and an ambiguous UN mandate, removed Saddam Hussein from power in Iraq. The principal motivation in both cases was American national security, which was clearly related to the fact that Afghanistan had become a safe haven and training ground for Al-Qaida, and less clearly related to misapprehensions about the level of weapons of mass destruction in Iraq. Regardless of motivation, once the regimes in these two countries were overthrown, the challenge was how to establish minimally decent domestic sovereignty.

V. THE PRESENT POLICY REPERTOIRE: GOVERNANCE ASSISTANCE AND TRANSITIONAL ADMINISTRATION

The current menu of policy instruments available for state building in badly governed or occupied countries is limited, consisting primarily of foreign assistance to improve governance and transitional administration, both of which assume that in more or less short order, targeted states can function effectively on their own. For many countries, this assumption is little more than wishful thinking.

Governance assistance is perfectly consistent with conventional sovereignty. Recipient states secure financial, technical, and other kinds of aid from international donors, which is designed, for instance, to train police and judges, organize elections, educate journalists, and enhance the capacity of political parties. While governance assistance can make a

positive contribution, there is no systematic evidence that it can make a decisive difference.³³

Transitional administration refers to situations in which the United Nations authorizes the temporary occupation of a country by representatives of the international community. Bosnia, Kosovo, East Timor, and Afghanistan are the most well known examples. The American occupation of Iraq can be seen as an analogous situation. Transitional administration is designed to restore full conventional sovereignty to the target country. The record is mixed. Coordination among a multiplicity of international actors has been difficult. Moreover, if local political leaders do not share the objectives of the international community, and they know that external actors are committed to leave, there are high incentives for them to cultivate parochial local interests with little commitment to democracy. Local actors must ask: when, not if, international actors leave, how can I stay in power? In both Bosnia and Kosovo, the answer has been to maintain ties with ethnic supporters.³⁴

VI. TRUSTEESHIPS: AN UNLIKELY POSSIBILITY

While there is no panacea for state failure or poor governance in general, the available toolkit of governance assistance and transitional administration is inadequate. Other policy instruments will be explored. One that has been mentioned with increasing frequency is some kind of revival of trusteeship.³⁵ The establishment of a trusteeship, unlike transitional administration, would not be short term. The political entity would lose its international legal as well as its Westphalian/Vattelien sovereignty. The immediate goal would be to improve domestic governance. The long term objective would still be to restore conventional sovereignty, but this might take decades, rather than years.

33. See Stephen Knack, *Does Foreign Aid Promote Democracy?*, 48 INT'L STUD. Q. 251, 262 (2004).

34. For discussions of peace building efforts since the Second World War, see Michael W. Doyle & Nicholas Sambanis, *International Peacebuilding: A Theoretical and Quantitative Analysis*, 94 AM. POL. SCI. REV. 779 (2000). For a second study with a different data base but comparable findings, see George Downs & Stephen John Stedman, *Evaluation Issues in Peace Implementation*, in ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS 43, 50–52 (Stephen John Stedman et al. eds., 2002).

35. E.g., Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POL'Y 3 (1993); Michael Ignatieff, *State Failure and Nation Building*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 299, 308 (Holzgreve & Keohane eds., 2003); Martin Indyk, *A Trusteeship for Palestine?*, 82 FOREIGN AFF. 51 (2003); RICHARD CAPLAN, *A NEW TRUSTEESHIP?: THE INTERNATIONAL ADMINISTRATION OF WAR-TORN TERRITORIES* (2002).

There will, however, be no revival of an explicit, named, and legitimated alternative to sovereignty like the trusteeship system. The major powers will not support such a move because it would put more pressure on them to become involved in places that they would prefer to ignore. Weaker developing countries will reject anything like trusteeship because it would threaten their own international legal sovereignty. The resemblance to colonialism could not be avoided.³⁶ The resistance of both the strong and the weak will preclude an explicit *de jure* endorsement of trusteeship for the foreseeable future.

