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Returning Sovereignty to the People

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By Hallie Ludsin

Abstract:

Governments across the world regularly invoke sovereignty to demand that the international community “mind its own business” while they commit human rights abuses. They proclaim that the sovereign right to be free from international intervention in domestic affairs permits them unfettered discretion within their territory. This Article seeks to challenge such proclamations by resort to sovereignty in the people, a time-honored principle that is typically more rhetorical than substantive. Relying on classical interpretations of sovereignty, this Article infuses substance into the concept of sovereignty in the people to recognize that a government is entitled to sovereign rights only as the legitimate representative of the people and as long as it fulfills its duties to them. The Article examines these conditions that must be met for a government to claim sovereign rights as well as how and by whom access to these rights should be determined. Taken to its logical conclusion, sovereignty in the people establishes that (1) sovereign rights can be lost when governments commit less than the most egregious human rights abuses, which differentiates this from Responsibility to Protect, and (2) any form of government is at risk of losing these rights, including democracies - two notions that are likely to be highly contentious. The Article relies on examples from Libya, Afghanistan, Sri Lanka, India and France to illustrate its points.

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Governments often invoke a claim of sovereignty to avoid international scrutiny of their human rights abuses. They angrily denounce conditions on international relations intended to influence them to stop their violations as a breach of sovereignty. Rather than change their behavior, they proclaim that their sovereignty serves as an impenetrable barrier permitting them unfettered discretion within their territory. Most credible institutions, politicians, academics and policymakers do not believe that sovereignty leads to such unregulated discretion, yet these proclamations serve as strong rhetoric that other than in the most egregious cases, the international community should “mind its own business.” This Article seeks to challenge this rhetoric by resort to a different type of sovereignty - sovereignty in the people.

Constitutions throughout the world declare that sovereignty lies with the people, yet the declaration grants no real rights and does nothing to check the power of
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governments to control, rather than represent, the people. Infused with substance, however, “sovereignty in the people” could be a powerful tool to promote accountability and minority rights. Taken to its logical conclusion, the concept establishes that (1) sovereign authority can be lost other than when governments commit the most egregious human rights abuses and (2) any form of government is at risk of losing this authority, including democracies - two notions that are likely to be highly contentious.¹

Part I of this Article provides the background necessary for understanding the meaning of sovereignty. It examines sovereignty as a mechanism for organizing domestic and international politics to protect and enhance the security and common good of the people and considers the challenges to and development of the concept. Relying on classical interpretations of sovereignty and its historical development, Part II articulates a substance-infused concept of sovereignty in the people that identifies the people as the true sovereign and recognizes that the government is entitled to exercise the rights of sovereignty only as the representative of the people. In addition to describing the theory, Part II examines how the international community’s response to Libya’s Arab

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Spring, particularly the lead up to United Nations Security Council Resolutions 1970 and 1973, lends nascent support to the content-infused concept of “sovereignty in the people” advocated here.

Throughout Parts I and II, this Article assumes “the people” constitute a united and homogenous political community within a territory of a state. Part III challenges this assumption by examining who comprises the people and how their will and common good should be determined in heterogeneous societies. It relies on examples from Afghanistan, Sri Lanka, India and France to show how “the people” and democracies can run afoul of the requirements for receiving sovereign rights.

Importantly, this Article’s conception of sovereignty in the people does not change the overall structure of international intervention in the affairs of states. Rather, it justifies current practice in response to human rights atrocities that trigger the Responsibility to Protect, while providing a coherent conceptual framework for countering the “mind your own business” attitudes of governments committing less than the most egregious human rights violations.

I. Understanding Sovereignty

One of the most difficult aspects of a discussion about sovereignty is defining the term. The difficulty lies in the fact that the concept has been evolving over hundreds of years and has been appropriated at different times for purposes not necessarily consistent with current usage. The term has been used, for example, to claim unlimited control

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2 See e.g. Frédéric Gilles Sourgens, Positivism, Humanism, And Hegemony: Sovereignty And Security For Our Time, 25 PENN ST. INT’L L. REV. 433, 434 (2006) (“Conceptions of sovereignty were the functional answer to the political power struggles of their day.”); Louis Henkin, That "S" Word: Sovereignty, and Globalization, And Human Rights, Et Cetera, 68 FORDHAM L. REV. 1, 1 (1999)(“ The meaning of "sovereignty" is confused and its uses are various.”); Michael J. Kelly, Pulling At the Threads of
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over a territory and people; to describe the independence of a country; to proclaim the self-determination of a people; to describe the legitimacy of a government; to express recognition of a state, and to claim government competencies. As one scholar explains, “Because the idea of sovereignty has evolved profoundly over history, it is surely quixotic to search for a definition that captures every usage since the thirteenth century.”

Instead of trying to define the term, this Article examines sovereignty as a mechanism for organizing domestic and international politics to protect and enhance the security and common good of the individuals who form a political community. The concept of sovereignty developed to avoid the chaos and violence of individuals asserting their interests often at the expense of others and violently. As is discussed more thoroughly in Part II(A) below, these individuals united as a political community to create a sovereign representative capable of organizing the interests and needs of a population to avoid the violence. The international rules of sovereignty developed for much the same reason – to prevent a disorganized international system from permitting leaders or rulers to promote their interests by attacking territory under the control of another authority. Examining sovereignty as a set of organizational rules is consistent with its conceptual development.

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, 369 (2005)(“Sovereignty” is a fluid concept. It is also an evolutionary concept, expanding and contracting over time, depending to a large extent on the meaning with which powerful states allow it to be infused.”).

3 Nagan, FRSA and Hammer, supra note 3, at 143-145.


5 This framework builds on the description of sovereignty provided by Kathleen Claussen & Timothy Nichol who limit sovereignty to the role of organizing international politics. See Kathleen Claussen & Timothy Nichol, Reconstructing Sovereignty: The Impact of Norms, Practices and Rhetoric, 10 BOLOGNA CENTRE J INTL AFFAIRS (2007).

6 See Part II(A) below.

7 See Part I(A) below.
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Four rules of international law are associated with a claim of sovereignty, which in international politics belongs only to states. States rely on these rules as their defensive shield against interference in their domestic politics, including to avoid criticism for their human rights abuses. The rules protect two different types of sovereignty - internal and external. Internal sovereignty permits the sovereign authority, conceived of as the government, to act freely within the territory of its state. Under the first rule of sovereignty, any actions or activities that do not cross state borders fall within the state’s exclusive jurisdiction. External sovereignty, which is protected by the second rule, prohibits the interference of one state in the matters of another sovereign state that threatens its territory or the integrity of the state. It “assert[s] that there is no final and absolute authority above and beyond the sovereign state.” External sovereignty forbids cross-border attacks, considering it interference with the integrity of that state.

External sovereignty also is the basis for the third and fourth rules of sovereignty. It demands a right to sovereign equality between states, since no country can claim supremacy over or use its power against another under international law. It also establishes the rule that a state must consent to be bound by international legal obligations, since no other body or government has authority to bind it. These rules of international law pertaining to sovereignty are viewed as the rights of sovereignty for

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8 There are a variety of efforts to recast sovereignty outside of the framework of the nation-state. See e.g. Recent Publications, 32 YALE J. INT’L L. 275, 278 (2007); Bruce Zagaris, Developments In The Institutional Architecture And Framework Of International Criminal And Enforcement Cooperation In The Western Hemisphere, 37 U. MIAMI INTER-AM. L. REV. 421, 514-515 (2006); Oscar Schacter, The Decline of the Nation-State and Its Implications for International Law, 36 COLUM. J. TRANSNAT’L L. 7, 18 (1997).
10 Sourgens, supra note 2, at 448.
purposes of this Article as they speak to protecting one state from the actions of another through law.

Under international law, a political community is granted the rights of sovereignty only once it achieves international recognition as a state.\(^{14}\) It can achieve such recognition only if it meets the four criteria for statehood. Statehood requires: (1) a territory with definable borders; (2) a cohesive political community within the territory;\(^{15}\) (3) political leadership that has control over the territory;\(^{16}\) and (4) leadership capable of conducting international relations.\(^{17}\) Once a territory achieves statehood, only in the rarest of circumstances can it be lost.\(^{18}\)

As Section A describes, traditionally the government was considered the sovereign that benefited from sovereign rights. Challenges to traditional notions of sovereignty and to the identity of the sovereign, however, make achievement of statehood an insufficient criterion for determining when and to whom sovereign rights accrue. The remainder of Part I describes these challenges, which provides the context for Part II’s explanation of the meaning of sovereignty in the people and for determining when a government achieves sovereign authority and can claim sovereign rights.

**A. Challenges to Traditional Notions of Sovereignty**


\(^{16}\) Jackson, supra note 12 at 786; Cohan, supra note 15 at 920. One important aspect of that control is that the government must hold a monopoly over the use of force, meaning that the population within the territory recognizes that the government is responsible for policing the territory and its borders. Jackson, supra note 12 at 786.


\(^{18}\) Cohan, supra note 15 at 930.
The traditional concept of sovereignty is that the state is sovereign and the rights of sovereignty belong to it, acting through its government, and are absolute. It derives from the Treaty of Westphalia signed in 1648 to end a 30 year war that devastated much of continental Europe. European rulers sought to establish international peace by creating boundaries for state power vis-à-vis another state. The traditional concept contains no requirement that the government be legitimate in the eyes of the people or conform to human rights standards. Nor is the form of government relevant to determining sovereignty. Whoever has the power to control the population, territory and borders, has the right to claim sovereignty and sovereign rights.

At least initially, the advent of the United Nations did little to change this traditional concept of sovereignty. The purpose of the UN is identical to the purpose of the Treaty of Westphalia – to avoid war by organizing the international community. Article 2 of the Charter enshrines three of the rules of Westphalian sovereignty:

The Organization and its Members . . . shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members . . .

2. 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.

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19 Kelly, supra note 2, at 370.
20 See .e.g. Id. at 374. But see, Stephen Carley, Note, Limping Toward Elysium; Impediments Created by the Myth of Westphalia on Humanitarian Intervention in the International Legal System, 41 CONN. L. REV. 1741, 1743 (2009).
21 See .e.g. Kelly, supra note 2, at 374. Prior to the Treaty of Westphalia, sovereignty was in the ruler, most likely to be a king arguing a divine right to rule. Id. at 374. The Treaty is considered “the point of marriage between sovereignty and state, simultaneously birthing the modern system of states in international law.” Id.
23 Held, supra note 9 at 163.
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3. 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.

The United Nations requires membership before any country can bind itself by the Charter, maintaining a consent-based system to international law. The UN Charter does provide for one key limitation to sovereignty. The remaining text of Article 2(7) permits international intervention in the affairs of a sovereign state when there is “any threat to the peace, breach of the peace, or act of aggression” that threatens international peace and security. If a state defies the rules of sovereignty, then it loses its sovereign rights.

Developments over the last half century, however, have led many to challenge traditional notions of sovereignty, some going so far as to proclaim them obsolete. These developments typically fall within three categories: (1) global interdependence; (2) continuing strife; and (3) human rights/humanitarian concerns. The global interdependence category captures challenges to traditional notions of sovereignty related to the growth of international law and the increasing influence of globalization on international relations. As Chayes and Handler Chayes describe, “modern states are bound in a tightly woven fabric of international agreements, organizations and institutions that shape their relations with each other and penetrate deeply into their internal economics and politics.” States increasingly have been ceding aspects of their sovereignty to international organizations, such as the United Nations and the World Trade Organization, and to regional bodies such as the Organization for African Unity

25 Id. at Art. 2(7).
26 Sourgens, supra note 2, at 433-434; Sohail H. Hashmi, Introduction, 1 in Hashmi, supra note 4.
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and the European Union. According to the treaties establishing these bodies, member states commit themselves to abide by rules established by the outside authority. These organizations essentially serve as a superior authority over states in agreed to matters.

While membership in these international and regional governmental bodies remains consent-based, the international community of states also recognizes the existence of customary and jus cogens norms of international law that restrain government behavior regardless of express consent. The concept of customary international law developed before the creation of the United Nations, dating back at least as far as 1847. Customary law is determined by “a general and consistent practice of States followed by them out of a sense of legal obligation, or opinio juris.” It serves as a limit on state sovereignty, but arguably maintains the element of consent since it is based on state practice.

The increasing interdependence of the international community of states through international governmental organizations and international law has led many to argue that sovereignty no longer exists in its traditional sense:

[W]here the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense. The new sovereignty is status, membership, "connection to the rest of the world and the political ability to be an actor within it.”

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28 Cohan, supra note 15 at 909.
32 Persistent objectors to customary law, however, are not bound by its rules unless they qualify as jus cogens norms. Major Alex G. Peterson, Order Out Of Chaos: Domestic Enforcement Of The Law Of Internal Armed Conflict, 171 MIL. L. REV. 1, 8 (2002).
33 Cohan, supra note 15 at 939.
The counterargument is simply that these international networks and laws follow the existing rules of sovereignty by retaining the requirement of consent to be bound, even if only implied. Until international organizations, institutions and laws are treated as a superior authority to states without the need for consent, traditional notions of sovereignty remain largely intact.

Globalization also strongly challenges traditional notions of sovereignty in large part because states are finding it difficult to control the flow of information, resources and even problems across their borders. Globalization has been “defined as the intensification of world-wide social relations, which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.”

The internet, international companies, and cheaper and more efficient travel and transport, among many other factors, link different parts of the globe with each other; they offer increased financial opportunities, cultural exchanges and often cheaper production of goods. Globalization also is perceived as threatening as the increased social connections have spread once localized diseases; have created international terrorist networks; and, for some, permitted Western “cultural domination” of local cultures. A positive or a negative depending on the commentator, globalization is seen as a factor weakening traditional notions of sovereignty: “globalization, with the concomitant advance of information technology and international commerce, is pushing

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34 Meenakshi Gigi Durham and Douglas Kellner, MEDIA AND CULTURAL STUDIES: KEYWORKS, p. 661(quoting Anthony Giddens 1990 p. 64). See also, Richard N. Haass, Sovereignty: Existing Rights, Evolving Responsibilities, Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University (2003)( defining globalization as “the sum total of connections and interactions – political, economic, social, and cultural – that compress distance and increase the permeability of traditional boundaries to the rapid flow of goods, capital, people, ideas, and information.”).
35 See e.g. Haas, supra note 34; Cohan, supra note 15 at 910.
36 Simonovic, supra note 13 at 386.
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toward a borderless world, which makes it impossible for states to operate unfettered powers of sovereignty.”

Globalization also makes it easier to justify intervention by one state in the affairs of another as more and more seemingly domestic actions have a global impact. Information about the internal affairs of a state is broadcast globally and often immediately. International outrage can serve as a check on governmental behavior locally. In rare instances of particularly egregious human rights violations, now publicized, the international community may even be required to act to protect a population under the doctrine of Responsibility to Protect, a point that will be picked up shortly.

In other instances, globalization unites diverse states behind common causes. States are willing to concede some sovereignty to address challenges and dangers that affect more than one country or that shrink the boundaries between them. For example, poor environmental practices in a state that increase air and water pollution are likely to affect neighboring states, making domestic actions a matter of international concern. Once sovereign activities can now be reviewed by neighboring countries as their impact is no longer perceived as purely domestic. International terrorism and crime have the same effect.

Continuing strife, largely internal, offers the next set of challenges to traditional notions of sovereignty. The phenomena of weak states, wars and terrorism strongly affect a state’s claim of sovereignty. Weak states are seemingly sovereign states that lose

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37 Cohan, supra note 15 at 910.  
38 Jackson, supra note 12 at 789.  
39 Cohan, supra note 15 at 955.
control over some or all of its population or territory, two elements necessary for claiming statehood. As Cohan explains:

A state may have sovereignty in the legal sense of having control over its borders and of being recognized in international relations, but may be unable to control its domestic affairs due to erosion of political support from within, due to civil war, insurrection, secessionist movements, or corruption. If things get bad enough, as where the sovereign wages an unjust or illegal war, international respect for that state's sovereignty could deteriorate, and other states may find it necessary to intervene, either militarily or in less drastic ways, and thereby usurp the autonomy that characterizes traditional sovereignty.  

Globalization makes it impossible for continuing strife, even internal strife, to be hidden from the rest of the world and for other states to turn a blind eye. Terrorism has a similar consequence as the damage to human life or attacks that cross borders provide incentive for other states to intervene.

The final category of challenges to traditional notions of sovereignty – human rights/humanitarian concerns - is closely linked to challenges caused by continuing strife. Increasingly, the international community of states is recognizing the importance of human rights and is unwilling to simply watch as they are violated. As Henkin explains: “By state consent, by the growth of systematic 'customary' (non-conventional) norms, international law developed a comprehensive law of individual human rights holding states responsible for how they treated persons subject to their jurisdiction.”

