A STATE OF FAILURE: THE SACROSANCTITY OF SOVEREIGNTY AND THE PERPETUATION OF CONFLICT IN WEAK AND FAILING STATES

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I. INTRODUCTION

The concept of sovereignty has long defined international law. Territories bestowed with the privilege of being "sovereign" gain access to an elite community of States and, more importantly, acquire the protection of international law.[1] Although in recent years both the legal and political relevance of sovereignty has come under increasing criticism, the concept remains the foundation of international law between States.[2] International law is premised on the fundamental notion that a State's internal functioning is at the complete discretion of the home government.[3] However, with the changing nature of warfare from inter-State to intra-State conflict, and the mounting relevance of non-State actors, the notion of sovereignty has become more troublesome as the definitive conception of the State.[4] As conflict and grave human rights atrocities continue to dominate the landscape of many developing nations, international scholars have become frustrated with the inefficient mechanisms international law provides to address these difficulties.[5] Consequently, sovereignty has become increasingly

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1. *See generally* Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 1 (1999) (explaining the connection between sovereign Statehood and international law).

2. See *infra* Part II.C for a discussion of the prevalence of the notion of sovereignty in international law.

3. *See, e.g.*, U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."). See also *infra* Part II.A for a discussion of the basic elements of sovereignty, particularly juridical and political sovereignty.

4. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 247 (2000) (noting a decline in international wars and rise in domestic wars); Stéphane Dosse, *The Rise of Intrastate Wars: New Threats and New Methods*, SMALL WARS J. (Aug. 25, 2010), http://smallwarsjournal.com/blog/journal/docs-temp/508-Dosse.pdf (discussing the "near disappearance" of inter-State wars and the rise of intra-State wars).

5. *See generally, e.g.*, CHIARA GIORGETTI, A PRINCIPLED APPROACH TO STATE FAILURE 43-65 (2010) (discussing international law's incapability to address weak and failing States);

problematic, yet remains unchallenged and reinforced.

In July of 2010, however, the International Court of Justice (ICJ) issued a controversial decision on Kosovo's unilateral declaration of independence—a decision that may open the door to establishing new legally-based critiques of sovereignty.[6] The decision examined the legality, under international law, of Kosovo's declaration of independence, and concluded that the declaration was not contrary to any international legal principles.[7] This opinion beckons international scholars concerned with the current conception of sovereignty to explore the implications this decision may have on other secessionist movements and, more importantly, the legal definition of sovereignty. This Article focuses on these effects and uses them to argue that the current international legal conception of sovereignty should be redefined to more aptly suit the current global environment which features many weak and failing States.

This Article examines the concept of sovereignty as it is used in the international legal system and as it applies to weak and failing States. Part II provides an overview of the international legal context of sovereignty. Part II.A discusses the basic elements of sovereignty and Part II.B examines the historical origins of the term. Part II.C reviews the international legal framework that has developed around sovereignty and provides an overview of the recent ICJ advisory opinion on Kosovo. Part II.D situates sovereignty in relation to current international issues, and Part II.E introduces a case study of Somalia.

Part III provides an analytical critique of sovereignty's applicability to weak and failing States and further proposes a new conceptualization of the international legal definition of sovereignty. Part III.A explains how the elements of sovereignty support an out-dated and Eurocentric understanding of sovereignty that is inapplicable to weak and failing States. Part III.B examines how the current understanding of sovereignty cannot account for weak or failing States, thus perpetuating their existence. Part III.C exposes the inapplicability of the current definition of sovereignty to weak and failing States by presenting a case study that applies the notion of sovereignty to Somalia and shows how this concept serves to preserve Somalia's existence as a failed State. Part III.D provides ways in which the current definition of sovereignty can be redefined to aid—rather than perpetuate—weak and failing States. This Part also examines how the August 2010 ICJ advisory opinion on Kosovo may affect the current international legal understanding of sovereignty. The Part concludes with a discussion of the various means by which the international community can move beyond the current understanding of sovereignty to more effectively address the problems presented

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GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS 34-38 (explaining how State sovereignty persists even when a State lacks one or more of its constituent elements, such as effective governance); David A. Lake, *The New Sovereignty in International Relations*, 5 INT'L STUD. REV. 303, 304 (2003) ("[S]overeignty is far more problematic than recognized in the classical model.").

6. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion 2010 I.C.J. 141 (July 22) [hereinafter Kosovo Advisory Opinion], *available at* http://www.icj-cij.org/docket/files/141/15987.pdf.

7. *Id.* ¶ 122.

by weak and failing States.

II. OVERVIEW

International society's understanding and use of the notion of sovereignty has profoundly changed since the concept's first introduction into legal discourse.[8] The following Section first introduces the basic principles of the term and then examines sovereignty's historical development in international legal discourse.[9] The Section then explores various sources of international law that address sovereignty, including the 2010 ICJ advisory opinion on Kosovo, and also provides an overview of the current legal discourse regarding this concept.[10] The Part ends with an introduction to the case study of Somalia, which informs the Article's later discussion of sovereignty.[11]

A. The Basic Elements of Sovereignty

Although there is no established definition of sovereignty in international law, various themes run throughout international legal discourse regarding the elements of this concept.[12] First, sovereignty applies exclusively to States, and presumes all States to be equal counterparts within the international community.[13] Moreover, sovereignty is absolute—a State is or is not sovereign.[14] Certain established elements also appear in the legal discourse regarding the definition of sovereignty. These elements include: (1) a monopoly over the legal authority within a State

8. *See generally* VERNON A. O'ROURKE, THE JURISTIC STATUS OF EGYPT AND THE SUDAN 10 (1935) ("[T]he word sovereignty holds various conflicting connotations and by no means arouses identical patterns in the minds of different students."); Daniel Philpott, *Ideas and the Evolution of Sovereignty*, *in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 15, 17 (Sohail H. Hashmi ed., 1997) (explaining sovereignty has "evolved profoundly over history" and it is thus impossible "to search for a definition that captures every usage since the thirteenth century").

9. See *infra* Parts II.A and II.B for a discussion of the basic elements and historical origins of sovereignty.

10. See *infra* Parts II.C and II.D for a discussion of sovereignty's use in international law and the current discourse regarding the notion of sovereignty.

11. See *infra* Part II.E for an introduction to the Somalia case study, and see *infra* Part III.C for a discussion of Somalia's fictitious sovereignty.

12. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 31 (1979) (explaining that there is no generally accepted and satisfactory modern legal definition of statehood). *See generally* MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE 7-8 (1995) (discussing the changed meaning of sovereignty in different contexts).

13. *See* James Gow, *Shared Sovereignty, Enhanced Security: Lessons from the Yugoslav War*, *in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 151, 154 (Sohail H. Hashmi ed., 1997) ("States are the necessary components of an international system, and the principle by which they are ordered is that of sovereignty."); Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Power's Rule*, 19 MINN. J. INT'L L. 137, 154 (2010) (explaining that Westphalian sovereignty includes equality between all States).

14. Lake, *supra* note 5, at 306.

(juridical and political sovereignty), (2) the principle of non-intervention, and (3) a monopoly of power within a territory (territorial sovereignty).

1. Juridical and Political Sovereignty

The definition of sovereignty encompasses juridical and political independence, or a monopoly over the legal authority within a State.[15] Sovereignty "is a type of legitimate authority," and "today it is prescribed by law."[16] Juridical and political independence entails that a sovereign State has the exclusive authority to regulate its own nationals ("personal sovereignty"), use the public sphere, enter into relationships with other States, become a member of various international organizations, and to declare war.[17] A sovereign State must be able to obtain political supremacy within its own territory, and the government must similarly be able to concentrate its supremacy over any other authority within the State's borders.[18] The main principal underlying this element of sovereignty is that a State claiming to be sovereign has no other State exercising legal authority over it.[19] Moreover, the principal of sovereignty is relative—all States are juridical equals under international law.[20]

2. The Principal of Non-Intervention

From the notion of juridical and political sovereignty stems the corollary understanding that a sovereign State shall not be disturbed in its domestic affairs by any foreign State, nor will any sovereign State intervene in the domestic affairs of another sovereign State.[21] All matters falling within the domestic jurisdiction of

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15. IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 115 (3d rev. ed. 1999).

16. Philpott, *supra* note 8, at 18.

17. PAUL SEIGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 11 (1983). Today, the right to declare war or use force is explicitly denied in the U.N. Charter, except in cases of self-defense. *See* U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

18. FOWLER & BUNCK, *supra* note 12, at 37 (explaining the thought that, internally, sovereignty defines the ultimate or highest authority within a State); *see* F.H. HINSELY, SOVEREIGNTY 26 (1966) ("The idea of sovereignty was the idea there is a final and absolute political authority in the political community . . . and no final and absolute authority exists elsewhere.").

19. SEIDL-HOHENVELDERN, *supra* note 15, at 20; *see* FOWLER & BUNCK, *supra* note 12, at 37 (noting that a truly sovereign State is more than autonomous and can assert its internal supremacy and external independence in practice).

20. *See* Conference on Security and Co-operation in Europe Final Act art. 1(a)(I), Aug. 1, 1975, 14 I.L.M. 1293 [hereinafter Conference on Security and Co-operation in Europe Final Act] (stating "the right of every State to juridical equality"). For a discussion of what "equality" means, see SEIDL-HOHENVELDERN, *supra* note 15, at 21.

21. U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State"); S.C. Res. 387 (Mar. 31, 1976); Philpott, *supra* note 8, at 20 ("[S]upreme authority within a territory means not only sovereignty within borders, but also implies immunity from external

a State are explicitly protected from any interference by international law, as domestic concerns do not fall within the purview of international legal concern.[22] The principal of non-intervention is, however, subject to the caveat of consent.[23] Under customary international law, where a State consents to interference in its domestic jurisdiction by an international body or by other States, the international community may enter within the domestic confines of that country.[24]

There are also a limited number of international legal mechanisms available that allow the international community to enter a State without first gaining consent, thus breaching that State's sovereignty.[25] These mechanisms include: the activities of United Nations (U.N.) agencies and programs along with non-governmental organizations in conflict-ridden countries which provide emergency aid-based services; interventions by the international community through action by the U.N. Security Council under Chapter VII of the U.N. Charter; and unilateral intervention by a foreign State or group of States.[26] Chapter VII of the U.N. Charter provides the primary tool by which the international community can breach the sovereignty of another State without that State's consent.[27] Chapter VII provides the U.N. Security Council with the authority to decide when the use of force is necessary in the international arena.[28] Moreover, the use of force is a decision made by the Security Council alone, which can be made without the consent of the nation to which the force is being sent.[29]

Over the past two decades, Chapter VII has most commonly been invoked in

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interference.").

22. U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter"); SEIGHART, *supra* note 17, at 11. The understanding that a State's internal affairs are shielded from the reach of international law is slowly being challenged by the emerging concept of humanitarian intervention. However, to date, neither international law nor customary international law support any general understanding of when humanitarian intervention is acceptable as a lawful form of intervention in the internal functioning of a State.

23. *See generally* Robert H. Jackson & Carl G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, 35 WORLD POL. 1, 20 (1982).

24. *Id. See generally* GIORGETTI, *supra* note 5, at 187 (explaining origins of consent doctrine are initially described in Article 23 of the Covenant of the League of Nations which entrusts the League to "generally supervise the execution of several kinds of international agreements," and that the U.N. Charter contains no corresponding provisions).

25. GIORGETTI, *supra* note 5, at 153.

26. *Id. See generally* U.N. Charter arts. 39-51.

27. Meron, *supra* note 4, at 247 (explaining that article 2, paragraph 7 of the U.N. Charter has allowed the U.N. Security Council to legalize forcible interventions to address internal conflicts).

28. *See* U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

29. GIORGETTI, *supra* note 5, at 163.

the face of humanitarian crises in weak or failing conflict-ridden States.[30] However, the ability to intervene "has – for the past decades – been in tension with other fundamental principles of international law," including the principle of self-determination, the general prohibition against the use of force, and sovereignty.[31] Yet, shifts in international law have come to support the opinion among States that gross violations of human rights are no longer considered an "internal" problem.[32] There has recently been a shift from "traditional prohibitions against forcible intervention in the internal affairs of States, toward the recognition of a right to humanitarian intervention by groups of States and regional actors in internal conflicts."[33]

3. Territorial Integrity

Territorial integrity is the principle that States are cohesive political units, whose borders are fixed and inviolable.[34] International law recognizes States as "political units possessed of property rights over definite portions of the earth's surface."[35] Thus, interwoven within the understanding of a sovereign State is the notion of "territorial possession."[36] However, international law does not provide any set standards regarding the size, number of people, or form of government that is required of a sovereign State.[37] The notion of territorial integrity is further considered a norm of customary international law, and is also considered treaty law, as the principle is explicitly defined in the U.N. Charter.[38]

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30. *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L. L. 866, 869 (1990) ("[N]o serious scholar still supports the contention that internal human rights are 'essentially within the domestic jurisdiction of any state' and hence insulated from international law."); UNA-USA'S GLOBAL CLASSROOMS, U.N. GENERAL ASSEMBLY THIRD COMMITTEE: SOCIAL, HUMANITARIAN AND CULTURAL AFFAIRS COMMITTEE (SOCHUM) (2010), *available at* http://www.unausa.org/Document.Doc?id=707 (explaining U.N.'s use of Chapter VII in various countries to stop humanitarian crises).

31. GIORGETTI, *supra* note 5, at 163.

32. *Id.* at 164.

33. Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 333 (1998).

34. Anghie, *supra* note 1, at 40; *see* T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 50-51 (7th ed. 1928) ("The rules of modern International Law are so permeated from end to end with the idea of territorial sovereignty that they would be entirely inapplicable to any body politic that was not permanently settled upon a portion of the earth's surface which in its collective capacity it owned.").

35. LAWRENCE, *supra* note 34, at 136.

36. Anghie, *supra* note 1, at 27.

37. FOWLER & BUNCK, *supra* note 12, at 33; *see* G.A. Res. 2709 (XXV), U.N. GAOR 25th Sess., U.N. Doc. A/8248, at 100 (Dec. 14, 1970) ("[N]either small size, nor remote geographical location, nor limited resources constitute valid objections to sovereign Statehood.").