VII. SHARED SOVEREIGNTY: A PROMISING ALTERNATIVE

Given the limitations on governance assistance, the inadequacies of transitional administration, and the difficulty in explicitly legitimating new institutional forms, alternative solutions will be explored. Shared sovereignty is one possibility. Shared sovereignty would involve the engagement of external actors in some of the domestic authority structures of the target state for an indefinite period of time. Such arrangements would be legitimated by agreements signed by recognized national authorities. National actors would use their international legal sovereignty to enter into agreements that would compromise their Westphalian/Vattelien sovereignty with the goal of improving domestic sovereignty. One core element of sovereignty, the ability to enter into voluntary international agreements, would be preserved, while at the same time another core element, the principle of autonomy, would be ceded.³⁷

To endure, shared sovereignty arrangements would have to create self-enforcing equilibria. Legitimacy issues would be mitigated by the fact that those empowered to exercise international legal sovereignty had agreed to the new arrangement. Legitimacy would be higher the more the agreement appeared to be the result of symmetrical, rather than highly unequal bargaining. By engaging external actors, local political leaders could provide better governance, at least in some specific issue areas. Better governance would attract domestic political support.

36. For a discussion of the importance of sovereignty for new and weak states, see ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* (1990).

37. Robert Keohane has discussed a similar set of ideas using the concept of gradations of sovereignty. See Robert O. Keohane, *Political Authority after Intervention: Gradations in Sovereignty*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 275, 276–77 (Holzgrefe & Keohane eds., 2003). I have developed the idea of shared sovereignty more fully in Stephen Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, in *INTERNATIONAL SECURITY* 29 (2004).

Domestic political support would help to create a self-enforcing equilibrium.

A. *Past Examples of Shared Sovereignty*

Given the complexity of the international environment and the absence of any authoritative decision maker, it is not surprising that shared sovereignty arrangements have been tried in the past. At the end of the nineteenth century, shared sovereignty arrangements were created in several countries in the area of finance. The Ottoman Empire and Greece offer two examples. The Empire entered international capital markets in the 1850s and, after several additional loans, found itself unable to meet its external obligations in 1875. In 1881, the Ottomans agreed to create the Council of the Public Debt. The members of the council—one each from Germany, Austria, Italy, and the Ottoman Empire itself, and one from Britain and Holland together—were selected by foreign creditors. The Council was given control over several specific sources of revenue including the salt and tobacco monopolies, the stamp tax, and the spirits tax.³⁸ In Greece, an international control commission, whose members were appointed by the governments of Austria-Hungary, Italy, Germany, France, Russia, and Britain, was appointed after a disastrous war with Turkey which left the country bankrupt and occupied by Turkish forces. The commission was given control over revenues that were necessary to fund a new loan for Greece, part of which was used to pay the war indemnity demanded by Turkey as a condition for removing its troops. The commission controlled certain revenues and also had the power to limit new Greek debts and to control the money supply.³⁹

Both of these arrangements established self-enforcing equilibria. Neither the Ottoman nor Greek government was happy about having part of its revenue stream controlled by a foreign entity, but without accepting these conditions, they could not secure access to international capital markets. If the arrangement were violated, new access would be blocked. For the lenders, direct control over specific revenues provided reassurance that the loans would be repaid.

As suggested above, the security arrangements for West Germany during the Cold War are another example of a successful shared sovereignty arrangement. The western allies wanted to internationally

38. DONALD C. BLAISDELL, *EUROPEAN FINANCIAL CONTROL IN THE OTTOMAN EMPIRE* 90–120, 124–30 (1929); HERBERT FEIS, *EUROPE THE WORLD'S BANKER 1870–1914* 332–34 (1965); BERNARD LEWIS, *THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS* 298–99 (1995).

39. JOHN A. LEVANDIS, *THE GREEK FOREIGN DEBT AND THE GREAT POWERS, 1821–1898* 108–115 (1944); FEIS, *supra* note 38, at 286–90.

legitimate the Federal Republic (FRG), while at the same time constraining its freedom of action. The leaders of Germany wanted to guarantee democracy in their own country and lessen the anxieties of their neighbors. Agreements signed at Bonn in 1952 and Paris in 1954 gave the German government autonomy over virtually all policies except security. Germany not only renounced its right to produce chemical, biological and nuclear weapons, but also integrated its forces into NATO. The status of forces agreement signed by Germany gave the allies expansive powers, including exclusive jurisdiction over the members of their armed forces, and the right of foreign military to patrol public areas including roads, railways, and restaurants, and to take any measures necessary to ensure order and discipline, authority usually reserved for national police forces alone.⁴⁰ Article 5(2) of the Convention on Relations gave the Western powers the right to declare a state of emergency in response to a threat of security until FRG officials obtained adequate powers to enable them to take effective action to protect the security of the foreign forces.⁴¹ Without a clear definition of these adequate powers, the Western powers formally retained the right to resume occupancy of the Federal Republic until 1990, when the Bonn Agreements were terminated by the 1990 Treaty on the Final Settlement with Respect to Germany.