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40 Cohan, supra note 15 at 909.
42 See e.g. Stacy, supra note 22 at 2030.
States are now expected to live up to “universal” standards and norms, many of which are “codified” in human rights treaties, or face the possibility of intervention. The shift favoring intervention over sovereignty claims resulted in large part from atrocities and genocide committed in the 1990s, atrocities that spurred then Secretary-General of the United Nations, Kofi Annan, to ask “If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violations of human rights . . . ?”

Canada responded to Annan’s question by establishing the International Commission on Intervention and State Sovereignty (ICISS) to re-examine sovereignty in light of human rights and humanitarian concerns. The ICISS developed the doctrine of the Responsibility to Protect, which was adopted unanimously by the member states of the United Nations at the 2005 World Summit. Responsibility to Protect places a duty on national governments to protect their citizens from genocide, war crimes, crimes

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44 See e.g. Hashmi, supra note 26, at 3; Kelly, supra note 2.
46 Cohan, supra note 15 at 954.
47 *Responsibility to Protect*, DISCUSSION GUIDE, Lessons from Rwanda: The United Nations and the Prevention of Genocide
49 DISCUSSION GUIDE, supra note 47.
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against humanity and ethnic cleansing. Protection includes an obligation to prevent these atrocities, stop them if they occur and then rebuild the effected society. If national governments fail in their duties, the international community then has a responsibility to intervene on behalf of the population. The doctrine is particularly important in that it does not simply permit intervention in those circumstances, but requires it. It authoritatively alters traditional notions of sovereignty, albeit through the consent of member states. Development of notions of sovereignty to accommodate the human rights and humanitarian challenges are particularly relevant to determining the meaning of sovereignty in the people and is discussed more fully below.

There is little question that the rights of sovereignty are narrowing. Each of the challenges described above is changing the contours of sovereign rights, making it more difficult for governments to hide bad behavior behind a shield of sovereignty. As a former Secretary-General of the United Nations explained, “[t]he time of absolute and exclusive sovereignty . . . has passed; its theory was never matched by reality.”

For some, these changes suggest the doctrine of sovereignty is unnecessary, irrelevant or obsolete. These views ignore some of the practical benefits of sovereignty, which include that sovereignty rules and the rights they create retain order and stability within the international community. Sovereignty also provides an outlet for self-

52 Id.
53 Id.
54 Jackson, supra note 12 at 787(quoting Boutros Boutros-Ghali’s An Agenda For Peace-Preventive Diplomacy, Peacemaking, And Peace-Keeping, Report Of The Secretary-General, UN Doc. A/47/277-S/24111, para. 17 (1992)).
55 See e.g. Claussen and Nichol, supra note 5.
56 Haass, supra note 34(“Sovereignty . . . has fostered world order by establishing legal protections against external intervention and by offering a diplomatic foundation for the negotiation of international treaties,
determination, particularly for populations that suffer under foreign domination. Most importantly, however, claims that sovereignty is unnecessary, irrelevant or obsolete overlook the fact that pragmatically it remains the foundation of the international legal system.

**B. Re-conceiving Sovereignty**

Reflecting these numerous challenges to sovereignty and the narrowing of the concept, new definitions of and nuances to sovereignty have been proposed. The literature is rife with new ways to describe sovereignty, attaching words that modify or limit sovereignty to reflect apparent changes to the traditional doctrine. Claussen and Nichol provide a helpful framework for understanding the new definitions or re-conceptions of sovereignty. They divide the modifying or limiting terms into three categories of “qualifiers”: (1) collectivity qualifiers, (2) divisibility qualifiers and (3) contingency qualifiers.

Collectivity qualifiers such as “pooled” or “collective” cover new conceptions of sovereignty based on the growing number of regional and international governmental organizations to which states cede aspects of their sovereignty. These qualifiers recognize that the state is not always supreme within the international community, although the system of supranational organizations remains consent-based. They respond to the challenges to sovereignty created by global interdependence.

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the formation of international organizations, and the development of international law.”); *Responsibility To Protect*, supra note 41 at 2.7.
57 Id. at 1.32.
58 See e.g. Hashmi, supra note 26, at 1.
59 Claussen and Nichol, supra note 5.
60 Id.
Divisibility qualifiers separate out the different functions of sovereignty to permit allocation of parts of sovereignty to state or non-state actors that together create full sovereignty.61 These qualifiers include: “disaggregated sovereignty, late sovereignty, earned sovereignty, imperial sovereignty, pluralistic sovereignty, constrained sovereignty, phased sovereignty, limited sovereignty and partial sovereignty.”62 They serve a similar function to collectivity qualifiers; they highlight that the state rarely retains full sovereignty in the traditional sense but rather that aspects of sovereignty devolve to others through consent63 or, at times, by force.64 These qualifiers reflect challenges to sovereignty from global interdependence, continuing strife, and human rights/humanitarian concerns.

The last category, contingency qualifiers, reflects the belief that states must meet certain conditions before they can claim sovereignty, in addition to the four requirements for statehood described above.65 Examples of contingency qualifiers include contingent sovereignty, conditional sovereignty and relational sovereignty. The types of conditions placed on sovereignty vary by theorist and range from requiring a democratic form of government to abiding by the United Nations human rights obligations.66 At a minimum, they require states to meet certain human rights and humanitarian law requirements or be stripped of sovereign rights.67

Missing from the Claussen and Nichols categories are qualifiers that reflect a change in understanding over the identity of the sovereign. Historically, sovereignty

61 Id.
62 Id.
63 For example, a state may cede part of its sovereignty to an international or regional organization.
64 Claussen and Nichol, supra note 5.
65 Id.
66 See e.g. Commentary By Experts, 4 Nw. U. J. Int'l Hum. Rts. 39 (2005); Stacy, supra note 22 (described as relational sovereignty)
67 Claussen and Nichol, supra note 5.
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rested with a religious or clan leader or a monarchical figure, whereas now there is an expectation that the people are the true sovereigns. In the past, the leader or ruler was seen as the source of law and therefore above it, whereas currently the people are the source of law and the government limited by that law. Identity qualifier terms such as “popular sovereignty” and “democratic sovereignty” exemplify this change, reflecting the belief that the state represents the people rather than serves as the sovereign. These qualifiers indicate the shift in focus in international law from solely protecting the interests of states to recognition of the importance of human rights regardless of state boundaries.

While the thesis of this Article does not rely on attaching particular words to the term sovereignty to limit or modify its meaning, two of the categories described above play an important role in understanding the meaning of sovereignty in the people. As the next section examines in depth, the principles underlying identity and contingency qualifiers are closely linked and together explain why governments cannot simply employ sovereignty to avoid intervention into their domestic behavior.

68 Kelly, supra note 2, at 364; Simonovic, supra note 13 at 384.
69 Simonovic, supra note 13 at 384.
70 Cohan, supra note 15 at 908-909.
71 Popular sovereignty does not require a particular form of government to serve as a representative of the people. See e.g. Mills, supra note 11 at 42. Democratic sovereignty presumes that “the state itself . . . [is] the democratic expression of the political community.” Kenneth Anderson, Squaring The Circle?
72 This becomes apparent in international law through concepts such as universal jurisdiction and responsibility to protect. Universal jurisdiction allows any state to prosecute a political leader who has committed crimes against humanity and/or war crimes against his/her constituency. Universal jurisdiction does not require a jurisdictional connection to the prosecuting country and has no regard for the sovereignty of the state or any sovereign rights that accrue to the political leadership. Responsibility to Protect also effectively lands on the side of the people as the sovereign as it ignores any claim to sovereignty by a government committing mass atrocities. If the political leadership were the true sovereign, such intervention would be a violation of sovereignty and illegal under international law.
II. **Sovereignty in the People**

Governments that use sovereignty to hide from criticism and to prevent international intervention\(^{73}\) to stop human rights abuses wrongly assume that they are the sovereigns entitled to the rights of sovereignty and that these rights are absolute. Relying on the justifications for contingency and identity qualifiers, Part II challenges this assumption by giving content to the concept of “sovereignty in the people.” Section A identifies the people as the sovereign and the government as their representative. Under this formulation, the government’s access to sovereign rights is not inherent, but instead is contingent on its fulfilling its duties as representative of the sovereign. Section B describes the duties that must be fulfilled before a government can claim sovereign rights on behalf of the people. Section C then tackles what happens when governments fail to respect the identity of the sovereign and meet those conditions. Who determines whether a government is meeting its duties is addressed in Part D. Part II concludes in Section E with a description of how the lead up to international support for the rebellion in Libya during the Arab Spring lends nascent support to the concept of sovereignty in the people proposed here.

**A. Identifying the Sovereign**

The phrase “sovereignty in the people” captures the true identity of the sovereign in whom the rights of sovereignty are vested. While traditionally the state was treated as the sovereign, or the government acting on its behalf, domestic and international law

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\(^{73}\) As explained in Part II(C), intervention refers to any measure used to encourage or coerce a government to change its policies. Intervention covers non-military measures such as censure, conditions on aid, trade and diplomatic relations, and political and economic sanctions. It also covers military intervention as well as those that violate territorial integrity including, dropping unwanted food and other supplies in a devastated areas, providing funding and other support to opposition or armed groups, as well as conducting military activities within the territory of another state.
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supports the shift of sovereignty to the people. From the most liberal democracies to the most autocratic of states, most constitutions proclaim that the people are sovereign.\textsuperscript{74} The concept often appears in the titles of states, such as “The People’s Republic of” or in provisions expressly stating that sovereignty lies in the people.

Sovereignty in the people also likely forms part of customary international law. The Universal Declaration of Human Rights (UDHR) states in Article 21(3) that: “The will of the people shall be the basis of the authority of government.”\textsuperscript{75} As a declaration, the UDHR is non-binding; however, many academics and practitioners believe that its provisions are customary international law.\textsuperscript{76} To the extent this assertion is true, all governments then must abide by sovereignty in the people regardless of whether their domestic law or constitutions expressly adopt the concept.

Sovereignty in the people also receives support as a principle of customary international law to the extent sovereignty is treated as synonymous with self-determination,\textsuperscript{77} which is an accepted principle of customary international law.\textsuperscript{78} At its

\begin{itemize}
\item \textsuperscript{76} Mills, supra note 11 at 39. But see, Hurst Hannum, \textit{The Status Of The Universal Declaration Of Human Rights In National And International Law}, 25 GA. J. INT’L & COMP. L. 287, 348 (1995/1996)(“ Despite the arguments of some that a “right to democracy” may be emerging as a norm of international customary law, it is apparent that many states have not accepted article 21’s guarantee of the right to participate in the political life of one’s country.”).
\end{itemize}
most basic, self-determination is the right to govern oneself;\textsuperscript{79} sovereignty in the people then would grant “the people” the right to govern themselves. More broadly, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights define self-determination as the right of peoples to “freely determine their political status and freely pursue their economic, social and cultural development.”\textsuperscript{80}

If the people are sovereign, then the benefits of sovereignty belong to them. The people then can choose how to exercise that sovereignty. In practice, they transfer their rights as sovereign to representatives that serve as the government.\textsuperscript{81} The government then conducts the state’s domestic and international affairs as the people’s representatives and receives the benefits of sovereignty as such.\textsuperscript{82} Governments, however, are not inherently deserving of the rights and protections of sovereignty; rather, they receive them only if the people choose to grant them. Governments then must act based on the will and common good of their constituencies. Any government that controls the state against the wishes of the people does not receive sovereign authority. It may have the

\textsuperscript{79} Joy M. Purcell, \textit{A Right To Leave, But Nowhere To Go: Reconciling An Emigrant's Right To Leave With The Sovereign's Right To Exclude}, 39 U. MIAMI INTER-AM. L. REV. 177, 182 (2007).

\textsuperscript{80} International Covenant on Economic, Social and Cultural Rights, (1966) Art. 1; International Covenant on Civil and Political Rights (ICCPR), (1966) Art. 1. These provisions typically spark the debate over who constitutes a “people”. There seems to be at least a general assumption that the individuals that form a majority of a particular political community within a state are a “people” deserving of self-determination. The debates, thus, usually centers on which minority communities are entitled to a degree of political autonomy from the majority group.

\textsuperscript{81} This stands in direct contrast to the notion of the State as the sovereign or of the government as the representative of the State.

\textsuperscript{82} W. Michael Reisman, Editorial Comment, \textit{Sovereignty And Human Rights In Contemporary International Law}, 84 AM. J. INT’L L. 866, 867 (1990)(“ Political legitimacy henceforth was to derive from popular support; governmental authority was based on the consent of the people in the territory in which a government purported to exercise power. At first only for those states in the vanguard of modern politics, later for more and more states, the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty.”)
power to enforce its will against the people, but the illegitimate government is not entitled to sovereign rights.

The theoretical underpinnings of this understanding of “sovereignty in the people” derive from centuries-old thinkers such as John Locke and Jean-Jacques Rousseau. Locke theorized about sovereignty in the people or popular sovereignty in his Second Treatise of Civil Government (1690). He starts by describing the formation of a political community to counter the violence that can occur when individuals pursue their interests without regard for others and without a superior body to protect them. To protect against such chaos, individuals consent to a social contract in which they agree to follow the laws of a government that will act based on the common good of the community. Each individual agrees to turn over his/her natural rights as an individual to a government to better protect his/her interests. The majority of the political community determines the common good the government protects.

Locke expected the government, now holding sovereign authority, to regulate relationships between individuals and protect their property rights– that of life, liberty and property. He describes these as natural rights that transcend claims of sovereignty. The government is not permitted to deprive individuals of any of these rights; if it does, the people have a right to revolt against the government or to secede from the territory under its control. Through the social contract, the people give the government the

83 John Locke, SECOND TREATISE OF CIVIL GOVERNMENT, Thomas Hollis ed. (1764), Chapter II, Sec. 6.
84 Id. at Chapter VIII, Section 96.
85 Id. at Chapter VIII, Section 95.
86 Stacy, supra note 22 at 2034. According to Locke, the government is bound by the trust of the people and “the law of god and nature.” Id. at Chapter XI, Section 142.
87 Locke, supra note 83 at Chapter XI, Section 139.
88 Stacy, supra note 22 at 2034.
authority to act for their common good; if the government uses its authority to violate natural rights, the authority is revoked.\textsuperscript{89}

Rousseau developed the concept of sovereignty in the people along similar lines.\textsuperscript{90} Like Locke, Rousseau believed that individuals reach a social contract for their self-preservation.\textsuperscript{91} They place their natural rights in government hands to protect their interests and the common good; these rights are returned to the people if the government violates the social contract.\textsuperscript{92} Rousseau believed that individuals must relinquish some of their natural liberty, which is determined by their individual strength to pursue their own interests, when forming a political community. However, he considered the rights the individuals receive in return, including to justice, to be greater than those surrendered.\textsuperscript{93} These greater rights are determined by the will of the people as a collective and are intended to be shared equally.\textsuperscript{94} When the government uses its strength to override the will of the people, then according to Rousseau, the government becomes the master, not the sovereign.\textsuperscript{95}

Under Rousseau’s theory, the people vest their sovereign authority in a legislature that is chosen by the people.\textsuperscript{96} As the people’s representative, the legislature has the absolute authority of the traditional concept of sovereignty.\textsuperscript{97} Rousseau did not foresee any potential conflict of interest between the people and the legislature:

\textsuperscript{89} Locke, supra note 83 at Chapter XIII, Sec. 149.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at Book 1, Chapter 8.
\textsuperscript{94} Id. at Book 1, Chapter 8.
\textsuperscript{95} Id. at Book 2, Chapter 1.
\textsuperscript{96} van der Vyver, supra note 90 at 328.
\textsuperscript{97} Rousseau, Book 1, Chapter 7.
The sovereign legislature thus was identified by Rousseau with the general will of the people. As such, the legislature could never enact a law which it could not break, and since the subordinates of state authority are also constituent parts of the volonté générale [general will], those subjects and the general will can never have conflicting interests.\(^98\)

Both theorists saw the social contract as a mechanism for organizing the domestic affairs of the political community. It is an agreement between individuals to establish a government that must abide by the will of the majority and act on the basis of the common good of that community.\(^99\) Individuals relinquish their rights to the government for their protection and the government receives sovereign authority. Individuals, however, always retain the power to revoke the social contract when the government violates those rights. As with traditional rules of international relations in which states must consent to limit their sovereignty, domestic relations depend on the consent of the sovereign individual to limit his or her sovereignty. The works of Locke and Rousseau greatly influenced the French and American revolutions and are credited with establishing the basis for democracy and human rights.\(^100\) These two philosophers and the movements that followed them began to shift the title of sovereign to the people.\(^101\)

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\(^98\) van der Vyver, supra note 90 at 330. See also, Rousseau, supra note 91 at Book 1, Chapter 6 (“These clauses, properly understood, may be reduced to one — the total alienation of each associate, together with all his rights, to the whole community; for, in the first place, as each gives himself absolutely, the conditions are the same for all; and, this being so, no one has any interest in making them burdensome to others.”)