38. Volker Röben, *The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo: Rules or Principles?*, GOETTINGEN J. INT'L L. 1065, 1068 (2010); *see* U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. . . .").

4. The Declarative and Constitutive Theories of Statehood

There are two predominant theories that attempt to explain the threshold that must be reached for a State to be identified as sovereign. These are the declarative and the constitutive theories of sovereign statehood. Taking the criteria previously outlined,[39] the declarative theory of statehood argues that any State maintaining to be a sovereign entity should be recognized as one.[40] This contrasts with the constitutive theory of sovereign statehood which offers instead that States are not sovereign and autonomous entities until other States in the international system recognize this fact and treat them as such.[41] The views of other sovereign States are typically expressed through formal recognition of the newly sovereign State or by establishing diplomatic relations with that country.[42]

No central international authority exists which confers sovereign status upon a State.[43] Similarly, no formal standard exists to determine how and when a State becomes sovereign.[44] Nor do any mechanisms exist to suspend or withdraw sovereign status.[45] Moreover, a "chicken-and-egg" type problem arises as sovereignty is sometimes considered a prerequisite to recognition and vice versa.[46] In practice, however, there seems to be a continuum regarding the threshold a State must reach to be viewed as gaining international recognition—the more States which recognize another nation, the more likely it is that the State will be recognized as a sovereign and autonomous international actor.[47] However, the concept of sovereignty remains useful because the international community operates upon the understanding that recognition as such is legally valid and important.[48]

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39. See *supra* Parts II.A.1-3 for a discussion of the elements of sovereignty.

40. *See* FOWLER & BUNCK, *supra* note 12, at 58 n.76 (explaining that the declaratory theory asserts that "recognition merely acknowledges fact," while the constitutive theory "holds that the act of recognition actually 'creates' the state").

41. *Id.*; *see* Sterio, *supra* note 13, at 150 ("Conduct of international relations is a two-way street, involving the new 'state' as well as outside actors that have to be willing to accept the new 'state' as their sovereign partner.").

42. FOWLER & BUNCK, *supra* note 12, at 58.

43. Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 828 (2009).

44. FOWLER & BUNCK, *supra* note 12, at 62.

45. Vidmar, *supra* note 43, at 828.

46. FOWLER & BUNCK, *supra* note 12, at 58.

47. For example, Turkey's recognition of the Turkish Republic of Northern Cyprus (TRNC) did not alone grant the community sovereign status; however, if Turkey were able to obtain recognition from an increasing number of countries to recognize and establish diplomatic relations with the TRNC, the validity of Turkish Cypriots' claim to sovereign status would continue to increase. Once a "sufficiently large" portion of the international community accepted the TRNC as a sovereign equal, some States may come to the conclusion that the community was sovereign. FOWLER & BUNCK, *supra* note 12, at 58.

48. *Id.* at 61; *see* CHARLES O. LERCHE, JR. & ABDUL A. SAID, CONCEPTS OF INTERNATIONAL POLITICS 107 (2d. ed. 1970) ("The persistence of States in acting as if sovereignty were a reality gives the doctrine great political significance.").

B. Historical Origins of the Notion of Sovereignty

The international legal conception of sovereignty has continually evolved over time.[49] The notion of sovereignty first appeared in the early period of the Middle Ages as a response to various assertions by Emperors of the Holy Roman Empire who maintained that they were "temporal rulers of the globe."[50] Around 1300, British and French monarchs became independent of papal and imperial authority and consequently developed supremacy within their territories.[51] Consequently, monarchs of early-modern Europe used the notion of sovereignty to legitimize their authority and dominance over the State and to combat religious claims by the papacy and feudal claims by nobility.[52] The concept of absolute sovereignty thus developed as an understanding that a monarch was the "master of his own destiny" and could not be subjected to the rules of other sovereigns.[53] Absolute sovereignty allowed the leader of a country to act as the ultimate source of authority within the nation along with the ability to make decisions about actions the country would take, free from interference by other sovereigns.[54] And from this foundation, the basic principle of international law—that of sovereignty—first emerged.[55]

Over time, as States began to enter into relationships with one another and grew increasingly interdependent, the notion of absolute sovereignty slowly became obsolete.[56] Due to these changes, the concept of *relative* sovereignty came to replace absolute sovereignty as the accepted understanding of sovereignty.[57] States began to recognize the necessity of international law as an authority that regulates interactions between countries over the alternative of anarchy.[58] As States grew increasingly interdependent, the notion of relative sovereignty gained prominence and began guiding interactions between States.[59] Relative sovereignty was based on the premise that any State is sovereign if it is not controlled by the

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49. *See* O'ROURKE, *supra* note 8, at 10 ("[T]he word sovereignty holds various conflicting connotations and by no means arouses identical patterns in the minds of different students"); Philpott, *supra* note 8, at 17 (explaining the idea of sovereignty has "evolved profoundly over history" and is thus "impossible to search for a definition that captures every usage since the thirteenth century").

50. SEIDL-HOHENVELDERN, *supra* note 15, at 19.

51. Philpott, *supra* note 8, at 29.

52. FOWLER & BUNCK, *supra* note 12, at 4-5.

53. SEIDL-HOHENVELDERN, *supra* note 15, at 19; *see* Philpott, *supra* note 8, at 19 (defining "absolute sovereignty" as "authority over all matters; [authority] was absolute, unconditionally").

54. Anthony Galano III, *International Monetary Fund Response to the Brazilian Debt Crisis*, 6 PACE INT'L L. REV. 323, 341 (1994).

55. *Id.*

56. *Id.*

57. *Id.*

58. In international jurisprudence, the concept of "anarchy" generally refers to the principle that no world or international governing body exists which can regulate the conduct of States. *See* Nicholas Onuf & Frank F. Klink, *Anarchy, Authority, Rule*, 33 INT'L STUD. Q. 149, 166-68 (1989) (explaining the role of anarchy as the ordering principle of the international system).

59. Galano, *supra* note 54, at 341-42.

laws of any other State, apart from customary international law or treaties.[60]

In 1648, the Peace of Westphalia was signed.[61] The treaty was a peace settlement negotiated at the end of the Thirty Years War (1618-1648) and came to establish the structural framework of the international system—a framework that endures today.[62] The treaty came to represent the international understanding of the legal rights possessed by States,[63] and was "the first of several attempts to establish something resembling world unity on the basis of States exercising sovereignty over certain territories."[64] Conceptually, however, "Westphalia" refers to a State-centric world order, grounded in the notion of territorial and juridical sovereignty.[65]

The Peace of Westphalia thus established the State as the ultimate holder of external sovereignty, making it illegal to interfere within the domestic arenas of other States.[66] The peace settlement also provided the foundation by which States could uphold the principles of sovereignty.[67] Among other provisions, the settlement curtailed the power of the emperor and papacy, instead shifting power towards the State.[68] It also included provisions for treaty making and conflict settlement that allowed States to interact on the international level.[69] Sovereignty thus came to denote "the independence of States interacting in a system of States rather than the potential supremacy of one State over other rivals."[70] Consequently, the concept of sovereignty grew to encompass new ideas of legitimacy, responsibility and international recognition.[71]

C. International Law and Sovereignty

As previously explained, there is no fixed legal definition of sovereignty.[72] However, various forms of international law have addressed the definition, all with

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60. *Id.* at 342.

61. Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20, 20 (1948).

62. For a further discussion of the Peace of Westphalia of 1648 and its effect on the structuring of international world order, see generally Richard Falk, *Revisiting Westphalia, Discovering Post-Westphalia*, 6 J. ETHICS 311 (2002).

63. Gross, *supra* note 61, at 20.

64. *Id.*

65. Falk, supra note 62, at 312.

66. Philpott, *supra* note 8, at 20.

67. *Id.* at 30.

68. *Id.*

69. *Id*; *see also id.* at 21 ("In the generation following Westphalia, states no longer forcibly interfered in the . . . affairs of other states.").

70. FOWLER & BUNCK, *supra* note 12, at 5.

71. *See id.* at 6 ("[A]s States moved from absolutist to representative rule, democratically elected governments co-opted a term that had originally been linked with the supreme powers of a State's ruler and used it to assert their own sovereign powers delegated to them by their citizens.").

72. See *supra* text accompanying notes 8-13 for a discussion of the lack of a single, generally-accepted definition of sovereignty in international law.

overlapping themes. What follows is an overview of some of the principal sources of international law and their treatment of sovereignty. The Section begins with international standards and then moves to an examination of various regional agreements and how they address the concept of sovereignty.

1. International Standards

International organizations and courts, like the U.N. and the International Court of Justice (ICJ), provide a starting framework for an examination of international legal treatment of sovereignty.

a. The League of Nations and the United Nations

The League of Nations grounded its organization upon the notion of sovereign statehood.[73] This fact is most evident from the Covenant of the League of Nations, which predicated membership in the organization upon sovereign statehood.[74] The United Nations, the League's successor, similarly utilized this foundation but expanded the articulation of the concept of sovereignty.[75] The U.N. Charter further elaborates on the principles of juridical and political independence, non-intervention, and territorial sovereignty.[76]

The U.N. Charter contains various provisions on the principles of juridical and political sovereignty and the principle of non-intervention.[77] The Charter explains that it is "based on the principle of the sovereign equality of all its Members."[78] In Article 2, paragraph 4, the Charter states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[79] Moreover, Article 2,

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73. Established in 1919, the League of Nations was created to ensure peace and security after the devastation of the First World War. *See U.N. History Home*, UNITED NATIONS, www.un.org/aboutun/history.htm (last visited Jan. 31, 2012).

74. *See* League of Nations Covenant art. 1, para. 2 ("Any *fully self-governing* State, Dominion or Colony not named in the Annex may become a Member of the League.") (emphasis added); *see also* FOWLER & BUNCK, *supra* note 12, at 17 (explaining that, by the early twentieth century, the League of Nations Covenant "presumed that a sovereign State's system of government would be generated internally rather than imposed by abroad: sovereign States would be 'fully self-governing'").

75. *See* Pamela Epstein, *Behind Closed Doors: "Autonomous Colonization" in Post United Nations Era—The Case for Western Sahara*, 15 ANN. SURV. INT'L & COMP. L. 107, 140 (2009) ("Any attempt aimed at the partial or total disruption other than national unity and territorial integrity of a State or country or in regard to political independence is incompatible with the purposes and principles of the U.N. Charter.").

76. *See generally* U.N. Charter art. 2.

77. *See, e.g.*, *id.* art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members."); *id.* art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State. . . ."); *id.* art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State. . . .").

78. *Id.* art. 2, para. 1.

79. *Id.* art. 2, para. 4; *see also* Philpott, *supra* note 8, at 19 ("The external sovereignty of the State is what international lawyers have in mind when they speak of sovereignty and what the UN Charter means by 'political independence and territorial integrity.'").

paragraph 7, of the Charter prohibits U.N. intervention in matters within the explicit domestic jurisdiction of any State, subject to some exceptions.[80] Regarding the principal of territorial sovereignty, the Charter explicitly condemns the use of force in the international system.[81] In fact, the U.N. Charter limits the use of force against a State by making the use of force a right that is solely within the discretion of the U.N. Security Council.[82] Moreover, the use of force by the Security Council is only available as an option of last resort.[83]

The United Nations General Assembly (G.A.) has issued various resolutions regarding the concept of sovereignty and its role in the international system. Although G.A. resolutions are non-binding,[84] the body still has an important influence on international law.[85] G.A. Resolution 2625, the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, reiterated the general principles of sovereignty articulated in the U.N. Charter.[86] Resolution 2625 details the legal obligations of States operating in the international system, with the principles of juridical and political independence, non-intervention, and territorial integrity at its core.[87] For example, the resolution repeats the U.N. Charter's request that States "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[88] Moreover, the resolution reaffirms sovereign equality[89] and explicitly lists the elements of this concept as including, among others: juridical equality, the inherent

80. U.N. Charter art. 2, para. 7 (noting that the non-intervention principle does "not prejudice the application of enforcement measures under Chapter Vll").

81. *See id.* art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

82. *See id.* art. 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decision. . . ."). See *supra* Part II.A.2 for a discussion of U.N. Security Council Chapter VII powers which can be invoked to breach sovereignty.

83. *See* U.N. Charter art. 46 ("Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee."). *See generally id.* arts. 39-51.

84. *Functions and Powers of the General Assembly*, UNITED NATIONS, http://www.un.org/en/ga/about/background.shtml (last visited Jan. 31, 2012) ("[T]he Assembly is empowered to make only non-binding recommendations to States on international issues within its competence. . . .").

85. *See generally id.*

86. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8082, at 121-24 (Oct. 24, 1970) [hereinafter G.A. Res. 2625].

87. *Id.*

88. *Id.* at 122.

89. *Id.* ("Reaffirming, in accordance with the Charter, the basic importance of sovereign equality and stressing that the purposes of the United Nations can be implemented only if States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations.").

right of full sovereignty, territorial integrity, and political independence.[90] The resolution further States that the use of force by any country against the territorial integrity or political independence of any other country "constitutes a violation of international law."[91]

b. International Court Decisions

International courts act as the interpreters and promulgators of international law.[92] What follows are three international cases which have addressed the definition and application of sovereignty. The first two cases discuss the definition of sovereignty in international law.[93] The third case is an introduction to the recent ICJ Opinion on Kosovo's declaration of independence, which is discussed later in this Article as providing a legal platform for re-defining the international legal conception of sovereignty.[94]

i. The Corfu Channel Case (United Kingdom v. Albania)

The *Corfu Channel Case* was brought before the ICJ by the United Kingdom of Great Britain and Northern Ireland against the People's Republic of Albania.[95] The case concerned the destruction of two British destroyers when they struck mines in Albanian territorial waters in the Corfu Channel, causing both damage to the vessels and loss of life.[96] Upon evidence of the Albanian government's involvement in the incident, the United Kingdom brought the matter to the U.N. Security Council's attention, which subsequently referred the dispute to the ICJ for resolution.[97]

In his separate concurring opinion, Justice Alvarez defines sovereignty as "the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States."[98] Justice Alvarez goes on to explain that the notion of sovereignty is no longer "an absolute and individual right of every State" to adhere solely to the international legal principles that the State has accepted.[99] He instead argues that due to the increasing

90. *Id.* at 124.