The United States succeeded in Germany because most Germans supported democracy, a market economy, and constraints on Germany's security policies. Obviously, the continuing strength of this support reflected many factors, including the long term economic success of the West relative to the Soviet bloc. Shared sovereignty arrangements for security in Germany contributed to effective domestic governance by taking a potentially explosive issue off the table both within, and more importantly without, Germany. Security dilemmas that might have strengthened undemocratic forces in Germany never spiraled, because Germany did not have exclusive control of its own defense.

B. Contemporary Examples of Shared Sovereignty

There have also been some hesitant steps toward shared sovereignty in the contemporary world. One example, albeit anemic, is the arrangement negotiated for the Chad-Cameroon pipeline, between the

40. *Revised NATO SOFA Supplementary Agreement*, arts. 19, 22, 28 (August 3, 1959), at <http://www.osc.army.mil/others/gca/files/Germany.doc> (last accessed May 8, 2004) (on file with the Michigan Journal of International Law).

41. *Convention on Relations between the Three Powers and the Federal Republic of Germany*, Oct. 23, 1954, art. 5(2), 6 U.S.T. 4251, 4256. For a detailed examination of the retained rights of the Western Powers, see Joseph W. Bishop, Jr., *The "Contractual Agreements" with the Federal Republic of Germany*, 49 AM. J. INT'L L. 125 (1955).

two governments and the World Bank. The arrangement includes both the development of oil resources in Chad and the pipeline that will carry this oil through Cameroon to the Atlantic. The lead oil company on the project, ExxonMobil, and its partners, were anxious to involve the World Bank. This was not so much because the project required additional funding from the World Bank, but rather because the companies feared that they would be criticized for violating human rights and environmental principles were they to become heavily invested in Chad and Cameroon, two countries with very poor governance and human rights records.⁴² Shell had actually withdrawn from the project because of its anxieties about the political situation. Exxon hoped that the involvement of the bank, which had been deeply engaged with problems of governance throughout the 1990s, would improve the way in which the project was administered, and also give the companies protection from accusations that might be made by NGOs concerning the environment and human rights, particularly the rights of indigenous peoples.⁴³

The World Bank was acutely aware of the natural resource curse and did move to introduce new governance structures to Chad and Cameroon as a condition of its involvement.⁴⁴ Chad enacted a new law in 1998, which committed a substantial portion of oil revenues to social welfare projects. All oil revenues are to be placed in an escrow account, which is overseen by a new body called the Oil Revenues Control and Monitoring Board, whose members come from both civil society and the state.⁴⁵ At the insistence of the World Bank, Chad and Cameroon also accepted the creation of an International Advisory Group, which is to visit the area at least twice a year and make recommendations to the governments regarding governance in general, the use of funds, and the engagement of civil society. The first chair of the Group was Mamaou Lamine Loum, a former Senegalese prime minister.⁴⁶

42. In the 2000–2001 Freedom House ratings, both countries were rated as not free for both political rights and civil liberties. Freedom House, *Table of Countries: Comparative Measures of Freedom*, at <http://www.freedomhouse.org/research/freeworld/2000/table1.htm> (last visited May 8, 2004) (on file with the Michigan Journal of International Law).

43. See Ken Silverstein, *With War, Africa Oil Beckons*, L.A. TIMES, March 21, 2003, at 1.

44. For a discussion of the natural resource curse, see Michael Lewin Ross, *Does Oil Hinder Democracy?*, 53 WORLD POL. 325 (2001).

45. Genoveva Hernández Uriz, *To Lend or Not To Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 222–24 (2001); World Bank, *IBRD/IDA Project Information Document: Chad—(Cameroon) Petroleum Development and Pipeline Project* 16–18, at <http://www.worldbank.org/afrc/ccproj/project/td44305.pdf> (last accessed May 8, 2004) (on file with the Michigan Journal of International Law).

46. World Bank, *Chad-Cameroon Pipeline and Related Projects International Advisory Group Terms of Reference* 2–4, at <http://www.gic-iag.org/doc/iagtoren.pdf> (last accessed May 8, 2004) (on file with the Michigan Journal of International Law); World Bank, *International*

The potential leverage of international actors over the terms of development was significant. The project, which provides Chad with a fifty percent increase in revenue, could not have become operable without the engagement of the oil companies, and the oil companies wanted the World Bank.⁴⁷

Nevertheless, the level of shared sovereignty is modest. Foreign actors are only fully engaged with the International Advisory Group, and it can only give advice. If anything, the lesson of the Chad-Cameroon pipeline is that creating potent shared sovereignty institutions in weak states in the contemporary environment will be difficult. More robust World Bank proposals for the project were dropped because of objections from some members of the Executive Board, including those representing African states.