\(^99\) As will be described in Part III, majority rule can be highly problematic and is no longer considered acceptable as notions of human rights and self-determination have evolved since the times of Locke and Rousseau.


\(^101\) d’Aspremont, supra note 100 at 883-884; Buys, supra note 100 at 18 (2007).
Relying on Locke and Rousseau’s concept of a social contract and supported by constitutional and international legal guarantees of sovereignty in the people, governments do not have the power to act independently of their people. They serve as the representatives of the people, not the state, which is merely a territorial unit in which a political community lives. As representatives of the people, the government is tasked with protecting the political community from domestic and international threats to their security and the common good.  As section A describes, a government can claim sovereign rights only when it achieves its purpose. As Part B explores, dependent on the people for its authority, a government no longer can simply invoke the rights of sovereignty against international criticism and action when abusing human rights.

**B. Retaining Sovereign Rights**

When the people grant sovereign authority to a government, the authority they receive is contingent on government efforts to achieve the security and common good of the people. To retain its authority to represent the people and therefore claim sovereign rights, two requirements must be met: (1) the government must hold domestic legitimacy; and (2) it must fulfill duties necessary for abiding by the will of the people and acting in accordance with the common good. The purpose of the first condition, which is described more fully in Subsection 1, is to ensure that the people have authorized the government as the sovereign representative. The power of the government

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103 See e.g. Mills, supra note 11 at 38.

104 d’Aspremont, supra note 100 at 878 (2006).

105 Sourgens, supra note 2.
to gain control over a population must not be confused with the consent of the people to relinquish its sovereign power to the government.

The second condition, which is described more fully in Subsection 2, serves multiple purposes. According to the International Commission on Intervention and State Sovereignty, recognizing government responsibility to the people has three important impacts:

First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community . . . And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. Conditioning entitlement to sovereign rights on the fulfillment of duties to the people ensures governmental accountability to the sovereign people.

If a government fails to achieve either or both of these conditions of sovereignty, then it loses some or all of its right to claim sovereign authority and the rights of sovereignty. When a government claims sovereignty to shield its behavior, the international community first must ask on whose behalf that claim is made. International intervention on behalf of the people ultimately bolsters sovereignty since the people are the true sovereigns. Refusing to intervene to the advantage of the government and disadvantage of the people undermines sovereignty by allowing the power of the government to override the will and common good of the true sovereign.

1. **Legitimacy**

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106 *Responsibility To Protect*, supra note 41 at 2.15.
There are two different types of legitimacy relevant to the determination of a government’s entitlement to claim sovereign rights – internal and external. Internal legitimacy concerns whether a government receives domestic support as the people’s representative and for its actions. External legitimacy describes whether the international community of states recognizes a government as legitimate, which in turn determines whether it will respect its sovereignty. Sovereignty in the people, as argued here, demands that a government maintain internal legitimacy in order to claim sovereign authority. If the government fails to achieve internal legitimacy, the international community should deny external legitimacy and refuse sovereign rights to that government.

The concept of internal legitimacy flows from sovereignty in the people. Since the American and French revolutions, when sovereignty in the people was institutionalized, the legitimacy of a government has depended on whether the people have supported it. Determining legitimacy in practice is far more complicated, as there is no accepted formula for measuring popular support. As d’Aspremont describes:

The highly controversial character of governments' legitimacy stems from the subjectivity of its evaluation. Indeed, there are no objective criteria to determine governments' legitimacy. That means that each state enjoys a comfortable leeway when asked to recognize the power of an entity that claims to be another state's representative in their bilateral intercourse. Each state evaluates foreign governments' legitimacy through the criteria that it chooses.

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108 d’Aspremont, supra note 100 at 882-883.
109 Id.
110 Unfortunately, external legitimacy is rarely decided on the basis of a state’s behavior towards its citizenry. Instead, in most cases, once a country attains statehood, it achieves external legitimacy and the full benefits of sovereignty automatically. Id. (describing how external legitimacy depends on whether a state meets the four elements necessary for statehood.); Catherine J. Iorns, Indigenous Peoples and Self Determination: Challenging State Sovereignty, 24 CASE W. RES. J. INT’L L. 199, 275 (1992).
111 Reisman, supra note 82 at 867.
112 d’Aspremont, supra note 100 at 878-879.
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The international community seems to rely most heavily on a test of periodic, free and fair elections to determine a government’s legitimacy. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights treat such elections as a universal right. For many scholars, only democratic governments can achieve legitimacy and therefore benefit from sovereign rights. Testing legitimacy by whether a government is elected raises the issue of what is democracy. Does democracy require nothing more than free and fair elections for a government that can be changed, which is procedural democracy? For some, the answer is yes. As one commentator proclaimed: “in circumstances in which free elections are internationally supervised and the results are internationally endorsed as free and fair and the people’s choice is clear, the world community does not need to speculate on what constitutes popular sovereignty in that country.” Others argue that democracy requires more. It also requires democracy in the exercise of government functions. This type of democracy, known as substantive democracy, demands a basic respect for human rights and equality as well as

113 Rachel Ricker, Two (Or Five, Or Ten) Heads Are Better Than One: The Need For An Integrated Effort To International Election Monitoring, 9 VAND. J. TRANSNAT’L L. 1373, 1400 (2006); Bartram S. Brown, Intervention, Self-Determination, Democracy And The Residual Responsibilities Of The Occupying Power In Iraq, 11 U.C. DAVIS J. INT’L L. & POL’Y 23 (2004); Angela R. Riley, Good (Native) Governance, 107 COLUM. L. REV. 1049 (2007). According to the European Union Handbook for European Union Election Observation, free and fair elections requires regular elections in which there is: equal opportunity to run for office and to vote without discrimination; a secret ballot; freedom of expression, association and assembly to allow all parties to air their platform; equal access for candidates and parties to state resources; and an independent and accountable election administration. See European Commission, HANDBOOK FOR EUROPEAN UNION ELECTION OBSERVATION, 2d Ed. (2008) 14-15.
114 d’Aspremont, supra note 100 at 88. See also, Martin Nettesheim, Developing A Theory Of Democracy For The European Union, 23 BERKELEY J. INT’L L. 358, 368-369 (2005). Article 21(3) of the UDHR requires periodic, free elections to ensure that the people authorize the government. Universal Declaration, supra note 75. Universal Declaration, supra note 75. ICCPR Article 25 guarantees a right of all people to participate in free, fair and universal elections of their governments. Supra note 80.
115 See e.g. d’Aspremont, supra note 100 at 884-885 and 889-890 (“the idea that democracy is the only acceptable type of regime has gained broad support, even monopolizing the political discourse (despite a lingering disagreement about its accurate meaning). This evolution has been underpinned by the common belief that democracy bolsters peace and prosperity, and even quells terrorism.”)
116 As footnote113 shows, there is a substantive requirement for a free and fair election, but the point being made here is whether free and fair elections alone should determine a government’s legitimacy.
117 Reisman, supra note 80 at 871. See also, d’Aspremont, supra note 100 at 891.
tolerance in political decision-making once the elections are complete. Representative governments must make their decisions democratically, formulating the common good to include the interests of all members of the political community, rather than permitting the majority alone to make those decisions. Substantive democracy ensures both that the government is chosen based on the will of the people, which is the procedural aspect, and that it acts in accordance with the will and common good of all the people, which is the substantive aspect.

This Article adopts substantive democracy as the appropriate litmus test for determining legitimacy as it most broadly reflects the meaning of sovereignty in the people. Free and fair elections, alone, are not enough to ensure the government will act according to the people’s will or their vision of the common good. A far wider range of human rights must be protected to achieve these goals, which is accounted for in the concept of substantive democracy. Subsection 2 describes the rights that must be protected and enforced to fulfill substantive democracy, and therefore achieve domestic legitimacy. It also discusses additional duties that go beyond those required for representative governmental decision-making that are necessary for ensuring sovereignty in the people.

2. Sovereign Duties

Meeting the criteria for legitimacy is not enough for a government to claim sovereign rights. A government may claim them only once it has met its responsibilities

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118 See e.g. Aharon Barak, Foreword: A Judge On Judging: The Role Of A Supreme Court In A Democracy, 116 HARV. L. REV. 16, 39 (2002); d'Aspremont, supra note 100 at 881-882 (2006)
120 See e.g. Barak, supra note 118 at 39; d'Aspremont, supra note 100 at 881-882 (2006).
to the people. These duties are not merely domestic duties but create international responsibilities since international recognition of sovereign rights of a government should depend on them.\footnote{Sourgens, supra note 2, at 468; Haass, supra note 34.} As Cohan describes, “In the era of international human rights, it seems the international community has become a party to the social contract between citizens and their government.”\footnote{Cohan, supra note 15 at 943.}

The duties required of governments to retain sovereign authority overlap with the substantive requirements for democracy and legitimacy,\footnote{Legitimacy and sovereign duties both include democratic rights. For example, both require governments to guarantee equality and free and fair elections.} but potentially also include wider responsibilities to the people.\footnote{For example, states may use torture against suspected domestic terrorists with the support of the population terrified of terrorist crimes. The government utilizing torture could be wholly legitimate in the eyes of its population if it fulfills its democratic responsibilities and the targets of torture are not determined by discrimination. The act of torture is illegal in all circumstances under customary international law regardless if the general population supports it. The use of torture, thus, would violate the government’s sovereign duties even as it retains its legitimacy.} Even if they are identical, it remains important to distinguish the requirements of legitimacy from sovereign duties. It ensures that the international community will look beyond free and fair elections to determine whether the government is protecting the people’s will and common good beyond the electoral process. Without separate requirements, illiberal democracies in which governments are elected but do not adopt democratic decision-making could inappropriately benefit from sovereign rights as the elected representatives of the people.

The next question is how to determine what duties should be required for governments to claim sovereign rights. At a minimum, governments have a duty to protect the human rights of their citizens: “individuals have certain rights as humans and . . . these rights are beyond the state. The state may hold these rights in trust, but cannot
Violate these rights for *raison d’etat*.” Proponents of conditional sovereignty consistently require governments to adhere to basic or fundamental human rights, but rarely define what those rights are. Likely this is because the determination of basic or fundamental rights is subjective and controversial. Many academics and practitioners argue that human rights are interdependent and indivisible, making it impossible to establish a hierarchy of rights. Others fear that a hierarchy of rights will preference rights based on particular, rather than universal, political experiences and/or favor a dominant political culture.

While ideally, the duties of the sovereign include protecting and promoting all human rights, it is unrealistic and not necessarily appropriate to deny sovereign rights when not all are met. No government is likely to achieve the ideal and it seems unfair to deny sovereign rights to governments substantially following the will and fulfilling the common good of the people. That conclusion leads back to the dilemma of essentially determining a hierarchy of rights. Establishing objective criteria for ascertaining fundamental rights and corresponding duties is extremely difficult. This Article offers some guidance as to which rights must be enforced for a government to benefit from sovereign rights based on the meaning of sovereignty in the people and on which rights the international community has already recognized as fundamental. The rights listed here, however, are not fully inclusive of those that create sovereign duties; instead, they provide a preliminary basis for determining them.

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125 Mills, supra note 11 at 372.
126 See e.g. *Responsibility To Protect*, supra note 41 at 1.35.
128 This section addresses these concerns shortly.
At a minimum, legitimacy requires access to democratic rights. From a procedural perspective, in addition to the right to vote in periodic, free and fair elections, the people must be given rights that allow them to make informed decisions when choosing their representatives, including freedom of association, expression, and press. Substantive democracy further requires governments to ensure representative decision-making, once elected, to accomplish true self-determination; thus the right to equality must be viewed as a core democratic right.\textsuperscript{129} Where there are minority groups that are historically disadvantaged within the state, equality may demand minority protections or affirmative action measures to ensure that all of the population has an equal opportunity to participate in the determination of the government and its policies.\textsuperscript{130} Legitimacy also turns on the government’s accountability to the people, which establishes a right to accountability.

International law provides further guidance in the decision over which rights must be met by the government in order for it to fulfill its sovereign duties. Customary international law, non-derogable rights, \textit{jus cogens}, Responsibility to Protect and international criminal law offer a partial list of the fundamental rights. These sources of law were chosen because they reflect the consensus of the international community as to which rights must be guaranteed in practice regardless of consent and already can be enforced by the international community regardless of sovereignty claims. They cannot be the only sources as the international law system currently protects the power of

\textsuperscript{129} Nettesheim, supra note 114 at 373.
\textsuperscript{130} The concept of sovereignty in the people theorized by Locke and Rousseau accepted majority rule, seemingly never anticipating the risk of tyranny of the majority. Many years of experience show that majority rule can easily turn into majority domination and lead to internal strife, necessitating the development of sovereignty in the people to include minority rights. This is consistent with protecting the political community from disorganization and internal strife.
governments to determine what they are willing to abide by, which undermines the concept of sovereignty in the people.

Determining which human rights have achieved customary international law status is no less daunting of a task then determining which rights are fundamental or basic. Customary international law derives “from a general and consistent practice of states followed by them from a sense of legal obligation.”

Determining consistent and general state practice is complex since all countries violate human rights (although the extent of violations varies) while promising to abide by them. Hurst Hannum published a fairly comprehensive examination of the scope of acceptance of the Universal Declaration of Human Rights as customary international law in mid-1990s. According to his research, equality rights, including equal treatment under the law and non-discrimination protected in Articles 1, 2, 6 and 7 have achieved customary law status. Article 3’s protection of the right to life is customary law, as well as the prohibition against extra-judicial murder and enforced disappearances. The prohibitions on slavery and on cruel, degrading and inhumane treatment and punishment in Articles 4 and 5 have achieved customary law status. Rules regarding the treatment of the criminally accused, particularly the right to be free from torture, the right to be free from arbitrary arrest and detention and the right to a fair trial protected in Articles 9, 10 and 11 also qualify as customary law. This list is not necessarily comprehensive but sets a minimum of which rights in the UDHR have achieved customary law status as of when his research
was conducted. There may be other rights that over the last 17 years have achieved the status of customary international law, not to mention rights listed in other international declarations, treaties and conventions.

Non-derogable rights are another source of human rights that governments may have a duty to protect in order to receive the benefit of sovereign rights. Rights that are non-derogable cannot be abrogated for any reason, including during a state of emergency, war or any threat to the state.\(^{136}\) The fact that an existential threat to the state does not permit violations of these rights indicates that they are fundamental.\(^{137}\) There are two sources of non-derogable rights – customary international law and treaty law. Within customary international law there are \emph{jus cogens} norms that are considered binding and non-derogable.\(^{138}\) These rights form part of customary law but have special status as a higher type of law; their violation is considered impermissible in all cases. Prohibitions on slavery, torture and genocide fall within this category.\(^{139}\) Violations of \emph{jus cogens} norms create obligations \emph{erga omnes} that require the international community of states to take action to prevent or stop their violation.\(^{140}\) This obligation is consistent with the concept of sovereignty in the people espoused in this Article.

Within treaty law, the International Covenant on Civil and Political Rights Article 4 declares the following rights non-derogable: (1) the right to life; (2) prohibition of genocide; (3) prohibition of torture, cruel, inhumane and degrading treatment and punishment; (4) prohibition of slavery; (5) prohibition on imprisonment for failing to

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\(^{136}\) Koji, supra note 127 at 92.

\(^{137}\) \emph{Id.}

\(^{138}\) Mills, supra note 11 at 40.

\(^{139}\) \emph{Id.}

meet a contractual obligation; (5) prohibition of punishment for an act that was not a crime at the time of its commission; (6) right of every person to be recognized as a person before the law; and (7) the right to freedom of thought, conscience and religion. Many of these rights already have been listed as customary international law, a few rising to the level of *jus cogens* norms.