91. *Id.* at 122.

92. *See* John R. Crook, *The International Court of Justice and Human Rights*, 1 NW. U. J. INT'L HUM. RTS. 2, 8 (2003) (noting ICJ produces a body of human rights law more "broadly accepted and effective").

93. See *infra* Part II.C.1.b.i-ii for a discussion of *The Corfu Channel Case (United Kingdom v. Albania)* and *The Island of Palmas Case (Netherlands v. United States)*.

94. See *infra* Part II.C.1.b.iii for a discussion of the ICJ advisory opinion on Kosovo's declaration of independence (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*).

95. Corfu Channel (Gr. Brit. & N. Ir. v. Alb.), Preliminary Objection, 1943 I.C.J. 39, 3 (Mar. 25) [hereinafter Corfu Channel], *available at* http://www.icj-cij.org/docket/files/1/1571.pdf.

96. *Id.*

97. *Id.*

98. Corfu Channel, *supra* note 95, at 43 (individual opinion by Judge Alvarez).

99. *Id.*

interdependence of nations and harmonization of international interests, the sovereignty of States has become "an international social function" which must be exercised with regard to a general international law abided by all nations.[100]

ii. The Island of Palmas Case

The *Island of Palmas Case* added to the discussion regarding the definition of sovereignty by linking sovereignty to the notion of State independence.[101] The case was decided by the Permanent Court of Arbitration and concerned a territorial dispute between the Netherlands and the United States over the Island of Palmas.[102] Although the *Island of Palmas Case* addresses the notion of sovereignty in terms of sovereign authority over territory (i.e., a claim to some land or area), the Court also discussed the notion of sovereignty and statehood more generally. In relevant part, the Court stated:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.[103]

iii. The ICJ's Advisory Opinion on Kosovo's Unilateral Declaration of Independence

Just three years after the conclusion of the 1995 Dayton Peace Agreement, bringing the Bosnia-Herzegovina war to a close, fighting re-erupted in the region between government forces and separatist Albanian guerillas in the southern Serbian province of Kosovo.[104] After a number of failed attempts to broker agreements between the warring sides, NATO launched a bombing campaign against Serbia in March of 1999.[105] Seventy-eight days later, Belgrade was captured.[106] As a result, Serbia no longer exercised direct rule over Kosovo and the United Nations Interim Administration Mission in Kosovo (UNMIK) assumed

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100. *Id.*

101. Island of Palmas (U.S. v. Neth.), Hague Ct. Rep. 2d (Scott) 1 (Perm. Ct. Arb. 1928).

102. The Permanent Court of Arbitration is an intergovernmental organization with over one hundred member States. It was established in 1899 to provide arbitration and other alternative dispute resolution proceedings for the resolution of disputes between States, State entities, intergovernmental organizations and private parties. *See About Us*, PERMANENT CT. OF ARB., http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Feb. 21, 2011).

103. Island of Palmas (U.S. v. Neth.), Hague Ct. Rep. 2d (Scott), at 8.

104. JAMES KER-LINDSAY, KOSOVO: THE PATH TO CONTESTED STATEHOOD IN THE BALKANS 1 (2009).

105. *Id.*

106. *Id.*

governing authority.[107] After six years of UNMIK rule, Kosovo remained unstable, further prompting Kosovo Albanians to increase their demands for independent statehood.[108] Comprising more than ninety percent of the population, Kosovo Albanian's argued for the right of self-determination, a right recognized by the U.N. Charter and other sources of international law.[109] Given this situation, the United States, Britain, and France decided that it was in the interest of stability in the region to "let the Kosovo Albanians go their own way."[110]

Having itself just achieved international recognition, Serbia was unwilling to let its country further fragment.[111] Thus, the Serbian government raised a series of arguments against Kosovo's calls for independence.[112] Primarily, Serbia argued that Kosovo was still recognized as a region of Serbia despite international administration of the territory.[113] To support this contention, the Serbian government invoked the U.N. Charter and Helsinki Final Act, which demand respect for the territorial integrity of the Serbian nation.[114] In addition, Serbia argued that the right of self-determination was inapplicable to Kosovo because international law only allows for self-determination to be exercised by colonized nations at the point of decolonization.[115]

Despite Serbian disagreement, on February 17, 2008, the Kosovo Assembly declared independence while also sending a letter to every Member Nation of the United Nations asking to be recognized as a sovereign State.[116] Although

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107. *Id.*; *see* S.C. Res. 1244, ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999) [hereinafter S.C. Res. 1244] ("Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences. . . ."); *see also* G.A. Res. 2625, *supra* note 86, at 121-24.

108. KER-LINDSAY, *supra* note 104, at 1.

109. *See* U.N. Charter art. 1, para. 2 (including as a purpose of the United Nations "respect for the principle of equal rights and self-determination of peoples"); *id.* art. 55 (noting that international economic and social cooperation should be promoted to promote stability necessary for respecting the principle of self-determination of peoples); G.A. Res. 2625, *supra* note 86, at 124 ("By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine . . . their political status.").

110. KER-LINDSAY, *supra* note 104, at 1-2; *see also Council Endorses Start of Status Talks on Kosovo, Top UN Envoy Calls this 'Historic,'* UN NEWS CENTER (Oct. 24, 2005), http://www.un.org/apps/news/story.asp?NewsID=16339&Cr=kosovo&Cr1= (noting Security Council endorsement of determining final status of Kosovo).

111. KER-LINDSAY, *supra* note 104, at 3.

112. *Id.*

113. *Id.*

114. *Id.*; *see* U.N. Charter art. 2, para. 1 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."); Conference on Security and Co-operation in Europe Final Act, *supra* note 20, art. 1(a)(I) (stating all States party to the Act "will respect each other's sovereign equality and individuality as well as the rights inherent in . . . its sovereignty").

115. Vidmar, *supra* note 43, at 832-34 (noting that Serbia found Kosovo's unilateral declaration of independence "null and void").

116. KER-LINDSAY, *supra* note 104, at 3.

numerous countries extended recognition almost immediately,[117] others declined to do so,[118] arguing that unilateral recognition of Kosovo would set a risky precedent for separatist movements around the world.[119] As of October 2011, over eighty countries have recognized Kosovo as a sovereign, independent State, including twenty-two of twenty-seven European Union Member States.[120]

In response to Kosovo's declaration of independence and upon the request of the U.N. General Assembly, on July 22, 2010, the ICJ issued an advisory opinion regarding the legality of Kosovo's declaration of independence under international law.[121] The decision's controversial holding, by a vote of ten to four, was that Kosovo's declaration of independence of February 17, 2008, "did not violate general international law."[122] In reaching this conclusion, the court examined various sources of international law, including customary international law and the practice of the Security Council, finding that neither was violated by the declaration.[123] Moreover, upon analyzing Security Council Resolution 1244,[124] the ICJ determined that the resolution was mainly concerned with establishing a provisional framework for Kosovo's self-governance.[125] From this, the Court concludes that Kosovo's declaration of independence did not intend to operate within this interim administration but "aimed at establishing Kosovo as 'an independent and sovereign' State."[126] The Court also determined that the unilateral declaration did not violate the Constitutional Framework established under UNMIK.[127] The Court came to this conclusion by determining that the UNMIK framework did not bind the authors of the declaration, the newly established Kosovo Assembly, as they were not a Provisional Institution of Self-Governance of Kosovo.[128] However, the Court explicitly limited the scope of the opinion,

117. *See id.* (listing the United States, Australia, Canada, Japan, Britain, France, Germany, and Italy along with a dozen other EU members as officially recognizing Kosovo shortly after the nation's declaration of independence).

118. *Id.* at 4 (explaining that Vladimir Putin, Russian President at the time, declined to recognize Kosovo as sovereign until Kosovo obtained Security Council approval).

119. *See id.* at 4 ("Under these circumstances, any act of recognition not only undermined the authority of the United Nations, [but also] served as a precedent for separatist movements around the world.").

120. *Background Note: Kosovo*, U.S. DEP'T OF STATE (Apr. 11, 2012, 1:42 PM), http://www.State.gov/r/pa/ei/bgn/100931.htm.

121. Kosovo Advisory Opinion, *supra* note 6, ¶ 1.

122. *Id.* ¶ 84.

123. *Id.* ¶¶ 29, 81.

124. *See* S.C. Res. 1244, *supra* note 107, ¶ 10 (establishing the United Nations Interim Administration Mission in Kosovo (UNMIK)).

125. Kosovo Advisory Opinion, *supra* note 6, ¶¶ 97-99, 105 (explaining the three principle purposes of the resolution and noting that the interim administration of Kosovo was meant to temporarily suspend Serbian authority over Kosovo).

126. *Id.* ¶ 105.

127. *Id.* ¶ 120. *See generally* U.N.MIK Reg. 2001/9, On a Constitutional Framework for Provisional Self-Government in Kosovo, chap. 2 (May 15, 2001).

128. Kosovo Advisory Opinion, *supra* note 6, ¶ 120.

explaining that the question posed to the Court "[did] not ask whether or not Kosovo has achieved statehood" or "the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."[129]

2. International Regional Bodies and Sovereignty

Regional organizations and bodies also provide various sources of international law that bind the members of these organizations. Although these standards are not applicable to all States, the conventions and treaties of regional bodies provide an informative source of international law as they structure and organize the conduct of large groups of nations that face similar legal issues in their interactions with one another.[130]

a. The Montevideo Convention of 1933

The Montevideo Convention on the Rights and Duties of States was signed at the International Conference of American States in Montevideo, Uruguay, and entered into force on December 26, 1934.[131] The treaty discusses the definition and rights of statehood, and provides four explicit criteria to determine whether any given State can be recognized as sovereign by international law. These criteria include: (1) a permanent population, (2) a defined territory, (3) government, and (4) the capacity to enter into relations with other States.[132] The Convention emphasizes that the fundamental rights of a State include juridical equality[133] and the rights of non-intervention and territorial integrity.[134] The Convention also promotes the declarative theory of statehood,[135] as it explains that the "political existence of the State is independent of recognition by other States."[136] Although originally a regional treaty, the Montevideo Convention has developed into

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129. *Id.* ¶ 51.

130. These conventions are also actively applied and relied upon in international law as evidenced by article 38(1)(a) of the ICJ Statute, which explicitly notes the Court will apply international conventions where contesting States are parties to them. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 at 25, 3 Bevans 1179 [hereinafter Statute of the International Court of Justice].

131. Seventh Int'l Conv. of Am. States, *Convention on the Rights and Duties of States (Inter-American)*, 49 Stat. 3097, T.S. No. 881, art. 1 (Dec. 26, 1933) [hereinafter Convention on the Rights and Duties of States].

132. *Id. See generally* Epstein, *supra* note 75, at 119 (explaining how a defined territory and permanent population provide for the "physical basis" of the existence of a State and that the other two criteria, capacity to enter into international relations and government, provide the "legal order necessary for a state to function").

133. Convention on the Rights and Duties of States, *supra* note 131, art. 4 ("States are juridically equal, enjoy the same rights, and have equal capacity in their exercise.").

134. *Id.* art. 8 ("No state has the right to intervene in the internal or external affairs of another.").

135. See *supra* Part II.A.4 for a discussion of the declarative theory of statehood.

136. Convention on the Rights and Duties of States, *supra* note 131, art. 3; *see id.* art. 6 ("The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other will have all the rights and duties determined by international law. Recognition is unconditional and irrevocable.").

customary international law and its criteria "have become a touchstone for the definition of a State."[137]

b. The Helsinki Conference on Security and Co-operation in Europe

The Helsinki Conference on Security and Cooperation in Europe[138] was a conference of various European countries[139] that discussed ways to facilitate European peace, security, justice, and cooperation, while also examining Europe's regional relationship with non-European States and international organizations.[140] The Final Act of the conference, issued August 1, 1975, provided the definitive statement of the international legal obligations agreed to by the participating nations.[141] Although the Final Act covers a range of international issues, its first operative section addresses sovereign equality and respect for the rights inherent in sovereignty.[142] The Final Act demands that "[t]he participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence."[143] Moreover, the Act reiterates a State's international legal obligations of non-intervention in the domestic affairs of other sovereign nations.[144]

D. Sovereignty Today – Questioning the Inviolability of Sovereignty

Post-Westphalia, States rarely forcibly interfere within the domestic affairs of other nations.[145] Yet, with the changing nature of warfare from inter-State to intra-State conflict, problems have surfaced with the notion of sovereignty as the

137. Epstein, *supra* note 75, at 129; *see also* Statute of the International Court of Justice, *supra* note 130, art. 38, ¶ 1 (noting the Court "*shall* apply" international conventions in resolving disputes) (emphasis added).

138. Conference on Security and Co-operation in Europe Final Act, *supra* note 20.

139. The Conference was comprised of thirty-five participating nations which included: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and Yugoslavia. *Id.*

140. *See* Dante B. Fascell, *The Helsinki Accord: A Case Study*, 442 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., 69, 71 (1979) (describing the rise of the Helsinki Accord as well as its goals and outcomes).

141. *Id.*

142. Conference on Security and Co-operation in Europe Final Act, *supra* note 20, art. 1.

143. *Id.*

144. *See id.* art. 6 ("[P]articipating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.").