Courts on which international judges sit offer a second example of shared sovereignty in the contemporary world. Hong Kong offers one example. China wanted formal control over Hong Kong and international recognition that Hong Kong was part of China. At the same time, it did not want to undermine Hong Kong's economic dynamism. China needed to reassure both Chinese and foreign investors that the basic economic rules of the game would not be changed after the British left. To provide this assurance, China allowed Hong Kong to continue to exercise international legal sovereignty, by keeping its seat in the WTO and other international organizations, issuing passports, enforcing its own customs procedures, concluding visa agreements with other states, and establishing foreign economic missions. In addition, the judicial arrangements for Hong Kong engaged external authority sources and foreign (Commonwealth) judges. Arrangements for the judicial system were explicitly spelled out in the 1984 Joint Declaration describing the conditions under which the British would relinquish its authority claims. The Hong Kong Court of Final Appeal could call on foreign judges from common law countries to sit with the Court and could refer to precedents from common law countries in reaching decisions. In the first years of the Court's existence, the fifth position on the bench was always occupied by a Commonwealth judge.

East Timor, Kosovo, and Sierra Leone provide a second set of examples of the role of international judges, although the motivations and mechanisms were quite different from those that led the Chinese government to create a version of shared sovereignty for Hong Kong. In

Advisory Group on the Chad-Cameroon Petroleum Development and Pipeline Project, at <http://www.gic-iag.org/eiag.htm> (last accessed May 8, 2004) (on file with the Michigan Journal of International Law).

47. See Uriz, *supra* note 45; see also Paul Raeburn, *A Gusher for Everyone?*, *BUS. WK.*, Nov. 6, 2000, at 60.

all of these countries, mixed tribunals were established that included both national and international judges. In East Timor and Kosovo, these tribunals, which William Burke-White has referred to as semi-internationalized, were initially created by a United Nations transitional authority that exercised executive power.⁴⁸ In East Timor, the newly independent state continued this practice, providing an example of shared sovereignty.

The clearest example of shared sovereignty is offered by Sierra Leone. In Sierra Leone, the Special Court was established through a formal treaty between the government of Sierra Leone and the United Nations. The Court is charged with prosecuting war crimes and crimes against humanity, as well as crimes under Sierra Leonean law dealing with the abuse of children and wanton destruction of property.⁴⁹ Three of the five judges in the Appeals Chamber of the Court are appointed by the Secretary General, as are two of the three judges in each trial chamber.⁵⁰ Pardons can only be granted if they are approved by the President of the Court.⁵¹ The Prosecutor for the Court is also appointed by the Secretary General.⁵² The Special Court has primacy over the national courts of Sierra Leone.⁵³

Semi-internationalized or mixed tribunals bolstered the meager legal talent available in the host country. They provided a mechanism through which national political leaders in East Timor and Sierra Leone could demonstrate to their external donors that they were committed to dealing with war crimes and crimes against humanity. They have also been far less expensive to operate than the international tribunals for Yugoslavia and Rwanda, although in the case of Sierra Leone, the Special Court has not come cheaply. By including both national and international judges, these semi-internationalized tribunals secure greater legitimacy than might be the case if international judges alone were in charge.⁵⁴

48. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement?*, 24 MICH. J. INT'L L. 1 (2002).

49. Statute of the Special Court for Sierra Leone arts. 2–5 (Aug. 14, 2000) at <http://www.sierra-leone.org/specialcourtstatute.html> (last accessed May 8, 2004) (on file with the Michigan Journal of International Law).

50. *Id.* at art. 12.

51. *Id.* at art. 23.

52. *Id.* at art. 15.

53. *Id.* at art. 8(2). See also Human Rights First, *The Special Court for Sierra Leone*, at http://www.humanrightsfirst.org/international_justice/w_context/w_cont_04.htm (last accessed May 8, 2004) (on file with the Michigan Journal of International Law).