The doctrine of Responsibility to Protect, which was adopted unanimously by the United Nations General Assembly, provides another source of duties a government owes its constituency in order to benefit from sovereign rights. The doctrine establishes that each state has a duty to prevent war crimes, crimes against humanity, genocide and ethnic cleansing; if any state fails to fulfill this duty, it becomes the responsibility of the international community to fulfill.\(^\text{141}\) The crimes that arise from violation of this duty are defined primarily in the four Geneva Conventions and the Rome Statute of the International Criminal Court (ICC).\(^\text{142}\) The Rome Statute serves as a source of duties independently of Responsibility to Protect. The crimes listed within it are considered universal, which means they can be prosecuted by any state against the leadership of another, although a treaty signature is generally required for their enforcement by the ICC.\(^\text{143}\)

Notably missing from this list of fundamental human rights so far are socio-economic rights. Despite vigorous arguments in favor of establishing socio-economic

\(^{141}\) Responsibility to Protect is markedly similar in application to the substance-infused concept of sovereignty in the people advocated here.

\(^{142}\) *Responsibility To Protect*, supra note 41 at 3.30-3.31

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duties are access to basic health care, food, water, shelter and education.

To prevent poorer countries from losing their claim to sovereign rights for no other reason than they lack the resources to fulfill these duties, which would be grossly unfair to the people, violations of socio-economic rights must be intended to oppress some or all of the people or must be done with little regard to the severe harm it will cause them. For example, a government that has insufficient food to feed its population during a famine does not violate its duty to the people; if the same government, however, refuses aid that could alleviate starvation, it would not be entitled to sovereign rights. A government that denies girls and women education would similarly violate its duty to the people whereas a government with insufficient resources to guarantee access to education to its entire population would not. The question is whether the government deliberately undertook a policy to violate these rights to the severe detriment of the people.

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146 Id.
148 Id. at 667 (2007); Orend, supra note 145 at 30-31.
A final source of obligations a government owes its constituency before claiming sovereign rights is a national constitution. A constitution may provide the best insight into the will and common good of the people or the rights they consider most fundamental.\footnote{Philpott, supra note 4 at 18.} It could also reflect the will of an authoritarian government, making some state constitutions a less appropriate source. Regardless, if a government bases its claim of legitimacy on the power it receives from a constitution then it inherently recognizes that it is subject to the limitations and responsibilities written into that constitution.\footnote{Mills, supra note 11 at 38.}

The list of fundamental human rights catalogued here are the bare minimum a government has a duty to protect in order to attain sovereign rights. The list is very conservative at it predominantly reflects international agreement on fundamental rights. It in no way should be treated as fully inclusive of all rights and duties owed to the people; instead, it offers a starting point for developing sovereign duties.

The Question of Cultural Relativism

The primary challenge to this list of duties required for a government to claim sovereign rights is likely to be that by relying on international law it risks cultural imperialism. Critics of international human rights law often argue that it is little more than a paternalistic attempt to foist Western values on cultures that prioritize or interpret rights differently.\footnote{Hal Blanchard, Constitutional Revisionism In The PRC: "Seeking Truth From Facts", 17 FLA. J. INT'L L. 365, 396 (2005); Thio Li-ann, Pragmatism and Realism Do Not Mean Abdication: A Critical and Empirical Inquiry into Singapore's Engagement with International Human Rights Law, 8 S.Y.B.I.L. 41, 50-51 (2004); Sharon K. Hom, Commentary: Re-Positioning Human Rights Discourse On "Asian" Perspectives, 3 BUFF. J. INT'L L. 209 (1996); Gracie Ming Zhao, Challenging Traditions: Human Rights And Trafficking Of Women In China, 6 J. L. & SOC. CHALLENGES 167, 169 (2004).} They argue that the choice of rights protected under international law and deemed universal depends on Western cultural preferences, values and socio-
economic conditions. Instead, these critics believe that prioritization of human rights should depend on context, particularly the culture and history of the people claiming those rights. If each culture prioritizes and interprets rights differently, then there is no one set of human rights that is fundamental.\textsuperscript{152}

This position adopts cultural relativism, which is often invoked by countries that preference communitarian values and group rights over individual rights to promote community harmony.\textsuperscript{153} They believe that individuals owe a duty of care to the community and should not simply receive individual entitlements.\textsuperscript{154} For these relativists, promoting individual rights over communitarian or group rights could undermine the social fabric of society.\textsuperscript{155}

The concern with relying on cultural and communitarian values to form the duties of governments is that they may impose a view of the common good and pretend a collective will of the people rather than reflect a true consensus. Cultures and religions are not monolithic; nor are they free of the power struggles for influence that exist within any community of people.\textsuperscript{156} Because not all individuals have equal power within a group, not all members have the opportunity to determine the group’s values.\textsuperscript{157} Using communitarian values to prevent individuals from exercising their individual rights results in the same paternalism cultural relativists claim pervades the concept of universal

\textsuperscript{152} Robert D. Sloane, Outrelativizing Relativism: A Liberal Defense Of The Universality Of International Human Rights, 34 VAND. J. TRANSNAT’L L. 527, 532 (2001)
\textsuperscript{154} Ludsin, supra note 153 above at 70.
\textsuperscript{155} Yash Ghai, supra note 153 at 1097-1098.
\textsuperscript{156} See e.g. Higgins, supra note 153 at 111-113.
\textsuperscript{157} Id. at 111-112.
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human rights. In contrast, the individual rights on which governmental duties are based are intended to create the best opportunity for individuals to exercise their autonomy, which in turns lets them express themselves as individuals and as part of a group.

The concept of sovereignty in the people does not reject group or communitarian rights; instead it demands that the government govern according to the will and common good of all the people or risk losing its sovereign rights. Group rights can promote self-determination by protecting the benefits members gain from their community and as briefly mentioned in Part II(B)(2) may be necessary to ensure full democratic participation of minority groups. The caveat, however, is that group rights are inappropriate when they are used against group members or against minority groups to restrict autonomy, equality and other fundamental rights.

Another point countering a potential claim of cultural relativism in the list of duties for governments is that the rights chosen protect the values of “justice, equality and fairness,” which are values found in all cultures and religions. As with sovereignty, governments often resort to cultural relativism to shield themselves for

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158 See e.g. Sloane, supra note 152 at 590-592.
160 Group rights are rights that “derive[] from a person’s membership in a group rather than his/her status as an individual; these rights can belong to the group or to the individual as part of his/her membership in the group.” Hallie Ludsin, Women and the Draft Constitution of Palestine, Women’s Centre for Legal Aid and Counseling (2011) 62.
161 See e.g. Sloane, supra note 152 at 540-54; Helen Quane, Rights In Conflict? The Rationale And Implications Of Using Human Rights In Conflict Prevention Strategies, 47 VA. J. INT’L L. 463, 496 (2007) (describing how protection of individuals from discrimination or providing equality does not prevent involuntary assimilation of minority groups into the majority society.).
162 See e.g. Ghai, supra note 153 at 1097-1098.
163 See e.g. Id.
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criticism of human rights abuses.\textsuperscript{164} Claims of cultural relativism need to be parsed to determine whether they are a crude attempt to justify human rights violations or whether any of the rights identified as fundamental in this Article in fact undermine the values of any culture or religion.

Cultural relativism is also invoked by underdeveloped societies that challenge universal human rights on the basis they exclude socio-economic rights.\textsuperscript{165} These critics argue that developed countries for which socio-economic rights are less urgent dominate the debate over which rights qualify as fundamental\textsuperscript{166} although survival and a decent quality of life is of greatest concern to most people.\textsuperscript{167} As described above, sovereignty in the people as conceived of here requires governments to guarantee socio-economic rights to qualify for sovereign rights, which dispenses with this aspect of cultural relativism.

\section*{C. \textit{How much sovereignty is lost?}}

A government that fails to achieve legitimacy and to meet its duties to the people loses some or all of its authority to act on their behalf. Sovereignty itself is not lost, since that belongs to the people. Nor does the territory lose its claim to statehood since, at least in most cases, it will continue to meet the four criteria for recognition as a state. Instead, the government loses its entitlement to claim the sovereign rights that derive from serving


\textsuperscript{165} See e.g. Higgins, supra note 153 at 93-94 (“[N]on-Western states have argued that the very hierarchy of human rights established in those instruments privileges civil and political rights over economic, social and cultural rights in a way that is biased toward both Western political traditions and the wealth of Western states relative to the rest of the world.”); Zhao, supra note 151 at 169.

\textsuperscript{166} Higgins, supra note 153 at 93-94.

\textsuperscript{167} See e.g. Zhao, supra note 151 at 169.
as the legitimate representative of the people within a state, particularly the right to be free from interference in domestic affairs.

The first question this conception of conditional sovereignty raises is to what extent sovereign rights are lost by a violation of duties? The answer depends on the severity of the violations. The loss of sovereign rights should be proportionate to the degree to which these duties are violated and the harm the violations cause. A dictatorial regime that already fails the legitimacy test and that commits gross violations of human rights loses all of its sovereign rights. A representative government that violates its duties to the people on a much smaller scale retains sovereign authority in most areas and therefore most of its sovereign rights, but not the right to demand non-interference in relation to those specific violations.

The proportionality requirement for determining how much of the sovereign rights are lost as a result of violating sovereign duties is identical to the proportionality requirement for determining how much intervention is appropriate. As the harm to the people grows in severity, so does the amount of intervention that is permissible. The international community can “intervene” through criticism, conditions on aid, trade and diplomatic relations, political and economic sanctions, international investigations, prosecution, political and financial support to opposition or insurgent groups, and, as a last resort, through military action. A factor in the proportionality test for determining

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168 While a government must be legitimate as well as meet its duties to its constituency to receive sovereign rights, it is hard to imagine a situation in which an illegitimate government is fulfilling its duties to the people. For this reason the question of whether and how much sovereignty is lost likely depends on the duties requirement.

appropriate intervention is whether the proposed intervention will cause more harm than good. For example, cutting off international aid or limiting trade for lesser abuses of human rights could cause disproportionate harm to the people and increase their disadvantages and suffering. The more severe the harm, the less likely intervention will have a disproportionately negative impact on the population compared to the human rights abuses. Testing whether the loss of sovereignty and corresponding intervention is proportional to the severity of the human rights abuses is consistent with current international practice that, for example, permits military intervention only when there is a threat to international peace or in the face of human rights atrocities. The understanding of sovereignty in the people described in this Article explains, or for some justifies, that practice rather than supplants it.

More complex is the question of what threshold the violations must pass before a government loses some or all of its sovereign authority and corresponding rights. No government is perfect and every government will commit injustices, so the threshold must be reasonable or else no government will be entitled to claim sovereign rights no matter how much they represent the will and common good of the people. At a minimum, the violation of duties towards the people must be systemic before any portion of sovereign rights is lost. It seems unfair to the people as a whole to have its government lose its sovereign entitlements over more isolated incidents.


171 Overall context, however, must be considered before assuming any incidents are isolated. If context shows that seemingly isolated incidents create severe harm in the aggregate, then the threshold may be met after all.
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There also must be no effective domestic accountability to correct government failures and to hold political leaders and institutions responsible for any violations of duties to the people. Accountability requires meaningful action in a relatively short period of time and with relative ease and predictability.\textsuperscript{172} If there is real accountability, systemic violations of duties will be corrected domestically and without the need for international intervention. This requirement recognizes that the government holds the primary responsibility for meeting its sovereign duties and that international intervention is only appropriate when the government shirks its responsibility to the people.\textsuperscript{173}

The next element of the threshold test for loss of sovereign rights is the severity of harm. Loss of sovereign rights will be overly harsh in the face of minor harm; only significant harm will justify these consequences.\textsuperscript{174} The proportionality test that determines how much sovereignty is lost and what level of intervention is appropriate will take care of this aspect of the threshold test. If the breach of duties does not warrant international intervention under the proportionality test, then the severity of harm does not pass the threshold test for intervention. So far, however, violations of the duties listed above are likely to cause severe harm to some or all of the people, which means nearly any systemic violation of duties will pass the threshold test. To the extent the list of

\textsuperscript{172} Government decisions and behavior lack accountability, for example, if there is no independent body capable of ensuring that those decisions or behavior comply with the rule of law and/or if the government employs stalling tactics to avoid judgment on those decisions or the behavior. See e.g. Joel M. Ngugi, \textit{Policing Neo-Liberal Reforms: The Rule Of Law As An Enabling And Restrictive Discourse}, 26 U. PA. J. INTL. ECON. L. 513, 540-541 (2005).

\textsuperscript{173} See e.g. Gareth Evans, \textit{Gareth Evans Offers Five Thoughts for Policy Makers on R2P} (2007)(describing that the Responsibility to Protect first falls on the domestic government and that intervention is only appropriate if that government is “unable or unwilling to exercise that responsibility that any responsibility shifted to the wider international community.”)

\textsuperscript{174} It is irrelevant to the analysis of the threshold for a loss of sovereignty whether the government violates one duty or all of its duty as the issue is the severity of the harm caused by each violation and/or in the violations in the aggregate.
duties is developed to include protections of other human rights, the test for severity of harm may be more than rhetorical.

While severity of harm should be a factor in determining whether intervention is appropriate, this understanding of sovereignty in the people should not be confused with the doctrine of Responsibility to Protect. Sovereign rights can be lost for abuses that do not reach the level of harm that triggers the international community’s duty to protect the people of another state. The duties that must be fulfilled by a government to achieve the benefits of sovereignty are far more comprehensive than the duties placed on a government by Responsibility to Protect. The difference is that the international community will not be obligated to intervene in the face of other violations of duties, but instead have the discretion to do so without violating sovereignty in the people.

Finally, even if all of these other tests are met, another question that must be asked before the threshold for intervention is met is whether the people whose rights are being violated wish for such intervention. Given the severity of harm that results from the violations of duties necessary for retaining sovereign rights, to some extent it can be assumed intervention will be welcome. Where that assumption is demonstrably false, then the international community may need to refrain from intervention to avoid acting out of paternalism.175

In conclusion, a government loses its sovereign rights when it fails to achieve legitimacy and violates the duties necessary to serve as the people’s representative. The threshold for determining whether a state loses some or all of its sovereign rights is whether (1) the violations of duties are systemic, (2) there is no domestic accountability

175 It is possible to imagine the situation where “the people” whose rights are being violated fear that international intervention will result in a severe backlash. Whether to defer to “the will” of the people will depend on the severity of the risk they face.
for them and (3) the harm the violations cause is significant. The determination of the last element could depend in part on whether intervention or loss of sovereignty will do more harm than good to the people and whether the people wish for intervention. The loss of sovereign rights may be restricted to only partial areas of government control or cover all claims to sovereign rights. The amount of sovereignty lost and the amount of permissible intervention should be proportionate to the harm caused by the violation of the conditions for retaining sovereign authority.

D. Who Decides?

The question of who decides whether and how much sovereignty is lost is likely to be a source of contention for those considering the concept of sovereignty in the people as espoused here. The question reflects two fears. The first is that this conception of sovereignty in the people will allow states to freely intervene in each other’s domestic politics, wholly undermining the overall purpose of sovereignty. The purpose of this concept is to provide governments with the rationale for overriding sovereignty claims when they have the political will to challenge human rights violations; it is not intended to change international relations practices. The vast majority of options for intervention are non-military, which means they do not breach territorial integrity or constitute “acts of aggression” in the context of the United Nations Charter and the Rome Statute of the International Criminal Court.\footnote{As of yet, there is no universally accepted or applied definition of “acts of aggression.” With that said, the focus of the discussion of the definition for a crime of aggression for the ICC was on prohibiting “being in a position effectively to exercise control over or to direct the political or military action of a State.” Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court Addendum Part II, PCNICC/2002.2/Add.2 (2002) 3.} They range from public censure, to limiting or cutting aid, trade or diplomatic ties, to political or economic sanctions to investigations and
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prosecutions of abuses. These non-military measures when applied bi-laterally or against the actions of people or entities under the jurisdiction of the intervening state are also an act of sovereignty by that state as it chooses how it will conduct its international relations. Whether to censure a country, to permit a diplomatic mission to work within its jurisdiction, whether to conduct trade or give aid or to impose sanctions on its citizens or legal persons located within the state’s territory for transacting with a disfavored state is well within the sovereign powers of the state making decisions on what is in the best interests of the people it serves.