145. Philpott, *supra* note 8, at 21.

definitive conception of the nation.[146] Over time, the concept of sovereignty has become deeply interconnected with global norms that regulate the conception and behavior of States in the international system.[147] However, the association between these normative commitments and sovereignty has long held the potential to threaten fragile States granted independence after World War II.[148] Due to these concerns, the contemporary debate over sovereignty has primarily examined two issues. The first deals with historicizing the concept of sovereignty, analyzing its position as an organizing and constitutive principle of the modern State system, and outlining the norms, rules, and practices that maintain it.[149] The second branch of scholarship looks at the concept of sovereignty as something evolving over time and thus needs to be understood as more than a straightforward concept applicable to all nations.[150]

As mentioned, the contemporary rise of so-called "quasi-States," or failed States, has complicated the international systems' traditional understanding of sovereignty, which has "become bound up in a complex relationship with other norms that reflected the intellectual, political, social, and economic transformations of the previous two centuries."[151] State failure implies that a State can no longer carry out its domestic and international obligations, even when formal recognition of statehood has been granted.[152] States have numerous obligations under international law, including the ability to provide various goods and services to their citizenry, and to institute and uphold the rule of law.[153] Thus, "State failure implies a gradation of sovereign capacity."[154] This failure is normally long-lasting and affects many, if not all, of the functions of the State, including effective governance, preservation of territorial borders, and maintenance of law and order.[155] State failure also has severe consequences on the international community. Weak and failing States cannot fulfill their international responsibilities, as they are unable to control their territorial borders or airspace, and effective governance and the rule of law is challenged.[156] This environment presents a risk to the international community as it is conducive to the rise of transnational problems such as terrorism, drug trafficking, or in the case of

146. *See* Meron, *supra* note 4, at 247 (noting a decline in international wars and rise in domestic wars).

147. See *supra* Part II.C for a discussion of the prevalence of the concept of sovereignty in international law.

148. David Williams, *Aid and Sovereignty: Quasi-States and the International Financial Institutions*, 26 REV. INT'L STUD. 557, 557 (2000).

149. *Id.* at 558.

150. *Id.*

151. *Id.* at 565.

152. GIORGETTI, *supra* note 5, at 6.

153. *Id.* at 3 (explaining that States are obligated to provide protection, a functioning legal system, a working judiciary, an effective education system, healthcare, an efficient administration to deliver the goods and services, infrastructure, and the possibility to participate in the global economy).

154. *Id.* at 6.

155. *Id.*

156. *Id.* at 7.

Somalia, piracy,[157] as well as health emergencies that cannot be adequately addressed.[158] The following Section introduces the factual and historical background of the often cited "failed State" of Somalia, a case study that will later inform the Article's examination of new conceptions and applications of sovereignty in current international society.[159]

E. Somalia – The History and Present State of a Failed Nation

More than four million people inhabit the Horn of Africa, sharing a common language, religion, and culture.[160] Yet, while sharing a common cultural and regional identity, prior to the colonial period, the Somali people lived in a relatively stateless society.[161] In the middle of the nineteenth century, Somalia caught the attention of the European colonizing powers as part of the greater "scramble for Africa."[162] The Somali territory was subsequently colonized by a series of different European powers leading to the inevitable fragmentation of the region.[163]

Somalia's period of colonization was characterized by "shifting administrations and inconsistent authority."[164] The British initially claimed the northwestern region of contemporary Somalia, while southern Somalia was divided at the Jubba River between the British and the Italians.[165] In the 1920s, Italy took control of the area from the Jubba River to the British Kenyan border.[166] Following Italy's defeat in World War II, Britain regained control of southern Somalia as a military administration.[167] In 1950, Britain returned the recently acquired land to Italy to be administered as a U.N. trusteeship.[168] Ten years later, the trusteeship was granted independence and both Italian Somalia and British Somaliland were unified to create the Republic of Somalia.[169]

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157. *Id.* at 23. In the absence of any effective governance, Somalia in particular has become a country devastated by civil war and prolonged instability. *Id.* It has become a center for arms, drugs, and human smuggling along with active terrorist activity. *Id.* Somali pirates have launched numerous attacks on international ships passing through Somali waters. *Id.*

158. GIORGETTI, *supra* note 5, at 7.

159. *See* Levitt, *supra* note 33, at 354 (classifying Somalia as a "collapsed" State, where the "state dissolves and nothing takes its place (except wide spread civil war or anarchy)").

160. David Laitin, *Revolutionary Change in Somalia*, 62 MERIP REP. 6, 6 (1977).

161. MARK BRADBURY, AFRICAN ISSUES: BECOMING SOMALILAND 23 (2008).

162. *Government Recognition in Somalia and Regional Political Stability in the Horn of Africa*, 40 J. MOD. AFR. STUD. 247, 250 (2002) [hereinafter *Government Recognition in Somalia*] (explaining Somalian national borders were drawn by European colonial powers after the "scramble for Africa").

163. *See generally* Catherine Besteman, *Representing Violence and 'Othering' Somalia*, 11 CULTURAL ANTHROPOLOGY 120, 126 (1996).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Besteman, *supra* note 163, at 126.

Independence spurred new problems within the recently unified nation as the former colonies had to find a means of integrating two separate forms of administration, language, and tradition.[170] Moreover, the union of two formerly independently colonized territories was rushed and incomplete.[171] Britain "hastily prepared" Somaliland for independence so that unification with Italian Somalia would be possible.[172] A government was formed from those in power at the time of independence and the two legislatures joined to form a new national assembly.[173]

Soon after independence, northwestern Somalia (formerly under British colonial rule) became increasingly disillusioned with the new unified government.[174] However, in the interest of preserving the newly unified State, the formerly independent Northern region initially accepted the conditions of southern leaders.[175] Mogadishu (located in the southern part of the country) was named capital of the new State, and southern Somalis held all major posts and a majority of seats in the parliament.[176] In addition, the new government's development programs failed to tackle severe problems of underdevelopment in the north, serving to further alienate the northern regime.[177] In 1969, Siyad Barre rose to power through a successful coup and ruled over the country for the following twenty-two years.[178]

By 1989, various international human rights agencies released numerous reports exposing Barre's regime's massacres and mass human rights abuses.[179] Inevitably, the United States, Somalia's largest foreign aid donor, was left with no choice but to dramatically reduce aid to the country.[180] This, along with the growth of many clan-based resistance movements and economic instability, led to the collapse of Siyad Barre's regime in 1991 and, with it, the collapse of the Somali State.[181] Shortly after, southern Somalia disintegrated into war between various clan leaders and warlords for control over scarce and desperately needed resources.[182] Political power was no longer centralized in the State but dispersed

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170. IOAN M. LEWIS, UNDERSTANDING SOMALIA AND SOMALILAND: CULTURE, HISTORY, SOCIETY 34 (2008).

171. *Id.* at 73.

172. *Id.*

173. *Id.*

174. Ismail I. Ahmed & Reginald Herbold Green, *The Heritage of War and State Collapse in Somalia and Somaliland: Local-Level Effects, External Interventions and Reconstruction*, 20 THIRD WORLD Q. 113, 116 (1999).

175. *Id.*

176. *Id.*

177. *Id.*

178. Besteman, *supra* note 163, at 126.

179. *See id.* at 120-21 (explaining exposure of Somalian internal conflict through international agencies like Amnesty International and through US domestic news and media starting in 1989).

180. *Id.* at 121.

181. *Id.*

182. *Id.* After the collapse of the State, Somali's "fashioned diverse forms of governance and revitalized economies within the territory of the Somali republic. These included military administrations, long-distance trading enterprises, civic structures, etc." BRADBURY, *supra* note

and fractionalized in the hands of local leaders throughout the region.

With the collapse of the Somali State, the former British protectorate of Somaliland announced its secession and independence from the Republic of Somalia, largely maintaining its colonial borders.[183] Following the declaration of independence, Somaliland went on to hold a series of clan conferences during which clan leaders formed "a government system that combined elements of an electoral democracy (a directly elected lower house) with traditional political structures (an upper House of Elders [or *Guurti*])."[184] Political parties were unable to operate unrestrained until 2003.[185] However, since then, the three main political parties have represented Somaliland's three most predominant clans (Dir, Isaaq, Darod).[186] Subsequent presidential and parliamentary elections were held in 2003 and 2005, respectively.[187] Due to instability in the region and its unrecognized status, the Somaliland government remains relatively weak, with clan-based conflicts presenting a continued threat to Somaliland's stability.[188] However, Somaliland remains free of the conflict and perpetual instability that pervades its southern counterpart.[189] Somaliland, however, is not recognized as a sovereign or independent State by the international community.

Regarding southern Somalia, in August 2000, the Transitional National Government (TNG) emerged from the Somali National Peace Conference (Arta Peace Process) held in Arta, Djibouti.[190] At the conference, the TNG also adopted a Transitional National Charter (provisional constitution) with noted vagueness regarding national boundaries.[191] The conference further established a 225-member Transitional National Assembly and transitional president.[192] Moreover, the newly established government received *ipso facto* recognition from the international community.[193] Thus, by the end of 2000, the TNG claimed universal acceptance and "re-assumed Somalia's seat at the U.N. as well as in all relevant international organizations."[194]

In 2002 through 2004, the Somalia National Reconciliation Conference was held in Kenya, resulting in the creation of the Transitional Federal Government

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161, at 3.

183. *Government Recognition in Somalia*, *supra* note 162, at 249.

184. *Freedom in the World 2008—Somaliland [Somalia]*, UNHCR REFWORLD (Jan. 18, 2012), http://www.unhcr.org/refworld/docid/487ca25c9b.html.

185. *Id.*

186. *Id.*

187. *Id.* Although they did not meet international standards, the elections were carried out without reports of misappropriation or widespread intimidation. *Id.*

188. *Id.*

189. *Id.*

190. *Government Recognition in Somalia*, *supra* note 162, at 253.

191. *Id.* at 249.

192. *Id.* at 252.

193. *Id.* at 253.

194. *Id.* at 254.

(TFG).[195] The TFG has "been the most successful effort at rebuilding a functioning State since the collapse in 1991."[196] However, parallel to these efforts was the growth of the Union of Islamic Courts, which challenged the TFG's control of Somalia.[197] Presently, the country remains rife with conflict, torn with fighting between regional factions.[198] This instability, along with the growing influence of Islamic fundamentalists, leaves the TFG unable to assert its authority beyond the country's capital.[199]

Currently, due to Somalia's largely porous and unregulated territorial and maritime borders, piracy has arisen in Somali waters, a development which is especially problematic for the international community.[200] Due to the TFG's relative weakness and inability to exert authority beyond the capital, only limited actions have been taken to combat this growing issue.[201] However, in 2008, the U.N. Security Council, in an unusual use of its Chapter VII powers,[202] allowed certain States to enter Somali waters to repress acts of piracy.[203] Resolution 1816 allowed for the use of force to repress acts of piracy and armed robbery in Somalia and explicitly notes Somalia's lack of capacity to fulfill its international obligations, including Somalia's inability to secure international sea-lanes and territorial waters.[204] Consequently, Somalia remains unstable and internally conflicted, with a government that lacks any real capacity.

III. DISCUSSION

Over time, the concept of sovereignty has become deeply interconnected with global norms that regulate the conception and behavior of States in the international system.[205] However, the association between these normative commitments and sovereignty has long held the potential to threaten fragile States granted independence after World War II.[206] International law continues to premise

195. GIORGETTI, *supra* note 5, at 6.

196. *Id.* at 27-28.

197. *Id.* at 28.

198. *Id.* (citation omitted).

199. *Id.*

200. *See id.* at 32 ("The safety of territorial and maritime borders is paramount for maintaining order and stability in the international community.").

201. GIORGETTI, *supra* note 5, at 32.

202. See *supra* notes 26-33 and accompanying text for a discussion of the U.N. Security Council's use of Chapter VII powers to address internal conflicts.

203. S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

204. *Id.* The resolution, in relevant part, permits States working with the TFG to "(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea . . . (b) Use, within the territorial waters of Somalia, . . . *all necessary means* to repress acts of piracy and armed robbery." *Id.* (emphasis added).

205. *See* Anghie, *supra* note 1, at 2 (discussing how the European construction of sovereignty as the primary principle of Statehood serves as the foundational element of current international legal order).

206. Williams, *supra* note 148, at 557; *see* GIORGETTI, *supra* note 5, at 1 (explaining that the international community has undergone substantial changes over the past fifty years, creating an environment where weak and fragile States have become ineffective).

itself on the concept of sovereignty, while many international scholars increasingly insist that sovereignty is not sacrosanct and that a State should be held accountable to its people in ways that were seldom considered before.[207] In practical terms, this has led to a re-thinking of current understandings of legal sovereignty. This Article argues that the current international legal understanding of sovereignty serves to perpetuate weak and failed States. This is because: (1) the current definition ignores the Eurocentric origins of the term, (2) the international legal elements of sovereignty are not altered with State weakness or failure, and (3) the legal mechanisms available are insufficient to combat weak or failing States. This Article further argues for a redefinition of the current understanding of sovereignty towards alternatively viewing weak and failing States as international security threats that allow for a suspension of sovereignty in the name of international peace and stability.

A. The Elements of Sovereignty Support an Outdated and Eurocentric Understanding of Sovereignty

The Peace of Westphalia provided the foundational event upon which current world order, and the rules which govern it, were established—namely, the principle of sovereignty.[208] However, the Peace of Westphalia was a European construct and served European interests.[209] These interests were and continue to be inapplicable in non-European regions, especially in current weak or failing States.[210] The entrenchment of sovereignty in the international legal order instead served the purpose of "accounting for the metamorphosis of a non-European society into a legal entity."[211] Thus, the inviolability of sovereignty, and sovereignty's exclusive presumptive application to European nations "create[d] a conceptual framework that dictates that the only possible history of the non-European world is the history of its absorption into the European world in order to move towards acquiring sovereignty."[212] International law remains grounded in this Eurocentric understanding of sovereignty—a privileged status of admission

207. *See, e.g.*, GIORGETTI, *supra* note 5, at 69 (arguing the definition of State must be reworked to accommodate reality and recognize that some States cannot fulfill their international obligations); Sterio, *supra* note 13, at 156 (citing Michael J. Kelly, *Pulling at the Threads of Westphalia: Involuntary Sovereignty Waiver—Revolutionary International Legal Theory or Return to Rule By the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 402 (2005) (citation omitted)) ("[W]hen a State engages in a particular kind of offensive behavior, it has involuntarily 'waived' it sovereignty.").