54. Burke-White, *supra* note 48.

C. Future Possibilities for Shared Sovereignty

Natural resource exploitation offers one promising opportunity for creating shared sovereignty arrangements. For developing countries, natural resources have usually been a curse rather than a blessing. The presence of raw materials has been negatively associated with democracy and economic growth.⁵⁵ Natural resources, and most clearly oil, have also been connected to high levels of civil conflict. Many kinds of raw materials, especially those requiring large amounts of investment, such as oil, concentrate power and wealth in the hands of the state. Receipts from natural resource exploitation obviate the need to establish the kind of legitimacy that would make it possible for a government to tax its own citizens, and provide political leaders with revenues to pay for repressive police and military structures.⁵⁶ The challenge for raw materials exploitation in poorly governed polities is to create a self-enforcing institutional arrangement that would limit the opportunities for corruption and exploitation and make revenues available for social welfare programs that would benefit the general population.

A shared sovereignty arrangement for natural resources, at least natural resources requiring large scale investments from multinational corporations, could work in the following way. A trust would be created through an agreement between the host country and say, the World Bank. The trust would be domiciled in an advanced industrialized country with effective rule of law. All of the funds generated by the natural resources project would be placed in an international escrow account controlled by the trust. All disbursements from the account would have to be approved by a majority of the directors of the trust. Half of the board of directors of the trust would be appointed by the host government, the other half by the World Bank; the World Bank would have the option of appointing directors, who would not be World Bank employees, from any country.

The trust agreement would stipulate that a large part of these funds would be used for social welfare programs, although specific allocations for say, health as opposed to education, would be left to the host government. The trust would refuse to dispense funds that did not conform with these commitments. The trust might even be charged with implementing programs using the resources of the escrow account if the government failed to act expeditiously.

The directors of the trust would be held accountable under the laws of the advanced democracy in which the trust was incorporated. The firms' responsibility to pay revenues into the escrow account and only

55. See Ross, *supra* note 44.

56. See Ross, *supra* note 44.

the escrow account would be backed by legislation enacted by the country in which the trust was domiciled, and possibly by the home countries of the companies involved in the project as well.

The obvious question is: why would political leaders in resource rich countries sign on to such an arrangement? Perhaps some farsighted leader might voluntarily embark on such a project, but relying on political will of this sort would have only limited results. Trusts would be more likely to be put in place if advanced democratic industrialized countries passed legislation that would prohibit the importation of any products that were not developed with a trust agreement. Major importing countries could also pass legislation that would prohibit imports from any oil companies that had circumvented trust arrangements. Rulers in resource rich countries would then have the option of getting nothing or getting something through a trust arrangement that would encourage productive use of revenues. This kind of arrangement would be most promising for the development of new projects.

The key element for the success of a natural resources trust is that the enforcement mechanisms would be outside of the producing country. The trustees would be held accountable under the laws of the advanced state in which the trust was domiciled. Companies that evaded payments into the escrow account could be prosecuted by their home country governments, or if their governments refused to pass such legislation (as might, for instance, be the case for Russia), would be banned from engaging in business with major industrialized democratic states.

Monetary policy is a second area where shared sovereignty might work. Controlling inflation can be a daunting problem for poorly governed states. A few have simply resorted to using the US dollar. Ecuador is the most prominent example. Others have tried to engineer credible commitments through domestic institutions, such as an independent central bank. The credibility of such arrangements could be enhanced if the governors of the central bank were appointed by both the national government and by external actors. In this case, the IMF might be the right partner. Non national governors could be of any nationality. They would not be employees of the IMF. The IMF would sign a contract with the host country setting up shared sovereignty on a permanent basis or until both parties agreed to end the arrangement. If the national government unilaterally abrogated the agreement, it would be a clear signal to external actors that they were abandoning the path of monetary responsibility.⁵⁷ If the central bank were successful in constraining

57. The logic of this argument follows the case presented for the Bank of England by North and Weingast, where the creation of the Bank served as a mechanism that provided information about the intentions of the ruler. See Douglass C. North & Barry R. Weingast,

inflation, the arrangement would generate support from domestic actors. Like oil trusts, one major attraction of such an arrangement is that it would not be costly for the Fund or any other external actor.

Either constituent demands or the need for higher levels of foreign assistance could provide incentives for national political leaders to enter into such a shared sovereignty arrangement. The leaders of a country that has suffered, for instance, from hyper-inflation might find that support for a shared sovereignty arrangement would be a way for them to demonstrate seriousness and commitment to their own constituencies. International lenders or aid donors might make shared sovereignty for a state's monetary authority the condition for additional funds. The sustainability of such an arrangement over the long term, however, would depend on its success; on the ability of a central bank with both national and international directors to provide a more stable economic environment that would attract the continued support of citizens.