The fact that decisions on non-military intervention are likely matters of government policy suggests that it is unnecessary to look at them as a breach of sovereignty of the targeted countries. Abusive governments would deny this suggestion, which makes a theory to counter the attempt to shield human rights violations behind sovereignty important. Further, developing countries have raised serious concerns with economic sanctions because they can cause severe harm, and as a result, are a particularly potent form of coercive power. The General Assembly adopted a resolution to urge state parties to mandate that only UN agencies have the power to impose economic sanctions. The theory of sovereignty in the people addresses concerns about the harm caused by intervention, including through economic sanctions, by requiring states to test

177 See e.g. ftnt 169 above.
178 See e.g. Cleveland, supra note 170 at 53 (describing how “because economic assistance is voluntary and given at the donor country’s discretion, the use of foreign assistance to alter a foreign state’s behavior may not be subject” to the norm of non-intervention.); Hossein Askari, Johan Forrer, Jiawen Yang & Tarek Hachem, Measuring Vulnerability to U.S. Foreign Economic Sanctions, 40 BUSINESS ECONOMICS 41 (2005)(describing economic sanctions as a matter of “foreign policy.”).
181 Id.
whether the effects of their intervention are likely to be proportionate to the harm from the rights violations and whether the intervention is likely to do more harm than good. It takes a different approach to alleviating the fears of developing countries.

The more difficult question of who decides whether sovereign rights are lost arises when there is the possibility of aggressive action by an intervening state. Such aggressive actions range from dropping aid within the territory of another state without its consent, to funding armed groups and agitators, to engaging in military activities in another state’s territory. The question of who should decide whether aggressive or military intervention is appropriate under the concept of sovereignty in the people is part of an existing, highly contentious debate on whether these actions can be unilateral, multilateral or must be undertaken only with the consent of the United Nations Security Council. 182 This conception of sovereignty in the people is implicated in the debate; however, it is beyond the scope of the Article to determine who should be permitted to order an aggressive intervention into another state. Rather, the concept simply explains why, in certain circumstances, sovereign rights are not a barrier to such intervention.

The second fear that this Article’s conception of sovereignty in the people raises with respect to who will decide whether and to what extent sovereign rights are lost is whether this concept will permit stronger countries to interfere with weaker countries for their own benefit.183 Justifiable intervention can easily be invoked by more powerful

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183 Julie Mertus, Special Project Humanitarian Intervention And Kosovo: Reconsidering The Legality Of Humanitarian Intervention: Lessons From Kosovo, 41 WM. & MARY L. REV. 1743, 1778 (2000); Priyankar
states and in their self-interest, while weaker nations are more likely to be on the receiving end of condemnation and intervention, unable to influence the human rights practices of stronger states.\textsuperscript{184} This concern also raises the specter of selective enforcement of human rights or selective intervention. Rather than applying human rights standards uniformly, factors such as race, ethnicity, religion and location of the abusive government also could play a role in the decision whether to intervene to stop human rights abuses.

While the fear of selective enforcement of sovereignty in the people is legitimate, it should not be permitted to serve as a pretext for avoiding criticisms of human rights violations or for negating the concept of sovereignty in the people. The problem of selective enforcement is not an inherent problem in the concept but rather a reflection of current politics. In fact, state-centric conceptions of sovereignty that allow governments to hide their abuses from international scrutiny are at least partially to blame for inconsistent responses to human rights violations.\textsuperscript{185} Selective enforcement undermines the purpose of sovereignty in the people, however, as one commentator discussed with respect to the Responsibility to Protect: “the question for universal and uniform application of a new principle should not lead to its abandonment, especially when it can save hapless individuals from a grim plight.”\textsuperscript{186}

\textsuperscript{184} See e.g. Jianming Shen, \textit{The Non-Intervention Principle And Humanitarian Interventions Under International Law}, 7 INT'L LEGAL THEORY 1, 10-11 (2001); Cohan, supra note 15 at 924-25.

\textsuperscript{185} Treating the state as sovereign permits governments, even those that do not represent their populations, to design the international enforcement mechanisms. Consistent with government interest and with the belief that states must choose to be bound by international law, these bodies rarely are given the power to act meaningfully in response to human rights abuses and depend almost wholly on government permission to submit to enforcement processes. State-centric sovereignty, thus, correlates directly with weak human rights enforcement.

E. Libya: Nascent Support for a Substantive Sovereignty in the People

There is little doubt that an autocratic government inherently violates the concept of sovereignty in the people. A dictatorship that does not permit free and fair elections and violates most human rights cannot qualify for sovereign rights. This is a basic premise of this Article. What bears discussing here is how the international community effectively applied the concept of sovereignty in the people to the Libyan protest movement that erupted as part of the Arab Spring when adopting United Nations Security Council Resolutions 1970 and 1973. As subsection 1 explains, the process leading up to international intervention in Libya to prevent Muammar Qaddafi’s forces from slaughtering civilians recognized that Qaddafi’s legitimacy depended on the support of the people; the Security Council was willing to consider action in response to the call of the people. Subsection 2 then describes that international intervention was expressly justified on the basis that Qaddafi had violated his duties to the people as required by the Responsibility to Protect. Taking this reasoning together, international intervention in Libya lends nascent support for the basic tenets of a substance-infused concept of sovereignty in the people and shows its potential force.

1. Background

Libya’s Arab Spring began on February 15, 2011 with protests in the city of Benghazi that spread quickly through Eastern Libya and Tripoli.187 Qaddafi reacted to

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the protests by killing and arresting demonstrators.\textsuperscript{188} Thousands continued to protest despite the government’s harsh response that within the first four days left approximately 233 dead and many injured.\textsuperscript{189} By February 18, the demonstrations turned into a full-fledged rebellion, with protestors pushing security forces out of parts of Benghazi and the city of Bayda.\textsuperscript{190} Qaddafi responded in a speech on February 22 by calling for “house by house” searches for the “cockroaches” opposing the regime,\textsuperscript{191} which was interpreted as “givin[ing] the green light” to loyalists to kill protestors and opponents.\textsuperscript{192}

In response to the government’s violent crackdown, on February 21, 2011, Libya’s Deputy Ambassador to the United Nations, Ibrahim Dabbashi, declared that he was breaking from the Qaddafi government but would continue to represent the Libyan people in his official capacity. Dabbashi expressly stated that he was not resigning:\textsuperscript{193} “[t]he Libyan mission will be in the service of the Libyan people rather than in service of the Libyan regime or of one person.”\textsuperscript{194} Similarly, Ali Adjali, Libya’s Washington Ambassador, stated: “I’m (not) resigning Moammar Gadhafi’s government, but I am with

\textsuperscript{189} Libya: Governments Should Demand End to Unlawful Killings, Human Rights Watch February 20, 2011.
\textsuperscript{190} Map of the Rebellion in Libya, Day by Day, THE NEW YORK TIMES, for February 18, 2011, updated April 29, 2011.
\textsuperscript{191} Thomas G. Weiss, RtoP Alive and Well After Libya, ETHICS & INTERNATIONAL AFFAIRS (2011) 1. His reference to protestors and rebels as “cockroaches” struck a chord internationally as “eerily echoing the term used in 1994 by Rwanda’s murderous regime.” Id.
\textsuperscript{192} Kareem Fahim and David D. Kirkpatrick, Qaddafi’s Grip on the Capital Tightens as Revolt Grows, THE NEW YORK TIMES, February 22, 2011.
\textsuperscript{193} Edith M. Lederer, Moammar Gadhafi Should Step Down: Libyan UN Diplomats, ASSOCIATED PRESS/HUFFINGTON POST February 21, 2011. Libya’s Ambassador in Washington, Ali Adjali, reportedly made a similar statement that he was not resigning, but rather remaining to represent the people, not Qaddafi. Id.
\textsuperscript{194} Jihad Taki, Libyan Ambassador to UN Urges International Community to Stop Genocide, GLOBAL ARAB NETWORK 21 February 2011. See also Colin Moynihan, Libya’s UN Diplomats Break with Qaddafi, THE NEW YORK TIMES, February 21, 2011 (quoting Dabbashi “We state clearly that the Libyan Mission is a mission for the Libyan people . . . it is not for the regime”)
the people. I am representing the people in the street, the people who’ve been killed, the people who’ve been destroyed. Their life is in danger.” 195 Qaddafi pulled their diplomatic credentials but the United Nations granted the Libyan UN mission “courtesy passes allowing unlimited access to U.N. headquarters.” 196

Acting as a UN diplomatic representative, on February 21, 2011, Dabbashi sent a letter to the UN Security Council requesting an urgent meeting to address the safety of Libyan civilians, 197 and in particular seeking the installation of a no-fly zone to prevent Qaddafi from attacking civilians and protection for Libya’s oil installations. 198 Based on this request, the Security Council met the next day and denounced Qaddafi’s violent crackdown, calling on him to fulfill his “responsibility to protect” Libya’s citizens. 199

The Security Council met again on February 25, 2011 to discuss a draft resolution in response to unfolding government suppression in Libya. The Security Council adopted Resolution 1970 on February 26 referring the events in Libya for an investigation by the International Criminal Court, establishing an arms embargo, and instituting an asset freeze and travel ban on certain members of the Qaddafi government. 200 During discussions, the Libyan Ambassador to the UN, Abdurrahman Mohamed Shalgham, initially a committed Qaddafi supporter even as Dabbashi and other Libyan diplomats broke with the official government, denounced Libya’s dictator and

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195 Lederer, supra note 193. Libya’s Ambassador in Washington, Ali Adjali, reportedly made a similar statement that he was not resigning, but rather remaining to represent the people, not Qaddafi. Id.
196 Anita Snow, UN Diplomat Works Against Gadhafi, ASSOCIATED PRESS April 27, 2011.
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made an impassioned plea for intervention to prevent further bloodshed.\textsuperscript{201} He also submitted a letter to the Security Council in support of a resolution allowing for international intervention on behalf of the Libyan people.\textsuperscript{202}

The National Transitional Council of Libya formed on February 27, 2011 as the rebel political leadership fighting Qaddafi and his forces.\textsuperscript{203} The rebels were making significant advances throughout Eastern Libya while Qaddafi forces used air attacks to drive them back.\textsuperscript{204} Throughout early March, there were reports of government supporters firing on unarmed protestors and, in Tripoli, that Qaddafi loyalists were searching for people in photos taken during protests to detain and/or kill them.\textsuperscript{205} On March 10, 2011, France became the first country to officially recognize the rebel forces as Libya’s “legitimate representative,” a move supported by the European Parliament.\textsuperscript{206}

By March 12, 2011, Qaddafi’s forces had succeeded in winning back control of some areas captured by rebel forces, leading the Arab League to ask the United Nations Security Council to establish a no-fly zone over Libya.\textsuperscript{207} Many feared that Qaddafi would succeed in crushing the rebellion and that the reprisals would be severe. By March 16, the United States began pushing for military support of the rebel forces believing a no

\textsuperscript{201} United National Security Council 6490\textsuperscript{th} Meeting, S/PV.6490 February 25, 2011 (Mr. Shalgham).
\textsuperscript{202} Matthew Russell Lee, As Libya’s Shalgam Supports Referral to ICC, Spin of France & NGO, Human Rights, INNER CITY PRESS (“With reference to the Draft Resolution on Libya before the Security Council, I have the honour to confirm that the Libyan Delegation to the United Nations supports the measures proposed in the draft resolution to hold to account those responsible for the armed attacks against Libyan Civilians.”).
\textsuperscript{203} Libya Opposition Launches Council, AL JAZEERA, February 27, 2011.
\textsuperscript{204} Kareem Fahim and David D. Kirkpatrick, Libyan Government Presses Assault in East and West, THE NEW YORK TIMES, March 7, 2011.
\textsuperscript{206} Libya: France Recognises Rebels as Government, BBC NEWS 10 March 2011.
\textsuperscript{207} Ethan Bronner and David E. Sanger, Arab League Endorses No-Flight Zone over Libya, THE NEW YORK TIMES, March 12, 2011.
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fly zone would be insufficient to support the rebel movement.\textsuperscript{208} On March 17, 2011, the Security Council adopted Resolution 1973, which demanded a ceasefire, created a no-fly zone, permitted UN members to take “all necessary measures” short of occupation to protect Libya’s civilian population, and increased sanctions against Qaddafi and his minions.\textsuperscript{209} Acting on the basis of the Resolution, on March 20, 2011, the US, the United Kingdom and France attacked Qaddafi forces who were assaulting rebel-held areas.\textsuperscript{210} On March 21, Libya’s Foreign Minister, part of the Qaddafi government, requested an emergency meeting to stop what he described as French and American “military aggression” taken in accordance to Resolution 1973.\textsuperscript{211} This request was refused. On October 23, 2011, the rebels declared victory over Qaddafi and his forces.\textsuperscript{212}

2. Legitimacy

The Security Council’s decisions along the path to adopting Resolutions 1970 and 1973 provide budding support for a substance-infused concept of sovereignty in the people, which prevents governments from claiming the sovereign right to be free from international intervention when they fail to retain domestic legitimacy and violate fundamental duties owed to the people. From the very beginning, the Security Council treated the Libyan protests as a direct repudiation of Qaddafi’s legitimacy. It accepted Dabbashi’s request for a Security Council meeting on Libya although he had defected from the Qaddafi government and Qaddafi had formally revoked his credentials as a

\begin{footnotesize}
\textsuperscript{208} Mark Landler and Dan Bilefsky, \textit{Specter of Rebel Rout Helps Shift U.S. Policy on Libya}, THE NEW YORK TIMES March 16, 2011.
\textsuperscript{210} Libya: US, UK and France Attack Gaddafi Forces, BBC NEWS, March 20, 2011.
\textsuperscript{211} Edith M. Lederer, \textit{UN Rejects Emergency Meeting Sought by Libya}, ASSOCIATED PRESS March 22, 2011.
\end{footnotesize}
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Libyan diplomat. The Provisional Rules of Procedure of the Security Council state that the President can call a meeting if there is a dispute under Article 35 or Article 11(2) that is brought to it by a state party.\footnote{Provisional Rules of Procedure of the Security Council S/96/Rev.7, Rule 3 read with the United Nations Charter, supra note 24, Articles 35 and 11(2).} By convening a meeting at Dabbashi’s request, the Security Council implicitly recognized him as Libya’s legitimate representative; the source of Dabbashi’s authority was no longer Qaddafi, but the people. Similarly, when the Security Council met to discuss draft resolution 1970, the Security Council invited Ambassador Shalgham to the meeting under Rule of Procedure 37, which permits the Security Council to invite a Member State that is not a member of the Security Council to meetings to discuss a resolution affecting it.\footnote{United Nations 6490, supra note 201. See also, Provisional Rules, supra note 213 Rule 37.} Shalgham was expressly acknowledged as the “representative of the Libyan Arab Jamahiriya” despite having formally broken with the ruler in control of the government.\footnote{United Nations 6490, supra note 201 (The President of the Security Council announcing “I now give the floor to the representative of the Libyan Arab Jamahiriya.”)} Again, the source of his authority as Libya’s representative was the people not Qaddafi, who had revoked Shalgham’s diplomatic credentials.

The international community specifically justified support for Resolutions 1970 and 1973 as a response to a call by “the people” to return sovereignty to them. The British Ambassador to the UN described the Resolution as “a powerful signal of the determination of the international community to stand with the people of Libya and defend their right to determine their own future.”\footnote{United Nations 6491, supra note 200 (Sir Mark Lyall Grant (United Kingdom))} South Africa’s representative described how “[t]he Libyan people . . . have been calling for an end to this

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\footnote{Provisional Rules of Procedure of the Security Council S/96/Rev.7, Rule 3 read with the United Nations Charter, supra note 24, Articles 35 and 11(2).}\footnote{United Nations 6490, supra note 201. See also, Provisional Rules, supra note 213 Rule 37.}\footnote{United Nations 6490, supra note 201 (The President of the Security Council announcing “I now give the floor to the representative of the Libyan Arab Jamahiriya.”)}\footnote{United Nations 6491, supra note 200 (Sir Mark Lyall Grant (United Kingdom))}
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indiscriminate use of force” as “echo[ed]” by Libyan diplomats.217 The Resolution took particular note of the letter Shalgham wrote to the Security Council stating support for the Resolution’s measures;218 reference to the letter implied that Shalgham’s support represents the people’s support.219

The adoption of Resolution 1973 also was justified on the basis that it reflected the wishes of the people. The US representative to the Security Council considered it a “respon[se] to the Libyan people’s cry for help.”220 The British representative described that “[t]he central purpose of the resolution is clear: to end the violence, to protect civilians and to allow the people of Libya to determine their own future.”221 The Portugal representative described how “[f]or the international community, the regime that has ruled Libya for more than 40 years has come to an end by the will of the Libyan People.”222 The rejection of Qaddafi as the legitimate Libyan leader is most apparent in the decision to refuse Qaddafi’s request for a Security Council meeting,223 which India’s UN Ambassador explained reflected that the Security Council “didn’t want to get into a discussion of who represents whom.”224

217 Id. (Sir Mark Lyall Grant (South Africa)). The United States representative stated: “[t]he protests in Libya are being driven by the people of Libya. This is about people’s ability to shape their own future, wherever they may be. . . . The Security Council has acted today to support the Libyan people’s universal rights.” Id. (Susan Rice (United States)) (describing “[a]s President Obama said today, when a leader’s only means of staying in power is to use mass violence against its own people, he has lost the legitimacy to rule and needs to do what is right for his country, by leaving now.”).
221 Id. (Sir Mark Lyall Grant).
222 Id., S/PV.6498, March 17, 2011(Moraes Cabral).
223 Id., supra note 211.
224 Id.
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As the processes leading to Resolutions 1970 and 1973 show, Security Council members recognized that the Qaddafi government controlled Libya, or by the time of Resolution 1973 - substantial parts of Libya, but they also recognized that Qaddafi was not the legitimate representative of the people. This exemplifies an important principle of a substance-infused concept of sovereignty in the people: the government may be treated as the legitimate representative of the people only if it maintains domestic legitimacy. If the people do not authorize the ruler to lead the country, s/he may be able to control the country, but cannot be treated as the true representative of the sovereign entitled to sovereign rights.