208. See *supra* notes 61-71 for a discussion of the Peace of Westphalia. *See generally* Gross, *supra* note 61.

209. *See* Anghie, supra note 1, at 35 (explaining that treaties caused non-European entities to surrender control to the Europeans who devised them).

210. *See id.* at 70 (explaining how European nations used the post-colonial period to entrench sovereignty as a primary international legal norm and juxtaposing the European powers' presumptive sovereignty with the conditional sovereignty of non-European nations, received only upon recognition from European nations).

211. *Id.*

212. *Id.* at 68.

into the international community as an international legal entity, the State, for those entities that can obtain it.[213] Thus, sovereignty was imposed, and continues to be imposed, by the international community on non-European entities that achieve this status, rather than allowing non-European countries to developed sovereignty naturally from within the nation.[214] Weak and failing States highlight the tension of this outdated and inapplicable understanding, and further emphasize the need for new conceptions of sovereignty and the State.

B. The Current Understanding of Sovereignty Cannot Account for Weak or Failing States

The framework of international law does not acknowledge State failure.[215] Failed States, despite their lack of effective government and internal stability, continue to be regarded as sovereign entities in the international system.[216] This anomaly is largely due to the fact that international law has no means by which to react to the failure of a State.[217] Due to this fact, failed States are required to fulfill their international obligations despite the absence of any authority to implement these duties.[218] The so-called sovereignty of fragile States has thus been maintained by the international community through its adherence to the principle of non-intervention and by integrating these nations into practices such as diplomacy and membership in international organizations.[219] This artificial sovereignty, sustained by international law, has allowed leaders of weak and failing nations to ignore the responsibility to adequately care for their own citizens and consequently allows weak and failing States to persist.[220]

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213. *See id.* at 76 ("International law remains emphatically European . . . regardless of its supposed receptivity to other legal thinking.").

214. *Id.* at 68-69. The arbitrary creation of many post-colonial States, like Somalia, never allowed for the creation of a cohesive national identity; yet, bestowed with the legal title of sovereignty, many formerly colonial but newly independent States entered a new international legal world as sovereign and unified, despite being internally divided and sometimes formally separate national entities. The title of sovereignty thus shielded these internal instabilities from the international community, which consequently viewed these States as effective and cohesive legal actors. See *infra* Part III.C for a case study of this concept in Somalia.

215. GIORGETTI, *supra* note 5, at 68.

216. *Id.*

217. *See id.* ("International law does not contemplate the case of a State that ceases to be able to deliver political goods, and has created no mechanisms for the recreation or substitution of State power when the State is no longer capable of performing its duties.").

218. *Id.* at 68-69. See *supra* Part II.D for a general discussion of State failure and a State's obligations under international law.

219. Williams, *supra* note 148, at 565.

220. *See* Samantha Power, *International Affairs*, 116 FOREIGN POL'Y 155, 156 (1999) (warning that, despite holding some leaders accountable for abusing their citizenry, States only exercise this type of jurisdiction after implementing their own domestic legislation which allows them to prosecute those who commit crimes against humanity abroad).

1. International Legal Elements of Sovereignty are not altered with State Failure

Weak and failing States continue to persist because the principle elements of the legal definition of sovereignty[221] are in no way altered or suspended in the case of weak or failing States. Once sovereign status is obtained and internationally recognized, international law provides no means by which to alter this status, even where a State no longer has the effective capacity to govern or exert authority over its population, or is perpetrating outrageous human rights abuses against its own citizenry.[222] Thus, paradoxically, although the requirements to obtain sovereign recognition are applied rigorously to newly emerging States, these elements cease to be applied with any force once that recognition is achieved.[223] This fact highlights the major legal inconsistency regarding the application of sovereignty to weak or failed States. As these entities fail to meet the requirements upheld in obtaining sovereignty, sovereign status is in no way eroded or affected by a State's degrading internal status.[224]

One reason for this anomaly lies with the international legal presumption in favor of the continuity of the State.[225] This presumption is well-established in international law and is reflected in the absence of provisions to withdraw or eliminate a State's sovereign status.[226] This presumption, however, rests on valid grounds. The inviolability of sovereignty provides for stability and continuity in the international legal system, as States are confident that they alone will exert authority within their borders.[227] However, contemporary reality does not support these goals. The increase in intra-State conflict along with the relatively recent recognition of weak and failing States instead turns sovereignty's protective measures against the continuity of the State.[228] The principles upon which sovereignty was founded are perverted,[229] allowing sovereignty to serve as a shield

221. See *supra* Part II.A for a discussion of the elements of State sovereignty.

222. *See* GIORGETTI, *supra* note 5, at 53. ("State failure does not seem to alter the identity of a State, once it has been recognized by the international community. In fact, under contemporary international law, State failure does not modify the tenets of Statehood.").

223. KREIJEN, *supra* note 5, at 34 (quoting ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 41 (1995)) ("[O]nce in the club [of States], the rules by which admission was tested . . . become less important.").

224. *See id.* ("[T]he occurrence of a 'defect' in any of the constituent elements of Statehood does not jeopardise the continuity of the State."); GIORGETTI, *supra* note 5, at 64-65 (noting that countries like Afghanistan, Democratic Republic of Congo, Liberia, and Somalia have been unable to fulfill their international obligations for almost a decade but continue to be recognized as States by the international community since their international legal status has not changed).

225. Kreijen, *supra* note 5, at 37.

226. *See id.* ("States may have complicated birth, but they do not die easily.").

227. The continuity of this principle is also derived from the Eurocentric origins of the notion of sovereignty. See *supra* Part III.A for a discussion of the Eurocentric origin of sovereignty and its effect on weak or failed States.

228. *See id.* (explaining that the presumption in favor of sovereignty should only apply when there is an identifiable government in place).

229. See *supra* Parts II.A-B for a discussion of the foundational elements of sovereignty.

masking a State lacking any capacity to fulfill its obligations to its citizenry.[230] Because it favors continuity, international law as it currently stands incentivizes the international community to "wait and see whether the period of turmoil causing the non-observance of a State's international obligations will pass."[231] Consequently, States that do not fulfill their international obligations or even fail to meet some of the criteria of statehood[232] are ignored and their poor performance does not serve as a basis upon which sovereignty may be terminated.[233]

Examining the Montevideo Convention's criteria for statehood,[234] it becomes apparent that many States fail to fully meet the convention's standards, yet remain sovereign international actors.[235] Although States generally must meet the Montevideo criteria to be recognized as sovereign, "the consequences of the changes of one of the elements in practice are not clear, and in fact do not extinguish or alter the position of States within the international system."[236] For example, the first criterion of statehood the Montevideo Convention requires is a defined territory.[237] Many States, unquestionably considered sovereign, have unstable or contested boundaries.[238] For example, Israel's territorial demarcation has been in dispute since the State's creation and African nations' borders have caused much conflict.[239] Additionally, many currently sovereign nations fail to meet the third Montevideo criterion—effective governance.[240] For example, Afghanistan lacked any effective or stable government throughout the 1990s[241] and to this day Somalia has a weak and ineffective government unable to exert authority farther than the State's capital.[242] Yet, the international community treats both countries as sovereign entities and each retains their seat in international

230. Kreijen, *supra* note 5, at 374.

231. *Id.*

232. See *supra* Part II.C.2.a for a discussion of the Montevideo Convention and the criteria for statehood.

233. Kreijen, *supra* note 5, at 38.

234. See *supra* Part II.C.2.a for a discussion of the Montevideo Convention and the criteria for statehood.

235. GIORGETTI, *supra* note 5, at 65-66.

236. *Id.*

237. See *supra* Part II.C.2.a for a discussion of the Montevideo Convention and the criteria for statehood.

238. For instance, North Korea and South Korea have fought over the demarcation line between their countries for years. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 115 (2d ed. 2006). Similarly, Somalia's boundaries have been the subject of much conflict, as pre-colonial Somali territory was arbitrarily placed within the borders of colonial Ethiopia. *Id.* at 116. This fact prompted the Ogaden War, in which Somalia sought to reclaim this lost land. *Id.*; *see also id.* at 115-16 (discussing the flexibility of Montevideo's permanent population requirement and listing various examples that challenge this criteria for Statehood).

239. *See id.* at 115 (discussing the continued border disputes in Israel and multiple African nations).

240. See *supra* Part II.C.2.a for a discussion of the Montevideo Convention and the criteria for statehood.

241. Sterio, *supra* note 13, at 148 (citing DUNOFF ET AL., *supra* note 239, at 116).

242. GIORGETTI, *supra* note 5, at 28.

organizations like the U.N.[243] These inconsistencies arise because the Montevideo criteria are explicitly geared towards State creation and do not provide any guidance for the maintenance of the State or any criteria to determine when a State may lose its sovereign status.[244]

Moreover, based upon the principle of non-intervention,[245] international action within the territorial boundaries of a sovereign State requires either U.N. Security Council authorization or the consent of that State to intervene within its domestic affairs.[246] This leads to a very paradoxical situation in the case of weak or failed States. Failed States often no longer have an effective government to provide such consent.[247] Additionally, the government or reigning power in many weak or failing nations benefits from the instability of the State and thus has no incentive to consent to international interference within the States' internal affairs.[248] Consequently,

> [t]he international legal system that sustains quasi-statehood uses a distinctively artificial conception of the State. Unlike traditional practice, statehood is *posited* rather than *real*. It no longer depends on meeting certain qualitative criteria, but has basically been conferred by the international community by means of recognition *and as a matter of right*.[249]

Once a State obtains sovereign status, the international community acts only to rubber-stamp the international legal validity of a country, no matter what its internal condition.[250] The substantive aspects of statehood (effective government, controlled borders, internal stability) are effectively ignored, sheltered by the seal of sovereignty, which allows the international community to turn a blind eye towards weak or failing States.[251] In effect, sovereignty "shield[s] weak post-colonial States from external pressures, putting inexperienced governments that lack[] effective political control in a position to do whatever they like without facing the ultimate consequence: the termination of the State."[252] In this manner, international law serves to perpetuate instability and underdevelopment in weak or failing countries.

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243. Press Release, Dep't of Pub. Info., United Nations Member States, U.N. Press Release ORG/1469 (July 3, 2006), *available at* http://www.un.org/News/Press/docs/2006/org1469.doc.htm.

244. GIORGETTI, *supra* note 5, at 68.

245. See *supra* Part II.A.2 for a discussion of the principle of non-intervention.

246. GIORGETTI, *supra* note 5, at 179.

247. *Id.*

248. *Id.*

249. KREIJEN, *supra* note 5, at 102 (emphasis added).

250. *See id.* at 370 ("Whereas the traditional sovereignty regime perceived independence predominantly as substantive capacity . . . the new regimes sees independence much more as a formal legal condition.").

251. GIORGETTI, *supra* note 5, at 65 (explaining that failed States continue to be viewed as sovereign even though they are unable to fulfill their international obligations).

252. KREIJEN, *supra* note 5, at 374.

2. International Legal Mechanisms that are Available are Insufficient to Help Weak or Failed States

International law currently provides insufficient avenues to eliminate or withhold the sovereignty of a State. Under international law, sovereignty can be eliminated in a limited number of circumstances, including where: (1) the State incorporates into another State and becomes part of that State, (2) a State is annexed into another State or a combination of the State with one or more other States to form a new State, and (3) where a State dissolves into smaller units.[253] However, none of these means of eliminating sovereign status are applicable in the context of a weak or failed State.[254] Failed States do not incorporate into another State, merge to create a new State, or dissolve. State failure instead implies that States cannot carry out their domestic and international obligations, or, in other words, "behave like States."[255]

In addition, international law provides limited mechanisms by which sovereignty can be breached and temporarily withheld, mainly in the case of humanitarian crisis.[256] Yet, these actions are rarely taken and require collective international action, a feat extremely hard to muster.[257] The ability to breach sovereignty primarily lies with the U.N. Security Council through its Chapter VII powers.[258] However, as mentioned, international intervention that breaches a State's sovereignty usually requires intervention premised on that State's consent.[259] Thus, the use of force in the absence of State consent under Chapter VII "remains an *ultima ratio*," or option of last resort, only to be invoked where a State is not only unable to carry out its international obligations but also where the failure to fulfill these obligations represents a threat to the international community.[260]

Moreover, humanitarian intervention on behalf of the U.N. is heavily premised upon the will of the so-called "Great Powers."[261] These States can easily

253. GIORGETTI, *supra* note 5, at 52.

254. *Id.* at 53.

255. *Id.* See *supra* Part II.D for a discussion of weak and failing States.

256. GIORGETTI, *supra* note 5, at 10-11 (discussing protectorate agreements, occupations, trusteeship arrangements, U.N. administrations, and development projects).

257. *See* Gross, *supra* note 61, at 21 (explaining how U.N. Charter is based on sovereignty to ensure the hegemony of the Great Powers and has thus left the State system established by the Peace of Westphalia virtually unchanged).

258. U.N. Charter art. 42 ("[T]he Security Council . . . may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."). See *supra* notes 26-33 and accompanying text for a discussion of the U.N. Charter's Chapter VII powers.

259. See *supra* notes 25-29 and accompanying text for a discussion of State consent and international intervention.

260. GIORGETTI, *supra* note 5, at 182. Although, exactly what constitutes a "humanitarian crisis" or the nature or level of such an event that would warrant unconsented international intervention within a nation is not defined and largely determined by the political will of the five permanent members of the U.N. Security Council.