Commercial courts might be another area where shared sovereignty could be productive. In a state where the rule of law has been sketchy, the international legal sovereign would conclude a contract with an external entity, for instance a regional organization like the European Union or the Organization of American States, to establish a separate commercial court system. The judges in these courts would be appointed by both the national government and its external partner. The expectation would be that this court system would be attractive to local business interests. It would provide a venue in which they could resolve disagreements more effectively than would be the case within existing national institutions. The presence of such a court system might even attract higher levels of foreign investment.

Like oil trusts and central banks, such an arrangement would not involve substantial costs for the external actor. Commercial courts could be funded by the national government, or even to some extent by litigants. To sustain themselves over the long term such courts would have to enjoy the support of the local commercial community, which would benefit from an environment in which the rule of law was more widely respected. In a generally badly governed environment, such as one with a corrupt police force, the efficacy of court rulings would have to depend on the willingness of litigants to obey them, if only because the reputational costs of ignoring a judgment would be higher than the costs of

honoring one. The key function of these commercial courts would be to provide unbiased information.⁵⁸

In sum, shared sovereignty, a situation in which a political leader uses international legal sovereignty to enter into a contractual arrangement which compromises his state's Westphalian/Vattelien sovereignty, has existed in the past, is being tried in the present, and offers some promising possibilities for the future.

CONCLUSION

The international system is messy and complex. It is hard for any actor to be fully, or in some matters even well, informed. There are many different kinds of actors, including states, multinational corporations, NGOs, and international organizations. The interests and capabilities of these actors vary both within and across categories. States are organized in many different ways: centralized, federal, presidential, parliamentary, autocratic, and theocratic. International organizations can be universal or regional; they can have general or specific portfolios. NGOs may be interested in everything from exploring outer space to spreading the Gospel. The behavior of corporations may vary depending on the national economic structures within which they are embedded. The ability of different actors to influence outcomes varies as a function of their capacity and the environment within which they are operating.

It would be reassuring to believe that the further development of international law will provide more stable, predictable, and just outcomes in this complex and sometimes chaotic environment. This is, however, an aspiration which ignores power asymmetries, differences in goals, and the absence of any final authority. Powerful actors, especially powerful states, can ignore norms, try to change them, or pick and choose among them.

Sovereignty, the most widely recognized institutional arrangement for the contemporary system, creates an inescapable paradox. One of the core norms of sovereignty is that each state is autonomous and independent; each has the right to determine its own domestic institutional arrangements. One state does not have the right to intervene in the internal affairs of another. At the same time, the domestic authority structures of a particular state can threaten the core interests of others, including their security interests. If those that are threatened conclude that regime change, rather than outright conquest, is the optimal path for enhancing

58. For a discussion of how such courts operated in medieval Europe, see Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs*, 1 *ECON. & POL.* 1 (1990).

their own security, there is nothing that can prevent them from trying to change the domestic authority structures of weaker target states.

In some instances, the threats posed by particular regimes are direct. A regime may be committed to an aggressive policy; under a different regime, the same state might pose no threat. In the contemporary world, for example, particular regimes might choose to support or harbor transnational terrorists.

In other instances, the threats posed by particular regimes are indirect, the unintended consequences of the inability of national institutions to effectively govern within their own borders. Failed or badly-governed states can generate pathologies that afflict the more powerful, including disease, crime, genocide, and migration. Terrorist networks may flourish not because they are supported by the government, but because public authorities cannot exercise effective control.

The problem of aggressive or failed and badly governed states cannot be adequately addressed if all of the conventional norms of sovereignty are honored. While some states might fix themselves, qualitatively changing the nature of regimes in others will involve actions that are inconsistent with the principle of Westphalian/Vattelien sovereignty. At least one strategy for improving governance would be to sacrifice autonomy to improve domestic sovereignty through the creation of shared sovereignty institutions. Ideally, this tradeoff would be legitimated by the exercise of international legal sovereignty, the right of the rulers of recognized states to sign contracts. Even if shared sovereignty arrangements were initially imposed by external actors or agreed to by national political leaders under duress, such institutions could only survive over the long term if they created self-enforcing equilibria.

Shared sovereignty arrangements would vary across issue areas and countries. Although shared sovereignty might generate new norms and expectations, and be explicitly legitimated by new international agreements, they would be inescapably in tension with other norms and rules in the system. Differences in interests and power, and the absence of any final decisive authority, make it impossible for international law to provide the kind of predictability and coherence to which some of its devotees aspire.