3. Failure to Fulfill Duties

In addition to Qaddafi’s express loss of legitimacy, the international community based its decision to intervene in Libya’s domestic affairs on Qaddafi’s failure to refrain from crimes against humanity in violation of his duties under the doctrine of Responsibility to Protect. In the run-up to Resolution 1970, Qaddafi fired upon unarmed protestors and called upon his loyalists to slaughter his opposition. In Resolution 1970, the Security Council specifically noted “the gross and systematic violation of human rights, including the repression of peaceful demonstrators . . . the deaths of civilians, and . . . the incitement to hostility and violence against the civilian

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226 United Nations 6491, supra note 200(Susan Rice (United States))(describing “[a]s President Obama said today, when a leader’s only means of staying in power is to use mass violence against its own people, he has lost the legitimacy to rule.”)
227 The legal basis for Resolution 1970 was the doctrine of Responsibility to Protect (RtoP), along with the Security Council’s Chapter VII powers under the United Nations Charter. Resolution 1970, supra note 218 (“Recalling the Libyan authorities’ responsibility to protect its population”). As described in Part II(C), RtoP places a duty on every State to “protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” World Summit Outcome, supra note 50 at para. 138.
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population made from the highest level of the Libyan government" that “may amount to crimes against humanity.” The Security Council then imposed an arms embargo, targeted the Qaddafí leadership with sanctions, and referred them to the International Criminal Court for an investigation into crimes against humanity.

When Resolution 1970 failed to achieve its goal of protecting the people and it appeared that Qaddafí might succeed at decimating the rebel forces, the international community revisited its options for protecting the people and their sovereignty. Resolution 1973 condemned Libya for “the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions” that possibly constituted crimes against humanity. Reflecting the escalation of Qaddafí’s violence against civilians, the international community stripped the Libyan leadership of the last vestiges of its sovereign rights and permitted military action on behalf of the civilian population.

The Security Council’s actions in the processes of adopting Resolutions 1970 and 1973 effectively adopted the approach advocated here to justify international intervention. It recognized that control over territory could not be equated with legitimacy when it treated the Libyan diplomatic mission as the representative of the people even as it defected from the Qaddafí regime that was still in control of Libya’s territory. It denied the government international legitimacy on the basis that it lacked domestic legitimacy. By basing international intervention on the Responsibility to Protect, the Security Council applied the concept that a government owes its citizens

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228 Resolution 1970, supra note 218.
229 Id.
230 See Part II(D)(2) above.
231 Resolution 1973, supra note 209 at para. 4.
duties that if unfulfilled stripped the government of the sovereign right to be free from international intervention in its domestic affairs. The international response to Qaddafi in the end days of the Libyan dictatorship illustrates both the logic of sovereignty in the people and how effective it can be when infused with substance.

III. The People

Part III asks two important questions likely to raise theoretical and practical concerns about the implementation of a substance-infused concept of sovereignty in the people: (1) who are the people, and (2) can democracies, which presumably represent the people, violate sovereignty in the people? These two questions reflect concerns regarding tyranny of the majority and parses out the differences in types of democracy. They reflect the importance of a nuanced approach to understanding the will and common good of the people as well as what constitutes appropriate representation of the people. Part A examines the first question concluding that minority groups must be accounted for within the phrase “the people”. Part B tackles whether and how democracies lose sovereign entitlements relying on examples from Afghanistan, India, Sri Lanka and France to illustrate its points.

A. Who Are The People?

So far, the description of the meaning of sovereignty in the people has assumed a unified voice for the people and that the individuals who comprise the people share a will and vision of the common good. In many countries unity is little more than an illusion, thus the seemingly common outbreak of violence and civil war.²³² This reality raises the

²³² See e.g. Mills, supra note 11 at 81.
issues of who constitutes the people and how should their diverse interests be reconciled to achieve sovereignty in the people?

Beginning with the first issue, the people are individuals in the aggregate. These individuals typically form groups based on perceptions of common needs and interests and based on identity factors such as race, culture, language, ties to a territory, ethnicity and religion, among other characteristics. How individuals choose to identify themselves typically represents societal divisions and is complicated by overlapping identities and socio-economic and other factors that create differing needs and interests within the group. Any cluster of individuals can define itself as a group deserving of a voice as part of the people. Majority groups typically claim to represent the will and common good of the whole of the political community, while minority groups demand a voice in that determination. This contestation often simply perpetuates the need to identify oneself as part of a group.

Under classical democratic theory and in line with Rousseau, the will of the people is expressed through elections in which the majority determines the outcome and elected government determines how to achieve the common good. Majority rule was adopted as a “political solution” to the difficulty of implementing democracy. It is expected to reflect the interests of a “fluid” majority; who constitutes the majority changes with the issues so no set of individuals or no groups are consistently excluded from decision-making. Experience shows, however, that majority rule can lead to

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233 See e.g. Daniele Archibugi, The Self-determination of Peoples, 10 CONSTELLATIONS 488, 491(2003)
234 Id. at
235 See e.g. Rosenfeld, supra note 100 at 1332.
tyranny of the majority - or “the majority's ability to abuse its authority without compromise” - making this classical approach to determining the will and common good of the people inappropriate.\textsuperscript{238}

To ensure that the will of the people truly represents all of the people, minority groups need to be given the opportunity for fair and effective representation.\textsuperscript{239} They must be able to elect representatives and their needs and concerns must inform the vision of a common good rather than simply being overridden by the majority. Failure to account for minority group needs and interests is a risk factor for armed conflict: “When minorities are denied a say in political affairs, conflict often results because a political voice is the key to the enjoyment of all other rights.”\textsuperscript{240} It is also a risk factor for mass atrocities such as genocide.\textsuperscript{241} Events in Sri Lanka, Sudan, and Rwanda, among others, illustrate this point.\textsuperscript{242} Recognition of the importance of minority representation thus is consistent with the underlying purpose of the concept of sovereignty – to organize

\textsuperscript{238} See e.g. Weinert, supra note 107 at 61 and 63.
\textsuperscript{239} This answer begs the question of who constitutes the people to the extent that it does not explain which minority groups deserve representation. Factors such as size of the group and the stability and sustainability of the shared identity are likely to play into the determination, along with the context of the group’s treatment within the State. Minority Rights Group International claims that the internationally-accepted definition of minority is “straightforward”: “it is a group of people who believe they have a common identity, based on culture/ethnicity, language or religion, which is different from that of a majority group around them.” Clive Baldwin, Chris Chapman and Zoe Gray, Minority Rights: The Key to Conflict Prevention, Minority Rights Group International (2007) 4. The Vienna Commission, which was responsible for producing a draft convention for the protection of minorities for the European Union, suggested the following definition of minority: “A group which is smaller in number than the rest of the population . . . whose members, although nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions religion or language.” Group Rights vs. Individual Rights?, ISIS International (2006) (citing European Commission for Democracy Through Law, Proposal for a European Convention for the Protection of Minorities, Council of Europe (91) 7.
\textsuperscript{240} Baldwin, Chapman and Gray, supra note 239 at 12.
\textsuperscript{242} See e.g. Karl Cordell and Stefan Wolff, ETHNIC CONFLICT: CAUSES, CONSEQUENCES AND RESPONSES (2009) 194 (referencing a “proliferation of ethnic conflict since the end of the Cold War.) Minority Rights Group International found that 71% of on-going conflicts had “an ethnic dimension”, suggesting that “[w]here minority rights go consistently ignored, a descent into conflict is always a risk. Conflict, Minority Rights Group International at www.minorityrights.org/6857/thematic-focus/conflict.html.
domestic affairs so as to protect the security and common good of the political community. Meaningful representation demands the removal of any barrier to effective participation of all groups in governance and an electoral system and human rights conditions that promote a more inclusive determination of the will of the people and their common good.

This ideal of representative government is complicated when minority groups refuse the assimilation inherent in the process. Some groups argue that there is no one people within their state’s territorial boundaries but multiple peoples who have the right to be governed according to their differing wills.243 These groups generally are less concerned with inclusion in the development of a unified will and vision of the common good and more interested in the survival of their particular linguistic, cultural, religious or ethnic characteristics.244 They typically demand a state design that permits limited self-rule and allows for equal representation with the majority.245 Examples of such designs range from accommodation for group rights through legal pluralism and protection of their ethnic, cultural or religious institutions to territorial autonomy through devolution of power, federalism, and semi-autonomous zones. These types of power-sharing arrangements may forestall or wholly prevent internal conflict,246 although some believe that such accommodations increase societal divisions, preventing the healthy

245 See e.g. Nettesheim, supra note 114 at 367; Mills, supra note 11 at 34.
development of a national identity. The claims need to be addressed in order for a government to retain legitimacy.

These alternatives to majority rule may not be accepted by the majority or may not satisfy the demands of a minority group, which leads to the next important question: what if one group in society is demanding secession as part of its right to self-determination? In theory, a healthy, functioning democracy that represents all groups in society and that does not enforce the will of the majority alone should weaken the desire for a separate state. Consistent with this theory, the United Nations General Assembly has adopted declarations maintaining a state’s right to territorial integrity only when the government is truly representative and provides real equality for minority groups; the stronger the violation of the minority group’s rights, the stronger their claim for secession. The phrase minority group in this context is intended to refer to an ethnic, racial, linguistic or religious group, rather than any self-proclaimed minority group.

The international community of states is extremely reluctant to consider secession as an option for ensuring self-determination for fear that it will encourage other groups to make such demands. The secession discussion is tangential to the topic of this Article as secessionists demand a new state with a new political community rather than representation within the people for purposes of sovereignty in an existing state.

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247 Dr. Kirsti Samuels, Post-Conflict Peace-Building And Constitution-Making, 6 CHI. J. INT’L L. 663, 672-674 (2006); Baldwin, Chapman and Gray, supra note 239 at 2 (“Too often, separating groups along ethnic, religious or linguistic lines has been seen as a way of upholding minority rights and keeping peace between groups. While such solutions might be an easy option in the aftermath of conflicts, long term these divisions can entrench old hatreds and wounds.”)


249 Bell and Cavanaugh, supra note 248 at 1349-1350; Raday, supra note 244 at 456.

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One important concern for the application of this theory of sovereignty is whether fringe members of minority groups will be able hijack the concept of sovereignty to undermine the democratic government. For example, a South African farmer recently complained to the United Nations Special Advisor on the Prevention of Genocide that the South African government was conducting genocide against its Afrikaner population.251 The complaint alleges that 36,500 white farmers have been murdered since 1990, while official statistics place that number at 3,020.252 The farmer is seeking a UN investigation of his claim, which raises sovereign rights issues.253 Whether the UN can conduct an international investigation into South Africa depends on whether it meets the test for losing sovereignty. Does it retain legitimacy, even among the Afrikaner population? Is the government fulfilling its duties to the people? If there are human rights violations, which the number of deaths of white farmers suggest, is the government responsible, even through behavior that would appear to be encouraging it? Is there accountability for these crimes? This assessment will weed out fringe claims, such as to genocide,254 but could potentially locate a real source of concern for the community – whether white farmers are disproportionately at risk for political violence.

252 *Id.*
254 Genocide has a very specific legal meaning. It is defined as:

. . . any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
   a) killing members of the group;
   b) causing serious bodily or mental harm to members of the group;
   c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   d) imposing measures intended to prevent births within the group;
   e) forcibly transferring children of the group to another group.

This discussion about who constitutes the people and how their will and common good are determined, while simplistic, is an important for understanding the contours of sovereignty in the people. To prevent tyranny of majority, which risks conflict and mass atrocities, minority groups must be represented in the formation of the will and common good of the people. Thus, the government must retain legitimacy among and fulfill its duties to all the people to benefit from sovereign rights.

**B. Can a democratic government lose its sovereign rights?**

One of the more contentious assertions of this Article is that a democratic government can lose sovereign rights just as a dictatorship can. Because, by definition, people living in democracies choose their representatives and can change them through elections, the international community is more likely to be reluctant to intervene in the domestic affairs of democracies. Yet, as the remainder of this section shows, procedural democracies and even liberal democracies can fail to meet the duties necessary to retain full sovereign rights.

1. **Illiberal Democracies**

An illiberal democracy is a democracy by procedure only; the people elect the government, but they have little influence on government policy. The lack of influence means the government does not accord the full human rights necessary to achieve substantive democracy. The failure to protect and promote full human rights is likely to violate both the legitimacy and duties requirements for the exercise of sovereign rights. By themselves, free and fair elections do not insulate governments from a loss of

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255 d'Aspremont, supra note 100 at 913.

256 *Id.* See Part II(B)(1) above for a description of substantive democracy.
sovereign rights, although certainly they are a factor in the test for legitimacy and whether the government is fulfilling its duties to the people.

Sri Lanka provides an example of a procedural democracy in which the government, once elected, regularly violates the rights of its people.\(^{257}\) The government stands accused of extra-judicial killings, particularly of political opposition members, human rights activists and journalists. For example, the Committee to Protect Journalists ranks Sri Lanka number 4 of the countries with the world’s worst record for killing journalists with impunity;\(^{258}\) this impunity leads the Sri Lankan media to censor itself.\(^{259}\) The Sri Lankan government also is notorious for torturing persons accused of crimes.\(^{260}\) The United Nations Committee Against Torture, in particular, expressed concern with the practice “where the victims were allegedly randomly selected by police to be arrested and detained for what appears to be an unsubstantiated charge and subsequently subjected to torture or ill-treatment to obtain a confession for those charges.”\(^{261}\) The government has been blamed for enforced disappearances, including of human rights activists and journalists;\(^{262}\) approximately 475 disappearances were reported to the United Nations Working Group on Enforced or Involuntary Disappearances between 2006 and 2010.\(^{263}\)


\(^{258}\) Getting Away With Murder, Special Report, Committee to Protect Journalists (2011). See also, The Price of Truth, For Reporters, a Moment of Fear, THE ECONOMIST, September 3, 2009(describing 20 year sentence on terrorism charges for journalist critical of army behavior toward Tamils in the North.)

\(^{259}\) See 2010 Report, supra note 257.

\(^{260}\) See Concluding Observations, Committee against Torture, Forty-Seventh Session, 31 October–25 November 2011, para. 6 and 11 (“Committee remains seriously concerned about the continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment of suspects in police custody, especially to extract confessions or information to be used in criminal proceedings.”); 2010 Report, supra note 257.

\(^{261}\) Concluding Observations, supra note 260 at para. 11.

\(^{262}\) Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka, United Nations Secretary General, March 31, 2011 (“Between 2006 and the end of the war, 66 humanitarian workers were either disappeared or killed.”)

\(^{263}\) Concluding Observations, supra note 260 at para. 9.
As with the murder of journalists, these human rights violations are committed with full impunity, as soldiers and government officials go unpunished despite evidence showing their participation or complicity in these crimes.264

In the wake of a military win in a nearly three decade long civil war between the majority Sinhala government and the Liberation Tigers of the Tamil Eelam (LTTE), which claimed to represent the minority Tamil population,265 Tamils266 complain of serious security fears.267 Particularly, they are concerned with the government’s mission to root out all possible LTTE supporters.268 While most of the 300,000 Tamils initially detained in internationally-funded “internment” camps have been released for resettlement,269 it is believed that up to 3000 Tamils are being detained incommunicado for “rehabilitation” in undisclosed facilities.270

264 See e.g. Sri Lanka: No Justice in Massacre of Aid Workers, Human Rights Watch August 11, 2011; Concluding Observations, supra note 260 at paras. 13 and 18 (“The Committee expresses its concern at reports that human rights defenders, defence lawyers and other civil society actors, including political activists, trade unionists and independent media journalists have been singled out as targets of intimidation, harassment, including death threats and physical attacks and politically motivated charges. It regrets that, in many cases, those allegedly responsible for acts of intimidation and reprisal appear to enjoy impunity.”); Expert Panel, supra note 262 at 10.