261. The Great Powers include the U.S., Russia, France, Great Britain, and China, and are also known as the P-5 because these five countries are the only nations with veto power on the

ignore the oppressive policies of another State if they, for whatever reason, do not wish to intervene.[262] However, recently there has been a shift in international legal thought that argues that the international community has a duty to intervene to assist domestic populations in emergencies, particularly in humanitarian crises.[263] Despite this fact, international intervention without the consent of the home government still remains an option of last resort, remains very ill-defined in terms of when such actions may be lawfully taken, and is highly dependent upon the political will of the veto-holding member-States of the Security Council.[264]

C. Somalia's Fictitious Sovereignty

As the *sine qua non* of the nation-State, the notion of sovereignty has come to define the legitimacy of a nation on the international playing field, regardless of a government's effective capacity within its own country. This understanding of sovereignty has led to a complex and puzzling situation in Somalia where Somalian sovereignty continues as a source of friction to the formation of a cohesive national identity across the country. More specifically, Somaliland, a stable and democratic region in the north of Somalia, fails to obtain international legitimacy despite repeated calls for secession and independence.[265] To the contrary, southern Somalia (and the nation of Somalia more generally) continues to be recognized internationally as a sovereign political entity, although the area remains unstable and lacks viable State institutions and effective governance.[266] Somaliland thus challenges accepted notions of what constitutes the State and emphasizes the obstacles and limitations that the international community faces due to its dependence on an outdated understanding of sovereignty. Thus, understanding the evolution of State building in Somaliland versus southern

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U.N. Security Council. Sterio, *supra* note 13, at 154.

262. Whether those reasons be political (e.g., a Great Power allies itself with the government of a nation in which a minority-group is seeking self-determination) or otherwise (e.g., U.S. fears involvement in any humanitarian interventions after its peacekeeping operations' embarrassing failure in Somalia), the P-5 Security Council members have no legal obligation to intervene in failing States. *See id.* at 140 (arguing that the presence and will of one or more of the Great Powers is determinative of international intervention in breach of sovereignty).

263. GIORGETTI, *supra* note 5, at 181. This is the emerging discussion of the Responsibility to Protect (or R2P as it is more commonly known). The Report of the International Commission on Intervention and State Sovereignty ("ICISS") reiterated this principle. G.A. Res. 60/1, ¶¶138-139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). A discussion of R2P is beyond the scope of this Article, as this Article is focused on the operation of the legal definition of sovereignty in international law. For a greater discussion of R2P, *see* NAOMI KIKOLER, GLOBAL CTR. FOR THE RESPONSIBILITY TO PROTECT, PROTECTING PEOPLE IN CONFLICT AND CRISIS: RESPONDING TO THE CHALLENGES OF A CHANGING WORLD (2009); Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99 (2002).

264. Sterio, *supra* note 13, at 140.

265. See *supra* notes 184-90 and accompanying text for a discussion of Somaliland.

266. *See* GIORGETTI, *supra* note 5, at 23 ("Presently, Somalia is in the unique position of being recognized in the international community as an independent State, but with no central government able to exercise control since the fall of the Barre regime in 1991.").

Somalia, and examining the reluctance on the part of the international community to recognize Somaliland as an independent State, helps clarify the limits of the current understanding of sovereignty and the term's insufficiency in the context of weak and failed States.

Previously regarded as a quiet and peaceful pastoral democracy, following the introduction of colonial rule, Somalia was thrust into the *realpolitik* of the international system.[267] European colonizers integrated the Somali people, formerly a largely "stateless society," into an international system based on the foreign notion of the sovereign State.[268] The colonial creation of internationally recognized boundaries between Ethiopia, Djibouti, Kenya, and Somalia further enhanced this integration into the international community.[269] Most importantly, after gaining independence, British Somaliland remained a sovereign and autonomous territory for five days before integrating with the Italian Somalian protectorate, a fact explicitly noted in the Somaliland Constitution.[270] This brief but significant period of sovereignty and independence had lasting repercussions on Somaliland, and served as the legal basis for Somaliland's claims to independence and sovereignty.[271] The decision of the colonial powers to unify the Italian and British protectorates also shaped the way the international community viewed the Somali region—as an integrated and unified Somalian nation.[272] This somewhat arbitrary identification continues to clash with the internal self-perception of the Somali people as a nation and highlights the friction between Somaliland and the Republic of Somalia.[273]

With independence, the Republic of Somalia was officially placed on the "global map" as a sovereign and autonomous nation.[274] By providing Somalia with a seat on various regional and international organizations and bodies, Somalia's colonial past and ad-hoc integration was quickly forgotten by the international community.[275] Yet within the country, cohesive unification was never fully

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267. *See* BRADBURY, *supra* note 161, at 24 (noting the drastic divisions in Somalia resulting from British colonization).

268. *Id.*

269. *Id.*

270. The Somaliland Constitution, in relevant part, states:

The country which gained its independence from the United Kingdom of Great Britain and Northern

Ireland on 26th June 1960 and was known as the Somaliland Protectorate and which joined Somalia on 1st July 1960 so as to form the Somali Republic and then regained its independence by the Declaration of the Conference of the Somaliland communities held in Burao between 27th April 1991 and 15th May 1991 shall hereby and in accordance with this Constitution become a sovereign and independent country known as 'The Republic of Somaliland.'"

The Constitution of the Republic of Somaliland, CENTER FOR HUM. RTS. U. OF PRETORIA, art. 1 (Jan. 31, 2012), *available at* http://www.chr.up.ac.za/undp/domestic/docs/c_Somaliland.pdf.

271. *Government Recognition in Somalia*, *supra* note 162, at 263.

272. *Id.*

273. *See generally id.*

274. GIORGETTI, *supra* note 5, at 36.

275. *Id.*

achieved.[276] This discrepancy inevitably led to an insurmountable tension between the way Somalia was viewed internationally and the way the country was understood internally by its own citizens.[277] However, this tension was ignored by the international community, which strove to facilitate the incorporation of this newly independent State into the international political scene.[278]

Ironically, applying the Montevideo criteria,[279] Somaliland seems to fulfill the international legal criteria for statehood despite the international community's continual denial of Somaliland's independence.[280] Since 1993, the government has been able to establish a functioning administration.[281] An interim constitution was drafted and was put to a referendum in 2001.[282] Moreover, Somaliland's economy has been "surprisingly buoyant" with a vibrant private sector.[283] Since severing ties with southern Somalia, the people of Somaliland successfully facilitated a process of reconciliation, constituting a public administration that has restored law and order, overseen demobilization, and even held several democratic elections.[284] The region also maintains active relationships with a number of foreign countries.[285] Somaliland has established active relations with Ethiopia, which has stationed a trade delegate in the province.[286] Moreover, Somaliland has signed formal memorandums with several European governments regarding the repatriation of asylum applicants.[287] However, Somaliland's ambiguous international identity has denied the region access to external funding and support that many post-conflict countries receive.[288] This funding is crucial to the continued development and stability of Somaliland as it would allow the region to rebuild infrastructure and

276. Sterio, *supra* note 13, at 148 (citing DUNOFF ET AL., *supra* note 238, at 116).

277. *Compare* GIORGETTI, *supra* note 5, at 36 (noting the international recognition of Somalia as a functioning state), *with* Sterio, *supra* note 13, at 148 (citing DUNOFF ET AL., *supra* note 238, at 116) (describing the current lack of government unification or efficacy in Somalia).

278. GIORGETTI, *supra* note 5, at 36.

279. See *supra* Part II.C.2.a for a discussion of the Montevideo Convention and the criteria of statehood.

280. Somaliland displays many of the attributes of a sovereign State, including a constitution, three political parties and a popularly elected government that provides "security for its population, exercises some control over its borders, manages some public assets, [and] levies taxes." BRADBURY, *supra* note 161, at 4. Moreover, to enhance the regions independent identity, Somaliland has also adopted its own flag, a national anthem, and national holidays. *Id.*

281. *See* Patrick Gilkes, *Briefing: Somalia*, 98 AFR. AFF. 571, 571-72 (1999) (noting that Somaliland has established police and defense forces, a judiciary, and a democratically elected parliament that incorporates clan elders in an upper house, referred to as the National *Guurti*).

282. *Id.* at 572.

283. *Id.*

284. BRADBURY, *supra* note 161, at 4. Moreover, much of the urban infrastructure, municipal services and systems of education and health that were destroyed during the war have been reestablished. *Id.*

285. *Id.* at 5.

286. *Id.*

287. *Id.*

288. *Id.* at 6.

develop its governing institutions.[289] Somaliland's main problem remains the insistence of the international community to keep the Republic of Somalia unified and its refusal to recognize Somaliland's calls for independence.

Despite Somaliland's progress, simultaneous developments in the southern part of the country established a parallel, albeit separate, effort to cease conflict and establish a central authority.[290] However, it took almost ten years after the establishment of the northern government under Egal for some form of authority to emerge in the southern region of Somalia.[291] This occurred with the Arta Peace Process of 2000, which established the TNG as a temporary governing authority in southern Somalia.[292] The TNG followed a very different path than its northern counterpart, acquiring a substantial degree of international recognition before instituting any effective control over the capital of the city and the rest of southern Somalia.[293] Moreover, the TNG succeeded in re-assuming Somalia's seat in the U.N. and among all other relevant regional organizations, something the north has been unable to acquire despite its noted development and political stability.[294] Somaliland's experience thus highlights that sovereignty, as understood today, is unable to adequately distinguish between the internal functioning of a society and that society's recognition as an independent and sovereign nation under international law. This highly problematic oversight allows weak States, like Somalia, to persist, while stable autonomous regions, like Somaliland, remain unable to attain sovereign statehood under international law.[295]

As noted, pre-colonial Somalia was "stateless," only to be introduced into a world order founded on the European Westphalian system.[296] Beyond never conceiving of their society as a modern State, the independent Republic of Somalia was also a European-crafted entity, forged from two separate colonial properties and arbitrarily forced to unite as a modern nation.[297] Given this historical context, it may be more useful to understand Somalia as never having been a cohesive State, but instead as always having existed as two separate entities created by

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289. *Id.*

290. *Government Recognition in Somalia*, *supra* note 162, at 247-48.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 247; *see* GIORGETTI, *supra* note 5, at 39-40 (noting that Somalia has remained a member of the United Nations and other international bodies, and sends a mission to the United Nations in New York City). On the contrary, the Somaliland Government in the north had achieved a considerable degree of internal stability and firm control over much of its territory, but failed to be granted any international recognition. *Government Recognition in Somalia*, *supra* note 162, at 247-48.

295. *See* Williams, *supra* note 148, at 563 (stating that State sovereignty as it emerged as a concept and a set of practices alongside the consolidation of the European state system did not refer to what governments as rulers might do within their States but instead largely concerned to regulate conduct between States).

296. See *supra* notes 165-73 and accompanying text for a discussion of the arbitrary unification of formerly separate colonial territories of the Somali region into the independent nation of Somalia.

297. LEWIS, *supra* note 170, at 33-34.

colonial powers.[298] Moreover, the historical context of the Somali nation further underscores how the colonial and post-colonial State in Somalia has long undermined the notion of sovereignty as we understand it today.

Despite this arbitrary and conflicted history, Somaliland has drawn upon traditional and customary authorities that have historically governed the region, which has resulted in the establishment of a legitimate and organic conception of sovereignty. Deeply premised in fundamental democratic principals, Somaliland has used these customary forms of governance to manage social relations and reestablish the rule of law.[299] This grassroots and local crafting of organic sovereignty pushes the confines of the current limited understanding of sovereignty and statehood in the international system. Despite the oversight of the international community in recognizing this unprecedented success, Somaliland's own citizens conceive of themselves as a legitimate independent nation.[300] If this contradiction in the understanding of statehood and sovereignty is not resolved, then it is more likely that Somalia will remain unstable and conflict-prone in the upcoming years with continued fruitless efforts towards re-unification.

D. Redefining Sovereignty

The ironic and devastating situation of Somalia highlights the importance of reconsidering the current definition of sovereignty. What follows is a discussion of the August 2010 advisory opinion of the ICJ regarding the unilateral declaration of Kosovo of February 17, 2008, and its implicit contemplation of moving beyond an outdated and Eurocentric understanding of sovereignty.[301] The Section concludes by examining various ways sovereignty can be redefined to better reflect the current world order and to aid, rather than undermine, the development of weak and failed nations.[302]

1. The International Court of Justice's Advisory Opinion on Kosovo's Declaration of Independence – New Hopes for International Legal Understandings of Sovereignty

The ICJ advisory opinion of August 2010 regarding the legality of Kosovo's unilateral declaration of independence has opened the door for the international community to contemplate a new understanding of sovereignty. Just as Somalia highlights the limits of the application of sovereignty in developing countries, the recent ICJ advisory opinion on Kosovo may be looked upon as an example of the

298. See *supra* notes 165-73 and accompanying text for a discussion of the arbitrary unification of the formerly separate colonial territories of the Somali region into the independent nation of Somalia.

299. See *supra* notes 184-90 and accompanying text for a discussion of the current form of governance in Somaliland.

300. *See* BRADBURY, *supra* note 161, at 245 ("[I]t should be evident that the varied needs in Somalia and Somaliland cannot be conflated within any single governance framework.").

301. *See generally* Kosovo Advisory Opinion, *supra* note 6.

302. See *infra* Part III.D.2 for a discussion of redefining sovereignty.

international legal community's ability to redefine sovereignty to stop the perpetuation of conflict in weak and failed nations.[303] The ICJ's advisory opinion on Kosovo may also present one of the first occasions of international recognition of internally-fostered or grass-roots sovereignty developed and grown from within a State.[304]

a. The Kosovo Advisory Opinion and Its Impact on the Current Understanding of State Sovereignty

The ICJ advisory opinion on the legality of Kosovo's unilateral declaration of independence makes several conclusions that imply a redefinition of the current understanding of sovereignty. The opinion acknowledges that certain changes have occurred in the international system since the independence of many former colonies. Moreover, the Court's conclusion that Kosovo's "adoption of the declaration of independence of 17 February 2008 did not violate general international law" proposes a reconstruction of the definition of sovereignty.[305] This conclusion acknowledges that an internal entity asserting self-determination may, under international law, unilaterally breach the sovereignty of the mother country.[306] The Kosovo question was one of first impression before the ICJ as it is the first advisory opinion where the World Court addresses the idea of secession in a post-colonial context.[307] This further signals a shift in the conception of statehood, recognizing that post-colonial assertions of independence stem from something other than the external conferral of sovereignty by colonial powers on their former colonies.[308]

Second, the ICJ opinion posits a new understanding of territorial integrity, an integral component of the current definition of sovereignty.[309] Territorial integrity, the notion that a State is the paramount authority within its own borders, has traditionally been used to uphold the sanctity of current boundaries between nations.[310] Yet, "the Court really makes short shrift of it by simply and

303. *See generally* Kosovo Advisory Opinion, *supra* note 6.