266 It is important to note two categories of Tamils in Sri Lanka to avoid confusions. The Tamil population the subject of the conflict in the north and east of Sri Lanka has been living in Sri Lanka for thousands of years. They are to be contrasted with Tamils of Indian origin brought to Sri Lanka by the British to work in tea plantations, who, while marginalized, did not participate in the decades- long conflict.

267 There are three separate periods worth examining under the sovereignty in the people framework as the answer to how much sovereignty is lost in light of the human rights abuses likely is different: the civil war period, the immediate post-war period while the majority of the Tamil population was interned and the present. Each period presents different government human rights abuses, making the analysis complicated but rich. The discussion here is focused solely on the current human rights picture while the remaining two periods will be discussed further below.

268 See 2010 Report, supra note 257.

269 While the Sri Lankan government denies that these Tamils were being interned, the Tamil refugees were not free to leave the camps but needed permission from the government. Ravi Nessim, Nobody in or Out: Sri Lanka Interns Tamil War Refugees with Help of Foreign Aid, ASSOCIATED PRESS July 18, 2009. The government initially intended to house Tamils in these camps, which they named “welfare villages” for up
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Reportedly, the Sri Lankan military has taken over 7000 sq km of the 18,800 sq km of land occupied by Tamils in Sri Lanka’s Northern Province and there is 1 soldier for every ten inhabitants in Jaffna, its provincial capital. The militarization is intended to assert government control and prevent the organization of Tamil opposition. Many Tamils also fear that their land is being taken as part of a government-sponsored ‘Sinhalization’ process, which appears to be an attempt to reduce the concentration of Tamils in the Northern and Eastern Provinces by giving land to the Sinhalese majority. The government further has linked with Tamil paramilitary groups in the Eastern Province who violently control the predominantly Tamil population there. These paramilitary groups regularly engage in “extrajudicial killings, abductions, extortion, prostitution and child trafficking.” They are permitted full impunity in exchange for loyalty to the government. The human rights picture for Tamils in the northern and eastern Sri Lanka, thus, is bleak. In fact, so bad are the government abuses that the United Kingdom ranks Sri Lanka as “one of the 26 countries where we have some of the most serious wide-ranging human rights concerns.”

In the areas in which Tamils have been permitted to return, the government has not yet been able to replace the infrastructure or basic services destroyed during the war, which makes living conditions difficult at best. Reconciliation, supra note 265 at 10.

Reconciliation, supra note 265 at 17.
270 M.A. Sumanthiran, Situation in North-Eastern Sri Lanka: A Series of Serious Concerns, October 21, 2011 at dbsjeyaraj.com/dbsj/archives/2759. See also, Bhavani Fonseka and Mirak Raheem, Land in the Northern Province: Post-War Politics, Policy and Practices, The Centre for Policy Alternatives (2011) 15. The government contests how much land has been claimed by the military, however, there are reasons to question their estimations. Id. at 151.

271 See e.g. Reconciliation, supra note 265 at 12 and 14.
272 Fonseka and Raheem, supra note 271 at 140.
273 Reconciliation, supra note 265 at 4. See also, 2010 Report, supra note 257.
274 Reconciliation, supra note 265 at 20.
In order for the Sri Lankan government to retain its sovereign rights, in particular the right to be free from foreign intervention, it must be the legitimate representative of and fulfill its mandatory duties to the people. There is little doubt that the government retains at least some domestic legitimacy.\textsuperscript{277} It was democratically elected by the majority of the population and receives much support from the Sinhalese population for how it conducted the war against the LTTE.\textsuperscript{278} To claim it has full domestic legitimacy within the majority of the population, however, is highly problematic given the extent to which the government violates the rights of anyone who dissents from or opposes its regime. 

More complex is the determination of whether the Tamil population views the government as legitimate. The civil war ended in 2009 with a decisive military victory during which it appears the government (and the LTTE) committed war crimes and crimes against humanity.\textsuperscript{279} The very existence of a civil war negates the domestic legitimacy of the government, at least with respect to the rebel group, a point considered more fully below. The fact that the government crushed the LTTE insurgents does not return domestic legitimacy to it. Rather, how the government treats the Tamil population

\textsuperscript{277}The Centre for Policy Alternatives in Sri Lanka conducted a poll to determine the population’s thoughts on democracy in Sri Lanka. It found that 58.8% of Sri Lankans feel that current President Mahinda Rajapaksa has run a more democratic country than his predecessors. When broken down by social groups, 69.9% of Sinhalese polled supported this view compared to 23.6% of Tamil respondents and 13.1% of “Up country Tamils,” meaning Tamils of Indian origin who live in non-conflict regions of Sri Lanka, and 21.9% of Muslims, showing that the poll numbers reflect the majority view. \textit{Democracy in Post-War Sri Lanka, Top Line Report}, Centre for Policy Alternatives, (2011) 25. Rajapakse has an 82.6% approval rating among Sinhalese polled but only a 15.9% approval rating among Tamils. P. 25-26. Furthermore, while 50% of Sinhala respondents consider themselves completely free to express political opinions, only 15.8% of Tamils, 38.8% of Up-country Tamil’s and 16.9% of Muslims agreed. \textit{Id.} at 33.


\textsuperscript{279}While these allegations were against both sides, the question of sovereign rights relates solely to government behavior. For this reason, the Article considers only the violations of duties to the people by the government. \textit{Expert Panel}, supra note 262 at ii. The Panel also accuses the LTTE of these crimes; however, the LTTE’s behavior is not a consideration in determining the sovereign rights of the government.
now, whether the government is currently addressing Tamil needs and concerns, and whether there has been any accountability for any crimes committed by the government during the course of the war and after are what determines its domestic legitimacy.

The very brief summary above shows that Sri Lankan Tamils suffer regular violations of the freedom of association, the right to equality and the right to be protected against arbitrary detention, along with heightened security fears, which likely prevents the Sri Lankan government from regaining legitimacy within this community. A recent poll shows that the majority of Tamils living in former conflict areas feels that the government has done nothing or is doing little to address the root causes of the conflict, which suggests that the government is not addressing the needs and concerns of the Tamil population. Additionally, the International Crisis Group reports that “most of the government’s policies have increased ethnic polarisation between and within groups and closed space for reform.” As to the last consideration, accountability for crimes against humanity and war crimes, the United Nations sponsored Panel of Experts reported that the Sri Lankan Government’s “notion of accountability” does not accord with international standards and that currently Sri Lanka lacks “an environment

280 *Democracy*, supra note 277 at 39. At the same time, however, just over half the Tamil population shows some trust in the government, *Democracy*, supra note 277 at 39 42-43. The United Nation’s Secretary General’s Panel of Experts described how “triumphalism on the part of the government, expressed through its discourse on having developed the means and will to defeat “terrorism”” has effectively “end[ed] Tamil aspirations for political autonomy and recognition.” *Expert Panel*, supra note 262 at vi. See also, *Reconciliation*, supra note 265 at 11 (“A central pillar of the government’s strategy since 2005 has been to recast the civil war as another front in the global “war on terror” and deny its ethno-political context . . . it has been an excuse for the government to reject the need for any meaningful power sharing or state reforms designed to address the political marginalization of minorities.”)

281 *Reconciliation*, supra note 265 at 10.

282 *Expert Panel*, supra note 262 at iv.
conducive to accountability. Each of these factors undermines nearly any claim of legitimacy of the government among the Tamil population.

There is also little doubt that the Sri Lankan government is running afoul of its duties to the people and that the problems are systemic and result in severe harm. There are three separate targets of human rights violations: 1) political dissent; 2) minority groups; and 3) purported criminals. Given that Sri Lanka retains the choice in leadership, the government can claim its sovereign rights except as applied to these three areas.

The extent of the loss of sovereign entitlements in these areas then depends on the severity of harm that results from the human rights violations. Looked at separately, each type of human rights violation likely would trigger a different degree of loss of sovereign rights. For example, violation of the right of a criminally accused to be free from torture would likely justify international criticism but not sanctions or conditions on international relations because of the likely overly harsh effects of either action. The efforts to censor political opposition by killing, disappearing, torturing and detaining human rights activists and journalists is likely to weigh more heavily in a proportionality test, which would permit greater intervention. There is little doubt that conditions on international relations would be appropriate here. The weight of harm increases enormously when looking at the Tamil population, as the government not only lacks legitimacy among this population but is abusing the rights of Tamils while sowing seeds of discord. Again this should escalate the level of permissible intervention. Weighing together the harm to all three targets of rights violations, nearly any intervention short of military intervention

283 Id. at. vi.
284 It is important to note that Sri Lanka has a significant Muslim and Indian Tamil minority that also suffers regularly from discrimination. See Reconciliation, supra note 265 at 8-9.
likely could be justified, including criminal prosecution of the Sri Lankan leadership under universal jurisdiction. \textsuperscript{285} Military intervention surely would cause more harm than good to Sri Lankans already suffering from the effects of decades of war.

Illustrating how sovereignty in the people justifies current international relations rather than alters it, the European Union recently applied a similar analysis to the one advocated here when deciding to remove Sri Lanka from the list of countries that were rewarded trade concessions for increased human rights protections under its GSP+ scheme. \textsuperscript{286} The decision to revoke these concessions was based on a report commissioned by the EU that found “widespread police torture, abductions of journalists, politicized courts . . . uninvestigated disappearances,” impunity, and arbitrary detention. \textsuperscript{287} Prior to the revocation of GSP+, the EU gave Sri Lanka the opportunity to commit to correcting the 15 human rights and governance issues identified as violations of Sri Lanka’s human rights commitments. \textsuperscript{288} The Sri Lankan government characterized the EU action as a breach of Sri Lanka’s sovereign right to be free from interference in domestic concerns when rejecting the EU conditions for GSP+. \textsuperscript{289} Sri Lanka’s Central

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\textsuperscript{285} Canada has threatened to cut aid to Sri Lanka as a result of this lack of accountability. Lee Berthiaume, \textit{Losing Canadian Aid Big Loss but Survivable: Sri Lankan Minister}, POSTMEDIA NEWS November 4, 2011.
\textsuperscript{286} EU Withdraws Sri Lanka’s Special Trade Status, CNN July 6, 2010. GSP+ stands for the Generalized System of Preferences. Developing countries may be included in the program if they can show a commitment to human rights and good governance.
\textsuperscript{288} EU Regrets Silence of Sri Lanka Regarding Preferential Import Regime, European Union IP/10/888 July 5, 2010. The conditions specifically target violations of the International Covenant on Civil and Political Rights, the Convention against Torture and the Convention on the Rights of the Child, with a particular focus on conditions that lead to arbitrary detention and torture. Dilini Perera, \textit{Sri Lanka Savaged}, THE SUNDAY LEADER
\textsuperscript{289} Perera, supra note 288.
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Bank Governor Ajith Nivard Cabraal, for example, explained that “the government had no intention of giving in to some of the demands made by the EU because it was essential to safeguard Sri Lanka’s sovereignty.” The EU ignored Sri Lanka’s vociferous calls to accord it sovereign rights when it formally revoked GSP+. 290

Another type of illiberal democracy arises from a constitution, which is considered an expression of the social contract, that determines the common good based on a particular set of religious or cultural values. 291 One issue these democracies raise is what happens if the people predetermine a vision of the common good that binds them indefinitely without consideration of whether that vision might change? For example, Afghanistan adopted a constitution that not only requires the application of aspects of Shari’a law within the country but prohibits amendments to provisions protecting Islam and its role in governance. 292 The constitution prescribes that the common good must be determined by the Islamic vision of the “good life”, rather than maintaining a neutral view that leaves open a wider range of choices for determining the content of the common good. The limitation on the constitutional amendments means that in the future, at least under this constitution, the people cannot choose to remove religion from governance. While Afghans exercised their will by adopting the restrictive constitutional

many fear will become increasingly more influential in Sri Lanka if Western nations implement sanctions or conditions on international relations to pressure the government to submit to an independent investigation of the war. China Backs Lanka over Humanitarian Crimes Problem, ZEENEWS.COM September 7, 2011. Again, as conceived of here, sovereignty lies with the people, not the government, which means if it is to have any meaning, the government cannot hide behind the sovereignty shield.

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provision, they have limited the future exercise of self-determination and their choices for what is the common good.

The question then is whether the people can choose to forgo their current and future freedom to determine the common good. Phrased differently, it leads us to ask what happens if the will of the people conflicts with their best interests? Can the people lose their sovereignty for making choices for the present that may restrict their ability to act according to their will in the future? As Rousseau describes: “Our will is always for our own good, but we do not always see what that is; the people is never corrupted, but it is often deceived, and on such occasions only does it seem to will what is bad.”294 Bearing this point in mind, the people never lose their sovereignty but, depending on the situation, the people may lose the benefits or rights of sovereignty. In an expression of their will, the people may make choices that are not in their best interests. Those choices are protected as an act of the sovereign as long as the actions do not violate their sovereign duties and the whole of the people views those choices as legitimate. Just as a government cannot violate these conditions for retaining its entitlement to claim sovereign rights, neither can the people.

For illiberal democracies based on a preference for a religious or cultural determination of the common good, the main question is whether their governments can fulfill their duties to all members of society and not just the majority. The concern in Afghanistan is whether minority religious groups and secular individuals will be able to exercise their rights or will be alienated from the state because of the preference of Islam

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294 Rousseau, supra note 91 at Book 2, Chapter 3.
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and role of Shari’a law in governance.\textsuperscript{295} If those fears come to fruition, then the government, even as it is acting according to the rule of law as defined by the people, cannot claim their sovereign rights. As for the prohibition on amendment of provisions pertaining to Islam, as long as the constitution remains a valid expression of the will of all the people, then the government acting on behalf of the people retains its sovereign rights. If and when the people conclude that the constitution no longer reflects their will and vision of the common good, they must be free to change it, despite the expectation that the constitution is permanent.

2. Democracies in Conflict

This type of clash between the will of the people and their best interests occurs not only in illiberal democracies but also generally in conflict situations. During internal or external strife, the people often are willing to trade their human rights for measures or a government that promise more security.\textsuperscript{296} The test for whether conflict societies run afoul of the legitimacy and/or duty requirements necessary for a government to claim sovereign rights depends on which rights are exchanged for security and whether certain groups within the people face human rights violations as a result. For example, repressive legislation curtailing non-derogable rights such as freedom of religion or permitting torture is not permissible, even when it reflects the will of the people. Nor are restrictions on democratic rights, even if the majority of the people agree to them. More common is the tendency for government supporters to exchange the rights of dissenters, perceived as agitators, for greater security. Once tensions boil over into armed conflict, it

\textsuperscript{295} See e.g. Mir Hermatullah Sadat, 10th Anniversary A Decade in Human Right Law, The Implementation Of Constitutional Human Rights In Afghanistan, 1 NO. 3 HUM. RTS. BRIEF 48 (2004)

\textsuperscript{296} Hallie Ludsin, Putting the Cart Before The Horse: The Palestinian Constitutional Drafting Process, 10 UCLA J. INT'L L. & FOREIGN AFF. 443 (2005)
is easy to justify the nearly total loss of rights of the group demanding change. In any of these circumstances, the people lose some or all of their sovereign rights.

India provides an example of how an exchange of rights for security can limit the people’s entitlement to sovereign rights when civil tensions run high. India’s constitution expressly permits preventive detention, or extra-judicial detention in anticipation of a threat against public order, but refuses detainees the due process rights necessary to protect against arbitrary detention.\(^{297}\) As a reminder, right to be free from arbitrary detention is considered customary international law and a duty the government is required to meet to qualify for full sovereign rights.\(^{298}\) During the Constituent Assembly, drafters removed a requirement that detainees be granted due process rights from the draft constitution. Its removal was justified on the basis of post-Partition violence following the creation of Pakistan and a communist-led armed rebellion:

On occasions like this sympathies of most of us go out to the high principles which in the past we proclaimed from housetops. But there are other friends who occupy seats of authority and responsibility throughout the country. They warn us that the aftermath of war and partition has unchained forces which if allowed to gain upper-hand will engulf the country in anarchy and ruin. . . . Many of us are not convinced that dire results would necessarily follow the adoption of the phrase "due process of law". But the difficulty is this, that even if we were- to stand for our own convictions there is no scope for experimenting in such matters.\(^{299}\)

As a result of a permissive constitutional regime, India regularly engages in arbitrary detention. The National Security Act, for example, adopts a “subjective satisfaction” standard for determining whether preventive detention is necessary, which

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\(^{297}\) Constitution of India Article 2 read together with Schedule 7, List 1(9) and List III(3)(permitting detention of persons considered a threat to public order, state and national security, defence of India, foreign relations, and the supply of essential services). Article 22 expressly denies detainees a right to a lawyer and mandatory judicial review of the detention.