304. *Id.*

305. *Id.* ¶ 122.

306. It should be noted, however, that the ICJ explicitly defines the scope of the Kosovo decision to exclude any contemplation or proclamation of the final status of Kosovo. *Id.* ¶ 51. However, one can draw certain conclusions from the plain language of the opinion and its implications on Kosovo's final status negotiations and on the meaning of what it is to be a "sovereign State." *See id.* (noting that the question posed to the ICJ "does not ask whether or not Kosovo has achieved statehood").

307. Röben, *supra* note 38, at 1065.

308. *Cf.* Anghie, *supra* note 1, at 73 (explaining how non-European societies had to "comply with authoritative European standards in order to win recognition and assert themselves").

309. See *supra* Part II.A.3 for a discussion of territorial integrity as a component of State sovereignty.

310. *See* LAWRENCE, *supra* note 34, at 50-51 ("The rules of modern International Law are so permeated from end to end with the idea of territorial sovereignty that they would be entirely inapplicable to any body politic that was not permanently settled upon a portion of the earth's surface which in its collective capacity it owner.").

authoritatively stating that territorial integrity applies between States only, horizontally, but not vertically within a State."[311] Due to this understanding of territorial integrity, the Court concludes that it cannot prohibit acts of non-State actors, such as Kosovo, from declaring independence—an assertion directly contrary to the territorial integrity (i.e., sovereignty) of Serbia.

This novel distinction in the understanding of territorial integrity further presents an important break from traditional understandings of sovereignty.[312] It implies that secessionist movements declaring independence do not violate the sovereignty of the mother country, as territorial integrity is only sacrosanct *between* nations. This distinction may also provide a platform upon which to expand the definition of sovereignty in cases where cohesive national identities within developing nations were never formed, and cannot be formed.[313] The ability to legally declare independence under international law provides an option, other than the perpetuation of conflict, for sub-national groups to express their sovereign identity when political or other processes have continually failed to integrate and unify the nation. The argument is not that secession is justified in all or even most cases, but instead that it should start to be considered a legally valid alternative in cases where other processes have continually failed to integrate or unify the nation.[314]

Moreover, the idea that secession, in certain circumstances, may be the only viable solution to end conflict is a consistent undertone in various statements of several international actors involved in the Kosovo conflict. For example, U.N. Security Council Resolution 1244 states that "[n]egotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions."[315] Although Resolution 1244 provided for a political-legal process towards a mutual agreement between the parties, it "did not require futile negotiations *ad infinitem*."[316] Similarly, the U.N. Secretary General submitted the report of his Special Envoy to the Security Council, explaining that it was the Special Envoy's "firm view that the negotiations' potential to produce any mutual agreeable outcome on Kosovo's status is exhausted," and that "[no] amount of additional talks . . . will overcome this impasse."[317] The Special Envoy further

311. Röben, *supra* note 38, at 1068; *see* Kosovo Advisory Opinion, *supra* note 6, ¶ 80 ("[T]he scope of the principle of territorial integrity is confined to the sphere of relations between States.").

312. *See* Röben, *supra* note 38, at 1068 (finding the ICJ's horizontal understanding of territorial integrity problematic as it is "disconnected from the development of [public international law] since the adoption of the [UN] Charter").

313. See *supra* Part III.C for a discussion of Somalia's fictitious sovereignty.

314. *See* Bart M. J. Szewczyk, *Lawfulness of Kosovo's Declaration of Independence*, ASIL INSIGHT (Aug. 17, 2010), http://www.asil.org/insights100817.cfm ("Remedial secession may be lawful as the only possible means to safeguard fundamental human rights so as to maximize values of human dignity, but does not justify all territorial fragmentation.").

315. S.C. Res. 1244, *supra* note 107, Annex 2, ¶ 8.

316. Szewczyk, *supra* note 314.

317. U.N. Secretary-General, Letter Dated 26 March 2007 from the Secretary-General

concluded that "[u]pon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence."[318] The conclusions of the Special Envoy were also cited in the ICJ's opinion on Kosovo as support for the Court's conclusion that the unilateral declaration of independence by Kosovo was not illegal under international law.[319] These facts support the conclusion that the ICJ and other international bodies recognize that the current understanding of sovereignty as sacrosanct may be inimical to the establishment of peace and stability in many nations and consequently should be reexamined.

Lastly, the Court's opinion makes an important distinction about the identity of the authors of Kosovo's declaration of independence, a finding that also questions the current definition of sovereignty.[320] The ICJ concludes that the authors of the declaration of independence did not intend to act within the interim framework established under U.N. Security Council Resolution 1244,[321] but instead aimed to establish "an independent and sovereign state" outside of this legal order.[322] By employing this line of reasoning, the Court posits that the authors of Kosovo's unilateral declaration of independence were neither acting within the UNMIK framework nor under Serbian authority, but rather as some sort of autonomous quasi-sovereign entity. Consequently, the Court confers the ability to act outside of Serbian authority upon Kosovo, sanctioning these unilateral actions despite the fact that no final status determination between Kosovo and Serbia has been reached.[323] Thus, at some level, this line of reasoning is an implicit attack on the sovereignty and territorial integrity of Serbia. However, although the Court provides several factors upon which this conclusion is based,[324] the opinion does

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Addressed to the President of the Security Council Attaching the Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, ¶ 3, U.N. Doc. S/2007/168 (March 26, 2007).

318. *Id.* ¶ 5.

319. Kosovo Advisory Opinion, *supra* note 6, ¶ 69.

320. *Id.* ¶ 105.

321. S.C. Res. 1244, *supra* note 107.

322. Kosovo Advisory Opinion, *supra* note 6, ¶¶ 104-05 (quoting *Kosovo Declaration of Independence*, REPUBLIC OF KOSOVO ASSEMBLY, ¶ 1 (Feb. 12, 2008), *available at* http://www.assembly-kosova.org/?cid=2,128,1635) (explaining that Resolution 1244 left open the question of the final status of Kosovo and holds that the authors of the declaration "did not act, or intend to act, in the capacity of an institution created by . . . [Resolution 1244's] legal order but, rather, set out to adopt a measure . . . which would lie outside that order").

323. *See generally* Röben, *supra* note 38, at 1069-71.

324. *See* Kosovo Advisory Opinion, *supra* note 6, ¶¶ 104-05. In addition to the Court's explanation that Resolution 1244 did not contemplate Kosovo's final status and that the language of the declaration of independence indicates it's authors intent to act outside of the interim administration established by this Resolution, the Court also cites several other factors informing its conclusion that the Declarations author's were not working within the interim framework established by Resolution 1244. *Id.* These additional factors include the declaration's adoption of fulfilling Kosovo's external international obligations, which under the Constitutional Framework and Resolution 1244 was the prerogative of the Special Representative of the Secretary General. *Id.* ¶¶ 106-07. Moreover, the Court notes that nowhere in the declaration's original text is there any reference to the "Assembly of Kosovo." *Id.* The court further notes the reaction of the Special

not clarify whether Kosovo's ability to detach itself from both the international interim administrative framework and Serbia is an ability unique to the case of Kosovo or is a right that can be invoked by other secessionist movements.[325]

b. The ICJ Opinion and Its Precedent?

It is unclear what precedent the ICJ's advisory opinion on Kosovo may set for the international community's conception of sovereignty, secession, and statehood. The Court explicitly limited the scope of the Kosovo opinion noting that the question posed to the Court did not ask "whether or not Kosovo has achieved statehood" or require an examination of "the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."[326] However, the implications arising from the Court's decision are sure to have notable effects on these lingering questions.[327]

Some authors have argued that the precedent and applicability of the Court's advisory opinion is unclear.[328] The ICJ opinion does not clarify whether the Court's holding applies solely to the particular facts of the Kosovo situation or generally to other secessionist movements that similarly make unilateral declarations of independence.[329] Other authors make a greater institutional argument about the effectiveness of the ICJ and international law generally. These authors posit that ultimately, Kosovo's recognition as a sovereign entity can only be determined by political influences and the formal recognition of Kosovo as sovereign by other States.[330] Moreover, although having recognized Kosovo's independent and sovereign status, both the United States and United Kingdom have adamantly expressed that Kosovo's situation is unique and establishes no precedent.[331] It is further unlikely that the ICJ opinion, despite being in favor of Kosovo, will influence the position of Serbia or have any effect on Kosovo's

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Representative to the Secretary General to the declaration, as the Special Representative was silent, indicating that he determined the declaration to be effective "outside the legal order for which he was responsible." *Id.* ¶ 108.

325. *See* Röben, *supra* note 38, at 1072 (expressing confusion as to whether the Court's holding is "really applicable beyond the precise historical circumstances of the case").

326. Kosovo Advisory Opinion, *supra* note 6, ¶ 51.

327. *See generally* Röben, *supra* note 38, at 1085.

328. *See id.* at 1072 ("It remains unclear what the coverage of the Court's findings really is beyond the precise historical circumstances of the case.").

329. Röben, *supra* note 38, at 1072.

330. *See, e.g.*, Kieran Gibbs, *The Symbolic Gesture of the ICJ Decision on Kosovo*, LEGAL FRONTIERS: MCGILL'S BLOG ON INT'L L. (Nov. 12, 2010), http://www.legalfrontiers.ca/2010/11/the-symbolic-gesture-of-the-icj-decision-on-kosovo/ (explaining that "State recognition is political," and that "State practice speaks louder than international law"). See also *supra* notes 40-43 for a discussion of the constitutive theory of Statehood and the importance of international recognition in determining sovereignty. See also *supra* Part II.A.4 for a comparison of the declarative and constitutive theories of Statehood.

331. *See* Vidmar, *supra* note 43, at 836 (noting the U.S. representative stated that the United States "do[es] not and will not accept the Kosovo example as precedent for any other conflict or dispute," with similar feelings reiterated by the representative of the United Kingdom).

admission to the United Nations, especially given Russia's veto power.[332] Consequently, there are large questions left unanswered regarding Kosovo's final status.[333] There is also the uneasy question of what impact the ICJ opinion will have on secessionist movements in other countries around the world.[334]

However, as previously discussed, the ICJ advisory opinion on Kosovo may have precedential value implied from the opinion's conclusions.[335] The opinion is also novel, as it forwards a notion that the relationship between secession and sovereignty is complementary.[336] This proposal is quite contradictory to the general notion that secession is antithetical to the conception of sovereign statehood—the idea that a State could digress from its own existence.[337] Yet, this is exactly the line of reasoning that must be followed if the international community hopes to address the inapplicability of current understandings of sovereignty to weak and failing countries that have either had difficulty or have never been able to internally foster their own sense of unified statehood.[338] Consequently, the ICJ advisory opinion opens a formerly airtight door and allows the international community to recognize that the concept of sovereignty is not sacrosanct and may be inimical in weak or failing States.

2. Looking Beyond Sovereignty – New Conceptions of Statehood for Weak and Failing States

This Article shows how the notion of sovereignty is highly problematic as the lynchpin of the international legal order of States, particularly in its application to weak and failing countries. Identifying this problem is only the beginning, as it calls for a change in the conception of sovereignty's role in international law and a rethinking of the international community's role and obligations towards weak and failing States.

In the first instance, international law must recognize the inapplicability of

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332. Morton Abramowitz & James Hooper, *Settling the Balkans*, THE NAT'L INTEREST (July 8, 2010), http://nationalinterest.org/commentary/settling-balkans-3651.

333. *See, e.g.*, Diane Marie Amann, *Leviathan Below Kosovo*, INTLAWGRRLS BLOG (Aug. 22, 2010, 6:00AM), http://intlawgrrls.blogspot.com/search?q=icj+kosovo (arguing that the ICJ's "very finding of nonstate status leaves open the question of what, now, Kosovo is").

334. *See, e.g.*, John R. Bolton, *Broader Implications of Last Week's World Court Decision on Kosovo*, KOSOVO COMPROMISE (Aug. 2, 2010), http://kosovocompromise.com/cms/item/analysis/en.html?view=story&id=2934&sectionId=2 (noting that separatist regions around the world will most likely have different interpretations of the ICJ decision, which may provoke unnecessary conflict between these movements and central governments).

335. See *supra* Part III.D.1.a for a discussion of the implications stemming from the ICJ advisory opinion on Kosovo. *See generally* Röben, *supra* note 38, at 1085.

336. *See* Röben, *supra* note 38, at 1085 ("In modern international law, sovereignty is complemented by self-determination.").

337. *See* Donald Horowitz, *The Cracked Foundations of the Right to Secede*, 14 J. DEMOCRACY 1, 10 (2003) ("Secession is an anti-State movement, and an international law that forgets that States are its main subjects risks its own survival.").

338. See *supra* Part III.A for a discussion of the Eurocentric origins of sovereignty and the extrinsic granting of sovereignty upon newly independent nations by European powers.

sovereignty to weak and failing States. As previously discussed, the current model of sovereignty ignores the Eurocentric origins of this model of State organization, origins that non-European nations do not share.[339] Consequently, international institutions that promulgate international law must stop perpetuating the status quo and instead recognize the contradiction that many non-European nations realize every day and that is embedded in the very conception of their existence.[340] Coupled with this realization is the further recognition that the concept of sovereignty cannot be absolute. The "black-box" which sovereignty erects over the internal affairs of a State allows weak and failing countries to continue in their steady decline.[341] Examined in this light, sovereignty's overly legalistic conception of the State or "undue emphasis on abstract rules" leads to "the neglect of concrete behavior and the social conditions that support or undermine legal rules."[342] International law instead needs to be equipped with tools by which this "black box" can be pierced in some exceptional circumstances.[343] Primarily, these circumstances include situations where there are profound human rights violations or dire humanitarian circumstances.

The incongruence between the legal conception of sovereignty and its real-life application is vividly highlighted by the current situation of present-day Somalia. To recognize this inherent contradiction one need only compare Somalia's non-existent central government, which lacks any effective capacity, with the international recognition the country retains in its international relations and membership in various international institutions.[344] The irony of this situation is further emphasized when one contrasts Somalia with its autonomous northern region, Somaliland. In stark contrast to the south, Somaliland has established an effective government, democracy, and has achieved relative stability.[345] These accomplishments have all been achieved despite the region's continued denial of international recognition.[346] Such overt contradictory scenarios call for a redefinition of sovereignty and a recognition that the term is not absolute, but may be qualified in some cases.

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339. See *supra* Part III.A for a discussion of the Eurocentric origins of sovereignty. *See generally* Anghie, *supra* note 1, at 67-68.

340. *See generally* Anghie, *supra* note 1, at 73 (noting that the nineteenth century has "presented non-European societies with the fundamental contradiction of having to comply with authoritative European standards in order to win recognition and assert themselves").

341. See *supra* notes 256-60 and accompanying text for a discussion of how sovereignty shields the internal affairs of weak and failing nations.

342. Jackson & Rosberg, *supra* note 23, at 4.

343. *See generally* GIORGETTI, *supra* note 5, at 186 (calling for an exception to the principal of non-intervention to fulfill international obligations of States when they cannot do so themselves).

344. See *supra* notes 295-300 and accompanying text for a discussion of the continued international recognition and legal presence of Somalia in the international community despite Somalia's recognized State collapse and ineffective government.

345. See *supra* notes 284-95 and accompanying text for a discussion of the present-day legal-political situation of Somaliland.

346. *Government Recognition in Somalia*, *supra* note 162, at 247-48.

This qualification of sovereignty can be achieved primarily by adopting international legal mechanisms that suspend or withdraw sovereignty in applicable situations.[347] Most prominently, international recognition of sovereign status should be suspended where States can no longer fulfill their international obligations.[348] The suspension of sovereignty would also trigger a qualification of the principle of non-intervention,[349] allowing the international community to more readily enter a weak or failing nation to temporarily perform that nation's international obligations.[350] This qualification of the principle of non-intervention must be justified by a fundamental shift in the thinking of the international community. More specifically, the international community must begin to view weak and failing States as collective security threats to the stability of *all* nations.[351] In doing so, the international community must balance the interests of all States in reducing threats to international security against the temporary breach of sovereignty of a State unable to carry out its international responsibilities.[352]

Viewing weak and failing States in this manner would mean that States are no longer able to do whatever they wish within their borders "as such actions necessarily impact other states, and thus give rights to other states to intervene."[353] "In other words, when a State engages in a particular kind of offensive behavior, it has involuntarily 'waived' its sovereignty."[354] Viewed in this context, the discourse surrounding intervention and breaches of sovereignty can be justified from an

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347. *See generally* GIORGETTI, *supra* note 5, at 69 ("To remain significant . . . any juridical definition of State must confront reality and must be elaborated so as to respond to changes in international law and politics. It needs to evolve and take into consideration the reality of statehood, and namely fragile, failed and failing states."); Sterio, *supra* note 13, at 155-58. One concrete legal mechanism that could be adopted is to amend the U.N. Charter to include a provision or provisions that definitely and explicitly note that sovereignty may be suspended in a certain set of circumstances. Moreover, as many authors have noted, the U.N. Security Council's voting structure should be changed to, at the very least, eliminate or alter the P-5's veto powers. *See e.g.*, Joseph E. Schwartzberg, *Entitlement Quotients as a Vehicle for United Nations Reform*, GLOBAL GOVERNANCE 9 (2003). However, a discussion of U.N. reform is beyond the scope of this Article.

348. *See* Sterio, *supra* note 13, at 156 (quoting Kelly, *supra* note 207, at 405) ("[W]hen state violate minimum standards by committing, permitting, or threatening intolerable acts against their own people or other nations, then some of the privileges of sovereignty are forfeited."); Christopher J. Borgen, *Great Power Politics: The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 12 (2009) (arguing that States should not continue to recognize other States if "such recognition would perpetuate a breach of international law").

349. This qualification of the principle of non-intervention could also be viewed as qualifying the requirement of consent. This would allow the international community to enter weak or failed States without first obtaining the consent of the home government. See generally *supra* Part II.A.2 for a discussion of the principle of non-intervention.

350. GIORGETTI, *supra* note 5, at 69 (arguing that allow the international community to temporarily perform the obligations of a failed State would take the reality of a world with weak and failing States into consideration).

351. *See generally* Sterio, *supra* note 13, at 156.

352. GIORGETTI, *supra* note 5, at 188.

353. Sterio, *supra* note 13, at 156.

354. *Id.*

international legal perspective as constituting a collective threat to the security of all States.[355] More specifically, when weak and failing States are regarded as collective security threats to the international community, Chapter VII of the U.N. Charter invests the Security Council with the legal authority to take coercive actions within these countries.[356] Thus, reconceptualizing weak and failing nations in this manner provides a legal ground for temporary breaches of sovereignty in the name of international peace and security.

The concept of reframing the problem of weak or failing States as collective security threats is not unrealistic. In fact, this premise was used in 2008 when the U.N. Security Council used its Chapter VII authority to breach the sovereignty of Somalia by authorizing certain States to enter Somali waters to combat acts of piracy.[357] This unusual use of Chapter VII was primarily instigated by the shared threat that piracy posed to the international community generally and Somalia's total lack of competent governance to deal with the issue.[358] The Security Council's actions in this incident further support the notion that weak or failing States should be viewed as collective threats to the peace and stability of the international community so that the Security Council has a legal basis upon which to invoke its Chapter VII powers.[359]

The qualification of sovereignty must be further complemented by a redefinition of how the international community grants sovereign recognition in the post-colonial context. In this light, Kosovo's experience is useful in defining several factors that promote the recognition of territories seeking independence. Because the factual context of the Kosovo conflict strongly influenced the legal reasoning of the ICJ opinion,[360] certain principles from this conflict can be highlighted to guide the international community when deciding whether to grant an autonomous entity international sovereign recognition.[361] First, the international community should consider whether there have been grave breaches of international law by the domestic government, including violations of human rights or severe humanitarian conflicts perpetuated by the mother State.[362] Second, the international community should consider whether the process initiated to

355. *See generally* U.N. Charter art. 39 (premising the use of force by the Security Council "for the maintenance of international peace and security").

356. *Id.* The U.N. Charter grants the Security Council the right to determine whether "any threat to the peace, breach of the peace, or act of aggression" exists. *Id.* The Security Council then must "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.*

357. S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

358. *See generally* GIORGETTI, *supra* note 5, at 32.

359. U.N. Charter art. 39.

360. *See* Kosovo Advisory Opinion, *supra* note 6, ¶ 57 ("The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption.").

361. *See generally* Vidmar, *supra* note 43, at 839 (listing factors in support of Kosovo's right to self-determination and independence).

362. *See id.* at 839 (explaining previous breaches of human rights and the grave humanitarian situation "softened Serbia's claim to territorial integrity").

determine the final status of the autonomous region is indefinitely deadlocked or has failed.[363] Third, it should be determined if legal instruments, such as Security Council resolutions and general international law, do not prevent secession.[364] The ICJ advisory opinion on Kosovo is thus pertinent as this decision's holding can be invoked as legal support for the international legal validity of other unilateral declarations of independence.[365]

Moreover, as mentioned previously, the international community's understanding of sovereignty must also be changed by redefining the relationship between statehood and secession.[366] Although the concepts of statehood and secession have traditionally been viewed as contradictory, these concepts must be re-understood as compatible in certain scenarios, particularly where the internal functioning of a State is compromised due to secessionist movements and extensively protracted conflict.[367] This argument posits that preservation of sovereign statehood is sometimes maintained by the allowance of secession. In this manner, sovereignty and secession are compatible. The ICJ advisory opinion on Kosovo becomes particularly relevant in this respect, as the opinion, along with other significant legal documents, forward the notion that secession may be complementary to the idea of statehood in certain exceptionable circumstances.[368] These exceptional circumstances include weak or failing States, like Somalia, which were arbitrarily unified into a single nation from independence and have never been able to form a cohesive national identity.[369]

IV. CONCLUSION

Sovereignty is a completely artificial creation of former European powers.[370] It is a tool that was created and continues to entrench the power of former European colonizers while also providing a mechanism by which to incorporate non-European States into the Westphalian system.[371] Moreover, the modern State

363. *See id.* at 838 (explaining Kosovo's right to secession only became legitimate "after the political process failed").

364. *See id.* at 839-40 (explaining Resolution 1244 was interpreted as a legal instrument which does not prevent secession).

365. *See generally* Kosovo Advisory Opinion, *supra* note 6, ¶ 122.

366. See *supra* notes 345-46 and accompanying text for a discussion of how statehood and secession may be seen as complementary in some scenarios.

367. *Id.*

368. See *supra* notes 320-25 and accompanying text for a discussion of how the ICJ advisory opinion on Kosovo and various other legal documents pertaining to Kosovo's final status determination forward the idea that secession may be the only viable solution to ensure the continued existence of the Serbian State. *See generally* Röben, *supra* note 38, at 1085 ("In modern international law, sovereignty is complemented by self-determination.").

369. See *supra* notes 296-298 for a discussion of Somalia's arbitrary unification and inability to form a unified identity as a single Somali nation.

370. Anghie, *supra* note 1, at 70 ("This artificially created sovereignty reflected the interests and world view of Europe, and it emerged and is inextricably linked with the exploitation and domination of non-European peoples.").

371. *Id.* ("[T]he extension and universalization of the European experience, which is achieved by transmuting it into the major theoretical problem of the discipline, has the effect of

is a relatively new conception of how to order social, economic, and political relations.[372] The "State" is therefore a very arbitrary way of conceptualizing the existence of many developing countries.[373] Thus, it is apparent why weak and failing States emerge and persist—many such countries have never conceived of themselves as cohesive units with shared identities of nationhood, let alone as unified "States."[374] Consequently, many currently sovereign nations face strong intra-State tensions along with having weak and ineffective central governments—factors that have led and continue to lead to grave humanitarian crises.[375]

Somaliland's experience highlights an important nuance to which the current understanding of sovereignty is not sensitive. Sovereignty, as we understand it today, fails to distinguish adequately between the internal functioning of a State and its external recognition as an independent and sovereign nation in the international system.[376] This problematic oversight is a main factor allowing weak States, like Somalia, to persist. In this sense, sovereignty allows for the creation of the "juridical state," a State granted sovereignty solely due to its territorial integrity (European designated borders) and international recognition of independence (sovereignty).[377] Yet, this understanding of the State problematically overlooks the internal functioning of the country and allows internally weak States to persist (i.e. remain internationally recognized) despite the chaos that may be occurring within their borders. The international community must instead recognize that this mode of thinking arose from an era in which *inter*-State conflict was the principal form of conflict. Today, with the predominance of *intra*-State conflict, this mode of thinking is outdated and thus inapplicable to internally conflict-prone nations like Somalia or to autonomous regions like Kosovo that have emerged unified out of destabilized and conflict-prone States.

The current understanding of sovereignty is too rigid and perpetuates conflict in many weak and failing States[378] and also suppresses the term's Eurocentric history.[379] Not only are the legal elements of sovereignty not altered by weak or failing States, there are currently no viable legal mechanisms to alter the status of

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suppressing and subordinating other histories of international law. . . .").

372. BRADBURY, *supra* note 161, at 243.

373. *See generally* Anghie, *supra* note 1, at 43-44 ("The sovereignty acquired by the non-European state . . . was tenuously connected with its own identity.").

374. *See generally id.* at 35-37.

375. *Id.*

376. *See* Williams, *supra* note 148, at 563 ("[S]tate sovereignty as it emerged as a concept and a set of practices along side the consolidation of the European state system did not refer to much which governments and rulers might do within their states but instead largely concerned to regulate conduct between states."). *See generally* Anghie, *supra* note 1, at 66 ("Recognition does not so much resolve the problem of determining the status of unknown entities as obscure the history of the process by which this decision-making framework came into being.").

377. Jackson & Rosberg, *supra* note 23, at 12.

378. *See supra* Part III.A-C.

379. See *supra* Part III.A for a discussion of the Eurocentric origins of sovereignty.

sovereignty once it is granted.[380] It is for this reason that the current notion of sovereignty perpetuates conflict in weak and failing States.[381] However, the ICJ's advisory opinion on the unilateral declaration of independence of Kosovo is an important step forward as it provides several legal bases upon which secessionist movements may rely towards establishing their independence.[382] Moreover, this Article posits several means by which the legal concept of sovereignty must be redefined so as to aid, rather than instigate, conflict in developing nations.[383]

It is time to move beyond the current understanding of sovereignty and statehood in the international system to allow new conceptions of State legitimacy and recognition.[384] The international community must move towards an understanding of States that better reflects current realities. Somalia's organic and legitimate sovereignty, independently established and fostered from the grass-roots level, is emblematic of the changing notions of what it means to be a nation-state today. In the greater task of developing and strengthening weak States globally, it is imperative that our international society seek to amend these contradictions in international thought, and devise more creative and novel solutions towards ameliorating conflict in weak States. Moreover, the concepts of sovereignty and statehood must be expanded to allow for divergent forms of State creation and national reconciliation to exist in an effort to promote a more stable world order.

380. See *supra* Part III.B for an analysis of the various reasons that make sovereignty a problematic conception of statehood today.

381. *See supra* Part III.C.

382. *See supra* Part III.D.1.

383. *See supra* Part III.D.2

384. *See generally* BRADBURY, *supra* note 161, at 245 ("If Somalia is to emerge from its political crisis and aid strategies are to be effective, greater diplomatic creativity and international acceptance of alternative formulations of state governance may prove necessary.").