\(^{298}\) See Part II(B)(2).

India’s Supreme Court has interpreted as restricting review of habeas corpus petitions to whether the Executive followed constitutional and statutory procedure when ordering detention. The United Nations Human Rights Committee has expressly stated that “court review of the lawfulness of detention . . . is not limited to mere formal compliance of the detention with domestic law;” instead, a full review, including of the substance, must be permitted.

The National Security Act also permits the detention of anyone considered a threat to public order. The judiciary has interpreted the term “public order” so broadly that nearly any ordinary crime can be considered a threat to it, making arbitrary detention all too easy. International law requires governments to apply a proportionality test to ensure that the loss of rights inherent in preventive detention is proportionate to the anticipated harm from the threatened activity. India’s judiciary, however, has been reticent to challenge Executive determinations of what constitutes public order. As a result, India has preventively detained “muggers, sexual harassers, robbers, bootleggers, blackmarketeers and smugglers, among many others” without any consideration of proportionality.
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While India’s population all too readily accepted the exchange of liberty rights for greater security, under the concept of sovereignty in the people as espoused here, the international community may refuse to fully grant India the sovereign right to be free from international intervention in its domestic affairs on this issue. Arbitrary detention is a systemic problem resulting in a severe deprivation of the fundamental right to liberty. The restriction on substantive review of detention orders coupled with weak jurisprudence deprive many detainees of an effective remedy for a rights violation and prevents accountability. Viewed in isolation, India’s loss of sovereignty can only be partial and international intervention proportionate to and targeted at the harm caused by preventive detention. In more concrete terms, criticism is likely to be the only appropriate form of intervention as any other intervention would be likely to cause more harm to Indians than a policy of arbitrary detention.

Civil wars raise a different type of sovereignty analysis as the issue is what happens when one group within the people violently rejects the government supported by the majority? Sri Lanka provides a particularly horrific example of this issue. Sri Lanka’s nearly 30-year civil war with the LTTE ended in 2009 amidst credible allegations of war crimes and crimes against humanity. The government stands accused of repeatedly and unilaterally declaring no-fire zones, calling all Tamil civilians to take refuge there, and then bombing them. The military allegedly bombed every...
hospital in the conflict area at least once.\textsuperscript{308} The government reportedly underplayed the numbers of Tamil civilians trapped in the conflict zone to allow it the greatest freedom to attack while avoiding criticism for killing civilians.\textsuperscript{309} It also allegedly sought to deprive the LTTE and the civilians under its control of food, medicine and other essential supplies.\textsuperscript{310} Of the between 290,000-330,000 civilians believed to be in the conflict zone, there are credible estimates that up to 40,000 were killed in the last months of the war.\textsuperscript{311} So bad were the violations of international humanitarian and human rights law that the United Nation’s Expert Panel that investigated the end of Sri Lanka’s civil war concluded: “the conduct of the war represented a grave assault on the entire regime of international law designed to protect individual dignity during both war and peace”\textsuperscript{312}

There is little question that the Sri Lankan government was not only the legitimate representative of the majority of the people during its fight against the LTTE, but also that the majority supported its activities.\textsuperscript{313} There is also no question that the government not only did not represent the Tamil population but that it breached its duties to this minority group sufficiently that the international community should have been forced to fulfill its Responsibility to Protect.\textsuperscript{314} The systematic targeting of civilians in the no fly zone it had proclaimed and at hospitals during the end of the war certainly would have justified military intervention much less all the less invasive means to influence Sri

\textsuperscript{308} \textit{Id.} at ii.
\textsuperscript{309} \textit{Id.} at ii-iii, paras. 124-125.
\textsuperscript{310} \textit{Id.} at para. 128.
\textsuperscript{311} \textit{Id.} at para. 133 and 137.
\textsuperscript{312} \textit{Id.} at ii.
\textsuperscript{313} Vaughn, supra note 278 at Summary.
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Lanka to protect civilians. Through complicated political games, the Sri Lankan government managed to avoid anything more than criticism of its behavior so that not only did it fail its minority population but so did the international community. What is important to point out here is that the fact that the majority supported the government’s actions did not legitimize its behavior and would not justify granting the government sovereign rights with respect to the Tamil community, although it was entitled to those rights with respect to the Sinhalese population. Popular support for extreme violations of the human rights of minorities does not justify them or restrict international intervention into domestic affairs.

3. Liberal Democracies

Liberal democracies also can face challenges to their entitlement to claim sovereign rights for the same reasons as illiberal democracies. Liberal democracies are associated with free and fair elections, protection for and promotion of the rule of law, protection for basic human rights, and neutrality toward the determination of the common good. Despite these promising characteristics, they can violate the two criteria for retaining sovereign rights when the will of the people, exercised by a majority of the population, supports the violation of sovereign duties towards some members of the

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315 Explanations for why countries refrained from taking any action to fulfill their responsibility to protect range from Sri Lanka being able to exploit the post-911 climate to characterize its action as a legitimate part of the war on terror, to fear that if the UN or other international NGOs were too openly critical of the government they would not be able to remain to help the civilians after the war to a fear of failure as anything short of military intervention was likely to be unsuccessful as Sri Lanka would turn to China, Pakistan, Israel and others to make up for any aid or benefits cut off. See Expert Panel, supra note 262 at para 56; India and Sri Lanka after the LTTE, CRISIS GROUP ASIA REPORT no. 206, International Crisis Group, June 23, 2011 p. 14; Jason Burke, Sri Lanka Unlikely to Face War Crimes Investigation, THE GUARDIAN, April 26, 2011.

316 War Crimes in Sri Lanka, CRISIS GROUP ASIA REPORT No. 191International Crisis Group May 17, 2010 p. 29-30 (UN agencies in Sri Lanka allowed themselves to be bullied by the government and accepted a reduced role in protecting civilians.”

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political community.\textsuperscript{318} Picking up the discussion from Part III, democracies risk creating a tyranny of the majority that excludes minority groups from meaningful representation in the determination of the will and common good of the people. Liberal democracies that suppress or oppress their minority groups run afoul of both requirements for retaining their sovereign rights.

France’s current ban on the \textit{burqa}, traditional Muslim clothing consisting of a loose robe that also veils a woman’s face, illustrates this point. The ban violates France’s duty to protect the rights to freedom of expression, association, religion, equality and equal protection of the law of Muslim women who are prevented from expressing their religious identity and from making personal decisions on how to dress.\textsuperscript{319} The ban has been justified on three grounds: 1) religious neutrality; 2) to protect Muslim women from patriarchy; and 3) for security. None of these justifications can withstand closer scrutiny, highlighting the French government’s violation of its duties to Muslim women.

\textit{Laicite} is the French term for secularism that forms official policy to achieve religious neutrality, including by removing religious symbols from public spaces.\textsuperscript{320} The \textit{burqa} ban is part of this policy that effectively hides any appearance of difference among its citizens,\textsuperscript{321} which includes restrictions on women wearing headscarves at citizenship naturalization ceremonies or in public schools.\textsuperscript{322} The larger driving force behind the ban, however, appears to be the belief that the government needs to protect Muslim

\footnotesize{\textsuperscript{318} Weinert, supra note 107 at 211.  
\textsuperscript{319} Much of the argument here was first made in South Asia Human Rights Documentation Centre, \textit{Reining in France’s Ethnocentrism, Human Rights Feature}, HUMAN RIGHTS FEATURE HRF/215/11 (2011), a document that I helped draft.  
\textsuperscript{320} Maurice Barbier, \textit{Towards a Definition of French Secularism}, p. 22 at http://www.diplomatie.gouv.fr/fr/MG/pdf/0205-Barbier-GB.pdf,  
\textsuperscript{321} South Asia, supra note 319.  
\textsuperscript{322} Summary Record of the 1675\textsuperscript{th} Meeting, Committee on the Elimination of Racial Discrimination, CERD/C/SR.1675, 28 February 2005 p.10.}
women from the patriarchal control of their families. French President Sarkozy described that “[t]he burqa is not a religious sign, it is a sign of the subjugation, of the submission of women. I want to say solemnly that it will not be welcome on our territory.” He characterized the policy, which became law, as protecting women’s freedom and dignity. In doing so, he assumed that Muslim women do not choose how to dress for themselves. He effectively replaced what he considered religious patriarchy with the patriarchy of the state. A last effort to justify its discrimination against Muslim women, the government claims that the burqa hinders security efforts as it could permit a terrorist to hide in plain sight. This motivation is highly suspect given that no similar ban has been required for beards, baggy clothes or a motorcycle helmet, which could have the same effect.

Read together, these “justifications suggest either that women cannot or should not be allowed to make decisions for themselves on something as personal as how to dress in public or that Muslim women who wear a burqa are particularly dangerous.” Bans on Muslim women’s dress have been perceived as “reinforce[ing] the problem of discrimination or exclusion of Muslim women in every day life.” There reportedly have been incidents of ordinary citizens attempting to pull veils off women and bus drivers and shop owners refusing the patronage of veiled women. As one Muslim woman articulated:

323 Estelle Shirbon, Sarkozy Says Burqas Have No Place In France, REUTERS, June 22, 2009.
324 Id.
326 Reining, supra note 319.
327 Id.
328 Summary Record, supra note 322.
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My quality of life has seriously deteriorated since the ban. In my head, I have to prepare for war every time I step outside . . . The politicians claimed they were liberating us; what they’ve done is to exclude us from the social sphere. Before this law, I never asked myself whether I’d be able to make it to a café or collect documents from a town hall. One politician in favour of the ban said niqabs were ‘walking prisons’. Well, that’s exactly where we’ve been stuck by this law.\textsuperscript{330}

As this description of the impact of the \textit{burqa} ban shows, the French government has lost its legitimacy on the issue of religious freedom and equality in the eyes of the target population of the law. On this issue, it also has failed to meet the duties required to access the sovereign right to be free from international intervention in domestic affairs. The bigger question is whether the rights violations passes the threshold test to justify international intervention as described in Part II(C). The violation of Muslim women’s rights is certainly systemic and the harm caused is severe as these women are increasingly isolated and at times physically attacked. Thus intervention is likely appropriate but would need to target the particular area of rights violations. The intervention would likely be restricted to criticism as most other options could not be limited effectively to target only the particular harm caused by the \textit{burqa} ban and the outcome would not be proportionate with France’s loss of sovereign rights. This approach provides retroactive justification for US President Obama’s criticism of the ban in which he stated: “it is important for western countries to avoid impeding Muslim citizens from practicing religion as they see fit– for instance, by dictating what clothes a Muslim woman should wear. We cannot disguise hostility towards any religion behind the pretence of liberalism.”\textsuperscript{331}

\textsuperscript{330} \textit{Id.}
\textsuperscript{331} Full text: \textit{President Obama’s Speech to the Muslim World at Cairo University}, US NEWS AND WORLD REPORTS, June 4, 2009.
Section A’s discussion highlights that while democracy currently is a determinant for the legitimacy of a government and democratic rights part of its duties to the sovereign people, being a democracy will not always protect the people or its elected representative from the loss of sovereign rights. Illiberal and liberal democracies alike can run afoul of the two conditions required for entitlement to sovereign rights, even when the state’s actions conform to the will of the people and their vision for the common good. While the people never lose their sovereign identity, they cannot deprive themselves or others of fundamental rights; nor can they use their electoral power to deprive a minority group of its rights. The people are allowed to make choices that appear to be against their interests when exercising sovereignty in the people, but they cannot use their sovereign power in violation of the purposes of sovereignty in the people.

IV. Conclusion

Sovereignty is difficult to define, subject to numerous challenges and qualifiers and overall is a source of open and widespread debate. Treating sovereignty as a system for organizing domestic and international politics to protect the security and common good of the individuals who form a political community allows this Article to side-step much of the unnecessary contentiousness of the topic while responding pragmatically to governmental attempts to shield human rights abuses from international rebuke by hiding behind sovereign rights. For some, the concept of sovereignty has grown obsolete or is inappropriate as a result of global interdependence, continuing strife around the world and the expectation that states will accord greater respect for human rights and humanitarian norms at the expense of sovereign rights. Pragmatically, sovereignty
remains the international community’s basis for determining whether and when to intervene to stop human rights abuses in another country. For this reason, sovereignty continues to be a relevant concept in the effort to protect human rights.

Government attempts to use sovereign rights to tell the international community to “mind its own business” when committing domestic abuses misunderstand who is entitled to claim these rights. Sovereignty lies with the people, as proclaimed by most state constitutions and as protected by international law, including possibly customary international law. Sovereignty in the people means that the people are entitled to receive the benefits of sovereign rights, not the government. The people may choose to authorize a government as their representative, passing sovereign authority and rights to them. The government, however, may exercise those rights only on behalf of the people - never at their expense.

A government must meet two conditions to claim entitlement to sovereign rights: (1) it must be legitimate; and (2) it must fulfill its duties as sovereign representative. A government retains legitimacy if the people support it and it fairly represents the will and common good of all the people, not just the majority. Only if a government receives this internal legitimacy should foreign states provide it with external legitimacy and support. A government also is required to fulfill its democratic and human rights-based duties to retain its sovereign authority. Determining what those duties are is complicated by strong debates over which human rights are fundamental and is likely to be subject to claims of cultural imperialism and paternalism. Customary law, non-derogable rights, the doctrine of Responsibility to Protect, international criminal law and state constitutions, at this stage, are the easiest sources for avoiding these complaints but create only a narrow and
conservative list of rights that form part of the government’s sovereign duties. The rights described as duties in Part II, Section B(2) need to be developed further to account for the concerns of all the world’s people and not just those of the developed countries or of governments working to retain their power.

A government that fails to meet the legitimacy requirement or fulfill its sovereign duties by committing systemic human rights violations with impunity loses some or all of its sovereign rights. The amount of sovereignty lost is proportionate to the severity of the human rights abuses. Once some or all sovereignty is lost, foreign states are permitted to intervene on behalf of the people to help them reclaim sovereign authority from their abusive governments. Intervention bolsters sovereignty as long as it is undertaken on behalf of the people, with their consent, proportionate to the amount of sovereignty lost and does more good than harm to the people.

This leads to the two most contentious points of this Article, which are the logical conclusions to sovereignty in the people: (1) a government can lose sovereign entitlements for violations of human rights that do not rise to the level of mass atrocities; and (2) like all other forms of government, democratic governments risk losing their sovereign rights for failure to meet the two conditions of sovereign authority. The first point is contentious because governments as well as historically disadvantaged political communities fear that revoking sovereign rights for anything less than mass atrocities allows for unfettered interference in their states. The determination of when a government loses some or all of its sovereignty and when and to what extent a government can intervene, as advocated here, is based on standards of fairness and proportionality that are consistent with current international practice. This Article’s
conception of sovereignty in the people justifies current government practice; it does not supplant it.\textsuperscript{332} It further explains how current practices, when implemented under strict proportionality requirements, do not violate sovereignty, although it is theorized by many as such.\textsuperscript{333}

Democratic governments are likely to protest this Article’s second conclusion, arguing that elected governments always reflect the will of the people and therefore retain the authority to claim sovereign rights. Free and fair elections, however, do not guarantee that a government will meet the legitimacy requirement or fulfill its duties to the people. The government must act in accordance to the will of the people and their vision of the common good once elections are completed. This requirement is much more complex than it first appears because the will and common good must be informed by the needs and interests of all the people and not simply the majority. Minority groups must have a voice in this determination or democracy will be oppressive to them, negating legitimacy and causing the government to fail at its duties at least with respect to some portion of the population. This does not mean the people cannot act against their own best interests; instead, they cannot act in violation of sovereign duties when attempting to claim sovereign rights. The people are not permitted to do what the government cannot do.

Sovereignty in the people conceptually ensures the people always remain the government’s source of power and that sovereign authority, representation and rights are


\textsuperscript{333} See e.g. Cohan, supra note 15 at 954 (“Humanitarian intervention is a clear intrusion into the offending state sovereignty, for it not only seeks to impose top-down standards that may abrogate a state domestic policies, but it also may entail military occupation or even a regime change.”).
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always exercised on behalf of the people. More problematic is turning this concept into consistent practice.